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The Free Law Journal results of a merger with the Eastern European Law Journals. It builds upon this previous success and aims at providing the freedom of publishing juridical research from everywhere and on all subjects of law. Its goal is to promote respect of the rule of law and the fair application of justice by sharing juridical research in its pages.

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EDITORIAL

Welcome to the last number of the second volume of the Free Law Journal, a print and electronic journal aiming at promoting respect of the rule of law and the fair application of justice everywhere through the sharing of juridical research.

The Free Law Journal's first issue was a definitive success in terms of scope and reach, registering a very high volume of consultation on the web and orders of paper copies. This signals a definitive interest in getting to know the legal research produced everywhere and to share this knowledge.

As such, this permits us to reach our first and foremost objective to promote the rule of law. Knowledge is definitely part of the application of this objective and we see a clear desire from people all over the world to gain access to this knowledge in order to foster the fair application of justice for all.

Therefore, welcome and we hope that our contributions to legal research and knowledge will expand through your written contributions.

Sincerely,

Louis-Philippe F. Rouillard
Editor-in-Chief, Free World Publishing Inc.

LESSONS OF GUANTANAMO: IS IT REALLY A LEGAL 'BLACK HOLE'?[1]

AGNIESZKA SZPAK, LLD*

The aim of this presentation is to explore the subject of the combatants and prisoners of war, their status and treatment, their human rights using the particular example of the Guantanamo Bay, Cuba detainees in the context of the so called "war on terrorism". I will try to prove that there is no legal 'black hole' (the

*** Nicolas Copernicus University, Toruń, Poland**

[1] His paper was presented at the Second Annual Polish-American Symposium Human Rights and a Just Society. Contemporary problems of human rights and international law – views from the United States of America and Poland, October 8th, 2007 organized by Nicolas Copernicus University, Faculty of Law and Administration in co-operation with the John Felice Rome Center of Loyola University Chicago, U.S.A.

term legal 'black hole' was invented by professor J. Steyn[2]) in Guantanamo Bay and in connection with that some lessons and conclusions from this case will be presented. Obviously there are lessons that may be drawn from the Guantanamo Bay detainees example.

First of all, the so called "war on terror" is said to have began after September 11th, 2001 and is fought *inter alia* in Afghanistan (also in Iraq but it is not in the scope of our interest today). As a result of the conflict between the U.S. and Afghanistan, which was an international armed conflict many Afghani soldiers were captured. Arguments emerged that international community is dealing with an entirely new kind of situation, new kind of an armed conflict which does not fit into classical framework of international humanitarian law with its division of the

[2] J. Steyn, *Guantanamo Bay: Legal Black Hole*, "International and Comparative Law Quarterly" 53 (2004).

armed conflicts into those of an international and non-international character. IHL governs the conduct of states in warfare and protects the victims of war such as e.g. prisoners of war. Then postulates had been proposed that international humanitarian law needs reforms as it is not capable of meeting such new challenges as "the war on terror". Doubts concerning the usefulness and strength of the IHL had been expressed also before September 11th but after that date they got a new meaning, intensity, frequency. The U.S. announced that it is in the state of war with Al Qaeda and terrorism in general. So called "war on terrorism" has been treated as armed conflict which gave rise to a lot doubts concerning the character of the conflict or applicable law. This debate contributed to creating a state of uncertainty and lack of clarity relating to IHL. The issue of the legal status of the persons captured in the course of the international armed conflict in Afghanistan and then transferred to Guantanamo Bay, Cuba became

one of the most controversial issues. Are they POW's (combatants captured on the battlefield) protected by III GC or civilian persons protected by IV GC?

One lesson that comes from the Guantanamo Bay detainees case is – that despite all the accusations and doubts – IHL is still working, it is very important and capable of meeting new challenges. It is possible to locate the phenomenon of the so called "war on terrorism" in the existing framework of IHL. In fact it is a metaphor similar to "war on hunger", "war on poverty" declared by president Johnson or "war on drugs" declared by president Reagan. All of them will probably be fought indefinitely[3]. Some elements

[3] In this way also A. S. Weiner, Law, *Just War, and the International Fight Against Terrorism: Is It war?, Center on Democracy, Development, and the Rule of Law*, Sanford Institute on International Studies, 47 (2005), available at: http://iis-db.stanford.edu/pubs/20962/Weiner_sep05.pdf, p. 6; P.

Kooijmans, *Is There a Change in the Ius ad Bellum and, if so, What Does it Mean for the Ius in Bello?*, [in]: L. Lijnzaad, J. van Sambeek, B. Tahzib-Lie (ed.), *Making the Voice of Humanity Heard. Essays on humanitarian assistance and international humanitarian law in honour of HRH Princess Margiet of the Netherlands*, Leiden-Boston 2004, p. 232; W. S. Heinz, J.-M. Arend, *The International Fight Against Terrorism and the Protection of Human Rights. With Recommendations to the German Government and Parliament*, Berlin 2005, p. 30. on this subject see also: J. Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terror*, "American Journal of International Law" 96 (2002), pp. 346-350. J. Fitzpatrick concludes that it would be most reasonable to think that the U.S. intervened in the non-international armed conflict between the Taliban and the Northern Alliance; S. Keller, *On What Is the War on Terror?*, [in:] T. Shanahan (ed.), Philosophy 9/11. Thinking about the War on Terrorism, Chicago 2005, pp. 54-55. The author states that declaring a war against something that itself cannot conduct war (such as

of the "war on terror" understood in this way constitute armed conflicts – international or non-international in their character. As such they are regulated by the international humanitarian law. I would like stress once again that IHL did not stop being useful and is still applicable to such conflicts as the one in Afghanistan. In the cases where there is no armed conflicts it is not applicable; nothing less nothing more. But this does not yet mean that this branch of law is not useful any more or not important or incapable of meeting new challenges and can be neglected[4].

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terrorism, fascism, poverty) simply indicates to the very strong negative judgment of the phenomenon.

[4] In this way also the ICRC – *The relevance of IHL in the context of terrorism*, point 1 (an official statement is available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705); E.-Ch. Gillard, *The Complementary Nature of Human Rights Law, International Humanitarian Law and*

And what also should be stressed is that before demanding the change of the law all efforts should be undertaken in order to comply in good faith with the law even in situations not envisaged at the time of the adoption of that law. Nowadays the main problem is not the lack of regulation but rather the lack of proper implementation of the law in force which in turn is a result of the lack of political will[5].

Refugee Law, [in]: M.N. Schmitt, G.L. Beruto (ed.), *Terrorism and International Law: Challenges and Responses*, San Remo, 2003, p. 55; A. McDonald, *Terrorism, Counter-Terrorism and the Jus in Bello*, [in]: ibidem, p. 63; N. McDonald, S. Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, "Harvard Journal of Law and Public Policy" 44 (2003), p. 306.

[5] J.-P. Lavoyer, *International Humanitarian Law and Terrorism*, [in]: L. Lijnzaad, J. van Sambeek, B. Tahzib-Lie (ed.), *Making the Voice of Humanity Heard. Essays on humanitarian assistance and international humanitarian*

Talking about "the war on terrorism" many UN organs expressed their views on it; the UN Security Council referred to similar arguments as mentioned when in its resolutions 1456 (2003) and 1624 (2005)[6] it emphasized that States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law. Similarly the General Assembly in its resolution 57/219 of 2003 with the

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law in honour of HRH Princess Margiet of the Netherlands, Leiden/Boston, 2004, pp. 265-266.

[6] UN SC res. 1456 (2003) is available at http://daccessdds.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement (point 6); res. 1624 (2005) is available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/510/52/PDF/N0551052.pdf?OpenElement (point 4).

title Protection of human rights and fundamental freedoms while countering terrorism confirmed this obligation[7]. The UN Secretary General as well emphasized that "[r]espect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension"[8]. Commission on Human Rights in its resolution 2004/87 with a similar title *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* corroborates that "States must ensure that any measure taken to combat terrorism complies with

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[7] UN GA res. 57/219 is available at http://daccessdds.un.org/doc/UNDOC/GEN/N02/553/64/PDF/N0255364.
pdf?OpenElement

[8] *Secretary-General's Statement at the Special Meeting of the Counter-Terrorism Committee with Regional Organizations* (of 6 March 2003) is available at http://www.un.org/apps/sg/sgstats.asp?nid=275

their obligations under international law, in particular international human rights, refugee and humanitarian law"[9]. Respect for international human rights law and international humanitarian law is not a weakness in the fight against terrorism but a weapon that can ensure broad international support for actions undertaken in the course of this fight.

R. Wedgwood states that the Geneva Conventions were never meant to regulate every form of war, for instance internal wars. Except for common Art. 3 it is indeed true but in case of Afghanistan (operation *Enduring Freedom*) there was surely an international armed conflict. On 7 October 2001 the U.S. and its allies attacked terrorist training camps of Al Qaeda and military installations of the Taliban regime in

[9] Resolution 2004/87 is available at ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-87.doc

Afghanistan. By such action the U.S. decided to in-a-way "locate" the conflict and thus hold it in the legally defined framework of IHL (Art. 2 (1) of the GC). In this particular situation the U.S. had to make a choice between actions of the executive forces such as police, intelligence etc. and an armed reaction. It chose the latter. It had its consequences.

Consequently, answering the question of the legal status of the detainees, in my opinion the Taliban fighters do qualify as POW's as they were "members of the armed forces of a Party to the conflict" so in other words the army of Afghanistan. Despite recognizing the Taliban as a party to the conflict the U.S denies granting them POW's status; this denial being based on the allegations that they did not meet certain combatancy requirements (from Art. 4(2) of GC III). The legal status of the al Qaeda members was more difficult to ascertain, most of all because of the lack of certainty as to the kind of relations

between al Qaeda and the Taliban. If the al Qaeda members belonged to the armed forces of the Taliban they would be entitled to the POW status just as the Taliban. The Taliban and al Qaeda complemented each other – Osama bin Laden provided the Taliban with material supplies and the Taliban provided him a safe haven; the Taliban consciously granted bin Laden protection. They also allowed al Qaeda to use their quarters, lines of supplies; they also shared the intelligence data. For those reasons it might be concluded that al Qaeda and its leader were integrated with the Taliban to the degree that it became uncertain who was controlling whom. In my opinion, all the persons detained at Guantanamo Bay are combatants (prisoners of war when they are in the hands of the enemy) or civilian persons. Such a statement is emphasized in the Commentary of the ICRC (a sort of guardian of the Geneva Conventions) to Art. 4 of GC IV which says that "[e]very person in enemy hands must have some status under

international law: he is either a prisoner of war and, as such, covered by the Third Geneva Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law"[10].

[10] *ICRC Commentary*, available at http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=com, p. 51. This position was confirmed by the International Tribunal for the Former Yugoslavia (ICTY) in its *Celebici Judgment* of 1998, in which the Tribunal stated: "It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war (or the First or Second Convention) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied". The judgment is available at:

Another important lesson is that human rights law does not cease to apply in the course of an armed conflict; that there is no legal vacuum towards people deprived of their liberty, despite what the U.S. President had been saying for a long time. There are various legal acts applicable which contain rights to which the detainees are entitled. Those legal acts comprise most of all International Covenant on Civil and Political Rights of 1966 and Inter-American Declaration on the Rights and Duties of Men of 1948, American Convention on the Human Rights (1969), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) and Basic Principles on the Role of Lawyers (1990) – very often declaratory of customary international law. International humanitarian law and human rights law mutually complement and support

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http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e-3.htm (paragraph 271).

each other. They have a lot in common especially in the sphere of their goals and stipulations. The common goal of those two branches of law is the protection of life, health and human dignity. This is mirrored by the content of particular norms. The detainees are protected by the IHL and HRL instruments; this protection includes among others the fundamental right to a fair trial and *habeas corpus* which has been flagrantly violated.

The next lesson is that the U.S. – a beacon of justice, human rights and the rule of law – arbitrarily and illegally deprived the detainees of liberty as the aim of the detention is not to prevent the return of the POW's on the battlefield (as it should be and which would legal) but extracting from them intelligence information and as such it is contrary to the Geneva Conventions. Moreover some of the interrogation techniques such as using dogs, exposure to extreme temperatures, deprivation of sleep or isolation cause

severe suffering; application of such methods in combination may even constitute torture and there are reasonable grounds to believe that torture has been used in Guantanamo Bay, Cuba. Surely such techniques reach the level of cruel, inhuman and degrading treatment (the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions). A question may be asked: is there any justification for using torture?

Can we torture to save many lives? Can we torture one person in order to save lives of a thousand people? In my opinion, absolutely not. The next abuse by the U.S. was the abuse of the right to use force. It took place mainly during the transfer of the detainees to Guantanamo Bay and during the force-feeding of the detainees. The conduct of the latter was torture. During the transfer prisoners of war were chained, hooded, forced to wear goggles making it impossible to see anything and ear-muffs making it impossible to hear anything. American soldiers in Guantanamo Bay beaten the detainees, kicked them, stripped them to naked and forcefully groomed them. These are just a few examples. Such treatment also reaches the level of torture as it causes severe pain or suffering to the victims in order to inhibit or punish them[11].

[11] See a report of the UN Commission on Human Rights *Situation of detainees at Guantanamo Bay*, available at

What is also very disturbing is the fact that the conditions of internment destructively affected the mental health of the detainees; granting medical care depended on the detainees' cooperation with the interrogators; this care was refused them; it was delayed without justification or was improper; the detainees were subject to medical treatment without their consent including sedating with drugs and force-feeding; the doctors were systematically violating the rules of medical ethics. In a few cases the conditions of internment led to mental illnesses, self-injurious acts, individual and collective suicide attempts (in June 2006 three such attempts succeeded and in May 2007 one) and to long lasting hunger strikes. This is a very bitter and shocking lesson – even medical doctors participated in illegal and unethical activities. This has been confirmed by the report of the

http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf

Commission on Human Rights (February 2006)[12] as well as in the Conclusions and Recommendations of the Committee Against Torture from 2006 (May). The Committee stated that indefinite detention of people in Guantanamo Bay without charging them is itself an infringement of the Convention Against Torture (1984); it then called the U.S. to close the Guantanamo Bay camp, respect and implement the rights of the detainees to a fair trial and their release with the reservation that they can not be sent to States where they may be tortured. The Committee also expressed its anxiety about some interrogation techniques[13].

Finally, the Guantanamo Bay detainees case is not

[12] Ibidem.

[13] *Conclusions and recommendations of the Committee against Torture*, 18 May 2006; available at http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf

only an example of flagrant violation, disrespect for the international law by the biggest Power of our world but also of its hypocrisy. It is evidenced by the fact that American administration created new terms and only after that invented their definitions (for example "enemy combatant" or "unlawful combatant"); these are terms that are nowhere to be found in the international humanitarian law. As to the term of "unlawful combatants", which was used by the former Secretary of Defense, D. Rumsfeld to determine the position of the Guantanamo Bay detainees, it was created by the U.S. Supreme Court in 1942 *Ex parte Quirin*[14] case in order to define the status of eight German soldiers who landed on the American territory with the intent to commit acts of war (sabotage) in civilian clothes. The Court stated

[14] The U.S. Supreme Court judgment in the case of *Ex parte Quirin* is available at: http://caselaw.lp.findlaw.com /scripts/getcase.pl?court=us&vol=317&invol=1

that: "lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful". It should be stressed, however, that when the concept of "unlawful combatants" was used by the U.S. Supreme Court in *Ex Parte Quirin*, Geneva Convention III did not yet exist. I am convinced that the issue of "unlawful combatants" may be explained as follows: if the Taliban and Al Qaeda members are regarded as "unlawful combatants" then they are simply civilian persons who illegally participated in armed hostilities. Thus the Geneva Convention IV relative to the protection of civilian persons in time of war applies. They can be punished for illegal participation in armed hostilities. Through distinguishing "lawful" and "unlawful" combatants the U.S. is attempting to avoid application of GC's.

For these reasons, the term "unlawful combatant" has no place in international humanitarian law and the detainees should be accorded protection under Geneva Convention III or IV. Still if the U.S denies the detainees protection of IHL, we must remember that HRL is naturally applicable and the detainees are under its protection. This is a second layer of protection in this case. There is no legal vacuum, no legal 'black hole'.

Another example of this hypocrisy is the fact that despite the well functioning of the U.S. federal courts, the American administration decided to prosecute and try the detainees before military commissions which do not ensure the detainees fair trial guarantees. They are also discriminatory in nature as only foreigners are prosecuted before military commissions; American citizens have been tried by criminal courts (John Walker Lindh and recently Jose Padilla). Generally it can be said that

different, ever-changing and in fact arbitrary standards of treatment and qualification of the detainees by American administration are only a proof of lack of respect for the law and its arbitrary interpretation as it suits American interests and needs.

So these are the lessons flowing from the of Guantanamo Bay detainees experience; this is not an exhaustive list but the most relevant lessons and conclusions. The list is of course subjective as well. The lessons and conclusions are not revolutionary but rather quite obvious. Hopefully the camp in Guantanamo Bay will soon be closed, many scholars and NGO's representatives have been calling for that. However, I do not think it will happen under the presidency of George W. Bush. Is there any way to convince president Bush or maybe his successor? What can the international community do? Finally what should be done with the detainees? In my opinion innocent people should be released (with the

reservation that they may not be sent to States where they may be tortured) and according to various reports the percentage of innocent people at Guantanamo Bay is high (about 50%); terrorists or persons accused of war crimes or crimes against humanity should be prosecuted but by American criminal courts.

THE VICTIM AND THE WITNESS WITHIN ICTY AND ICC - A COMPARATIVE PERSPECTIVE

IOANA-ALINA APREOTESEI*

This article's goal is to draw attention mainly on the status and role of the victim within the ICTY and ICC. In the history of international law, the victim was often seen as a witness. The ICC managed to change that fact and for the first time in the history of international law, the victim can participate in a criminal trial in his or her own name. The victim became more than a witness. This article will refer to both situations: the victim as a witness and the victim as an independent participant in a criminal trial. The comparative perspective will follow not only the theory but also the practice, the jurisprudence offered by ICTY and ICC.

1. Victims and Witnesses. Definition

'Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs'[1].

The United Nations offered the definition of the 'victims of crime', back in 1985, when adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[2]:
'Victims means persons who, individually or collectively,

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[1] Statement by Fiona McKay, representing Redress, on behalf of The Victims Rights Working Group, Rome Conference, 17 June 1998.

[2] UN Doc. A/RES/40/34, 29 November 1985.

have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

A person may be considered a victim, under this Declaration, regardless of weather the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term victim also includes, where appropriate, the immediate family or the dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

ICTY does not provide a specific definition for the victim. Being an UN organism, it was no need to

define the victim separately as the definition can be found in the Resolution 40/34.

ICC is an independent organism[3] and that is why the definition of the victim can be found in Rule no. 85[4]:
(a) Victims mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their

[3] To see an analyze of the legal personality of the international courts and tribunals, see Péter Kovács: 'Métamorphoses autour de la personnalité juridique et des sources dans le droit international'. Available on: http://www.jak.ppke.hu/tanszek/doktori/tananyag/nemz_kozjog/erreursmjil.doc

[4] ICC Rules of Procedure and Evidence, Rule 85, 'Definition of Victims'.

property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

In a very large meaning, a witness is someone who has first-hand knowledge about a crime or dramatic event through their senses and can help certify important considerations to the crime or event.

So, there are differences between victims and witness. Sometime victims are not witnesses and sometimes the witnesses are not victims. Their interests may differ. It is true that most of the times the victims were called to participate in a trial as witnesses, but this reality has changed once the ICC was established. A lot of factors contributed to this,

and among them a special help was provided by NGOs[5].

2. Victims and witnesses. Protective measures under ICTY. Theory and practice

Both statutes of ICC and ICTY offer a protective regime for the victims and witnesses. Their help can

[5] See e.g. Victims Rights Working Group, 'Strategy Meeting on the Development of Structures and Procedures for Victims at the International Criminal Court', 6-7 December 2002 or Victim Participation at the International Criminal Court, Summary of Issues and Recommendations, November 2003. See also Redress, 'Ensuring the Effective Participation of Victims before the International Criminal Court, Comments and Recommendations Regarding Legal Representation for Victims', May 2005.

be considerable for finding the truth and making justice. Almost always those persons are very frightened and they don't have the courage or the will to come forward to help the justice system. They are victims and witnesses of the most horrible crimes, the gravest ones. War crimes, crimes against humanity, genocide, are crimes that you never forget and their effects are marking you for the rest of your life.

That is why the justice system has to encourage these people to come and help finding the truth and punishing the responsible for the gravest crimes. The Tribunals have to collaborate with the victims in order to accomplish their mission[6]. The provisions of

[6] 'If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are

the ICTY Statute and its Rules of Procedure and Evidence dealing with victims almost exclusively concern their protection because they are seen as part of a witness protection scheme and are not addressed as victims and such[7].

The statute of the ICTY foresees in the article 22 that protective measures shall be provided by the rules of

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serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission', *Prosecutor v. Brdanin and Talic*, Motion for Protective Measures, case No. IT-99-36-PT, 10January 2000, para. 14.

[7] See Pascale Chifflet, 'The Role and Status of the Victim' in G. Boas and W. Schabas (ed.), *International Criminal Law Developments in the Case Law of the ICTY*, (2003), at 75-111.

procedure and evidence[8]. As an example of protective measures, the article refers to the conduct of in camera proceedings and the protection of the victim's identity. Indeed, the rules 34, 69 and 75 contain such dispositions.

Rule 34 foresees the settlement of a Victims and Witnesses Section[9] within the Registry. The Victims and Witnesses Unit is the organism which provides qualified stuff to support, counsel and protect the

[8] 'The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity'.
[9] The Section was transformed in an Unit.

victims and the witnesses. As the rule 34[10] provides, a significant part of the stuff is formed by qualified women, as most of the persons in need are victims of rape and sexual assault, mainly women. This decision was made because the women victims are more open to discuss about such painfully subjects, as rape and sexual violence, with women and not with men.

[10]'A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
(ii) provide counseling and support for them, in particular in cases of rape and sexual assault. (Amended 2 July 1999)
(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women'.

Rule 69 offer the possibility for the victims and witnesses to stay anonymous[11] because they might be in danger. A lot of persons refuse to testify under their true identity because they are afraid of the consequences. Again, ICTY is dealing with the crimes committed by the most dangerous criminals, and the victims and witnesses know that, so they are

[11] '(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)
(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)
(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defense'.

afraid. But if the Tribunal offers them the guaranty of anonymity, the chances for them to come to testify are much more.

Rule 75 contains the other protective measures regarding the privacy of victims and witnesses, camera proceedings, closed sessions, closed circuit television, no harassment or intimidation when interrogating them[12].

[12] '(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999)

(B) A Chamber may hold an in camera proceeding to determine whether to order:
(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as (Revised 12 Nov 1997): (a) expunging names and identifying information from the Tribunal's public records (Amended 1 Dec 2000 and 13 Dec 2000);
(b) non-disclosure to the public of any records identifying the victim;
(c) giving of testimony through image- or voice- altering devices or closed circuit television; and
(d) assignment of a pseudonym;
(ii) closed sessions, in accordance with Rule 79;
(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002)
(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.
(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal. (Amended 12 July 2002)
(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the 'second proceedings') unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
(Amended 17 Nov 1999, amended 1 Dec 2000 and 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002)
(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:
(i) to any Chamber, however constituted, remaining seized of the first proceedings; or

We can see that ICTY ensures a protective regime for the victims and witnesses. This regime can also be seen not only in theory, but in practice, too. There is

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(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.
(Amended 12 July 2002)
(H) Before determining an application under paragraph (G)(ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal. (Amended 12 July 2002, amended 12 Dec 2002)
(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to 'a Judge of that Chamber'. (Amended 12 July 2002)'

some jurisprudence by now which shows that the victims and witnesses who appeared before the ICTY, requested and beneficiated of protection.

Article 22 of the statute was invoked in the first trial before the Court[13]. As a result, the identity of six witnesses was protected from the public and the media. Four of them were victims of sexual assault and they requested further protective measures as the possibility of giving testimony by one-way closed circuit television[14]. These measures aimed to

[13] *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-PT, 10 August 1995, para. 27.

[14] Ibid at 39. See also separate opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures

minimize the trauma of victims, because they were afraid of consequences. First, they were afraid of the social consequences they could suffer if the community they lived in discovered them as rape victims. Second the measures were taken to avoid the trauma of confronting and meeting the accused, the offender. As it have been said, it would be like raping them the second time[15]. In the indictment against *Dusan Tadic* and *Goran Borovnica* we can see starting with paragraph 4.1[16] that some victims'

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for Victims and Witnesses, Case No. IT-94-1-PT, 10 August 1995.

[15] 'Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped the second time', *Prosecutor v. Tadic*, supra note 13, para. 46.

[16] "F" was taken to the Omarska camp as a prisoner in early June 1992. Sometime between early June and 3

names are replaced with letters in order to keep the anonymity.

In the *Slobodan Milosevic* case[17] the Prosecutor filed a partly confidential and *ex parte* 'Prosecution's Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses'[18]. The Motion's aim was to add 11 witnesses to its witness list for the Croatia and Bosnia part of the trial and remove 34 witnesses from that witness list. The Prosecution wanted also protective

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August 1992, "F" was taken to the Separacija building at the entrance to the Omarska camp and placed in a room where Dusan TADIC subjected "F" to forcible sexual intercourse. (ICTY, Case No. IT-94-1-I, *Prosecutor v. Dusan Tadic* a/k/a 'Dule' Goran Borovnica, Indictment)

[17] *Prosecutor v. Milosevic*, Case No. IT-02-54-T.

[18] 5 February 2003

measures for witnesses who faced exceptionally serious risk to their safety and/or that of their families. They requested that eight of the additional witnesses to beneficiate of delayed disclosure, of a pseudonym as well as face and voice distortion, and one of the witnesses to testify with a pseudonym and in closed session. In this matter, the Trial Chamber ordered at 13 March 2003[19].

[19] '… (4) As to the protective measures sought, the witnesses identified in Annex A to the Motion as requesting protective measures shall be granted those measures specifically sought (pseudonyms, face and voice distortion and), and in respect of those witnesses

> (a) disclosure of unredacted witness statements and related exhibits shall be made to the *amici curiae* not less than 30 days, and to the accused and his appointed associates not less than 10 days, before the witness is expected to testify;

(b) the accused and his appointed associates shall not disclose the witness statements and related exhibits to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case (or, in the case of the *amici curiae*, the extent to which they are assisting the Trial Chamber), and (c) the accused, his appointed associates and *amici curiae* shall obtain non-disclosure agreements from third parties (as provided by the Prosecution) as a precondition for release of the witness statements and related exhibits to them.

(5) The request for closed session testimony is rejected'.

(*Prosecutor v. Slobodan Milosevic*, Decision on Prosecution motion to amend witness list and for protective measures for sensitive source witnesses). See also *Prosecutor v. Blaskic*, case no. IT-95-14-T, 4 November 1996, para.24, 42, 43, 45; *Prosecutor v.*

3. Victims and witnesses. Protective measures under ICC. Theory and practice

ICC has the advantage of being established after ICTY or ICTR[20], so, the experience of the Tribunals helped the Court in improving the system of justice. Article 43 (6) foresees the establishment of a Victims and Witness Unit[21], also within the Registry, as in the

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Kolundzija, IT-95-8-PT, 19 October 1999; *Prosecutor v. Furundzija*, IT-95-17/1-T, 11 June 1998; *Prosecutor v. Delalics*. IT-96-21-T, 25 September 1997; *Prosecutor v. Kunarac*, IT-96-23-T, 29 March 2000.

[20] See also FIDH, 'Rapport de Situation. Entre Illusions et desillusions: les victims devant Le Tribunal Pénal International pour le Rwanda ', no. 343, Octobre 2002.

[21] 'The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective

case of ICTY. Article 68[22] of the Rome Statute

measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.

[22] '1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

contains the protective measures that the victims and

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4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6. 5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information
and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information'.

witnesses can beneficiate of. The rules of procedure and evidence explain in detail how the Victims and Witness Unit will work (rules 16-19)[23] and also, provide some information regarding the protective measures (rules 87 and 88): camera proceedings, anonymity, electronic testimony, usability of means that enable the alteration of picture or voice, videoconferencing. This is not an exhaustive list as some other measures can be ordered by a Chamber of the Court in order to prevent the release to the press or to the public of the identity or location of a victim, a witness or other persons at risk[24]. The Court must

[23] See also 'The International Criminal Court, The Victims and Witnesses Unit (art.43.6) of the Rome Statute', a Discussion Paper by T. Ingadottir, F. Ngendahayo and P. Viseur Sellers, March 2000.

[24] See also Helen Brady, 'Protective and Special Measures for Victims and Witnesses' in R. Lee (ed.), *The*

ensure that the measures are not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.

The ICC is dealing with four situations[25]: Democratic Republic of the Congo (DRC), Uganda, Darfur (Sudan) and Central African Republic. The situation in DRC offers already examples of using the protective measures with regard to the victims and witnesses. On 4 August 2006[26] the Pre-Trial Chamber

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International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, 2001, at 434-456.

[25] As the situation in November 2006.

[26] Decision authorizing the Prosecutor and the Defence to file observations on the applications of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06 in the case of the *Prosecutor v. Thomas Lubanga Dyilo.*

I, presided by Single judge Sylvia Steiner ordered the Registrar to provide as soon as possible to the Prosecution and Defence Counsel a non-redacted copy of the Applications for participation, in which any information leading to the identification of the applicants had to be deleted. The judge also ordered all the organs of the Court not to contact the applicants directly and to do so only, if necessary, via the Victims Participation and Reparations Section[27].

In order to make possible the disclosure meetings, it was created an E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version[28]. In this way, if the Counsel of

[27] See *Prosecutor v. Dusan Tadic*, supra note 16, para. 5.

[28] Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in

Defence request, the Prosecution can provide a CD containing the related information for the Defence at the occasion of disclosure meetings.
At the recommendation of the Victims and Witnesses Unit it was created a general framework concerning protective measures for Prosecution and Defence witnesses[29].

4. Participation of victims in ICTY. Theory and practice

The only kind of participation of victims that ICTY provides is that of participation as a witness. So,

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Electronic Version for their Presentation during the Confirmation Hearing, public, 28 August 2006.
[29] Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses, 19 August 2006.

ICTY does not recognize the victim's right to participate in a trial in his or her own name, but only allows participating as a witness. Rule 90 refers to the testimony of a witness, rule 90 bis establishes how the transfer of a detained witness has to be done and rule 94 bis is about the testimony of an expert witness. ICTY recognizes the right of a child to participate as a witness in the trial and the Chamber may allow him or her to testify without saying the solemn declaration. The rule 90 (B) specifies that a judgment can not be based only on such a testimony. Examples of participation of victims as a witness can be easily found in the Jurisprudence of the ICTY[30].

5. Participation of victims in ICC. Theory and Practice

[30] See e.g. *Prosecutor v. Kupreskic* et al., IT-95-16-T, *Prosecutor v. Delalic*.

For the first time in the history of international law, ICC gives the victim the right to participate in a trial not only as a witness, but in his or her own name, too. The experience from ICTY showed that the persons who suffered because of an odious crime are afraid to come to testify, or if they come, they are not satisfied with the position of the witness. Yes, they want to come to help the system of justice in finding the truth, but they would be more interested to come if they could express their personal experiences, their own points of view, and most of all, their needs.

In the ICTY practice it was formed an assumption that if a person testified, then he or she was the witness of the Prosecution, therefore, the victims who testified for the Prosecution, were in a way protected by the prosecutor. In reality, it was not like this, and the victims were not protected at all. In Rwanda, which is a civil law country, they had the "parte

civile" institution[31], but the ICTR did not. As a consequence, the victims stopped cooperate. ICC learned from that.

The rules pf procedure and evidence contain a whole subsection regarding the participation of victims in the proceedings. Rule 89 explains how to make an application in order to participate[32]. The application can be made by the victim him or herself, or by someone else on his or her behalf. The application has to be written and addressed to the Registrar, who will transmit it to the Chamber. A copy will be given

[31] A person who suffered a material loss as a consequence of the criminal act committed, can participate in the trial in his or her own name in order to get reparation.

[32] See also Victims Rights Working Group 'Victim Participation at the International Criminal Court, Summary of Issues and Recommendations', November 2003, at 7.

to the Prosecutor and the defense.

The victim can choose a legal representative. Rule 90 foresees that a victim or a group of victims can request a common legal representative or more representatives. The legal adviser can also be chosen by the Court. If the victims don't have the financial means to pay the legal representative chosen by the Court, they may ask the Registry to offer them financial assistance[33]. On 19 September 2005 it was established The Office of Public Counsel for Victims (OPCV), which provides support and assistance to the legal representatives of victims and to victims participating in the proceedings as well as asking for

[33] See also Redress, 'Ensuring the Effective Participation of Victims before the International Criminal Court, Comments and Recommendations Regarding Legal Representation for Victims', May 2005, p.3.

reparations.

The Office provides legal research and advice to victims and their legal representatives at all stages of the proceedings in accordance with the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Regulations of the Registry. The Office also appears before a Chamber in respect of specific issues, when required[34].

The victims can ask to participate in every stage of the proceedings. This is a very interesting element of procedural law. In the national systems, a victim can ask to participate in his or her own name in a trial only until a certain stage. For example, in Romanian law there is a difference between the victim who

[34]http://www.icc-cpi.int/victimsissues/victimscounsel/OPCV.html

wants to participate in a trial and the victim who doesn't want. They have different names. The one who wants to participate is called 'parte vătămată'[35] and the one who does not want to participate is called 'persoană vătămată'[36]. What is very interesting is that, unlike under the ICC, where a victim who participates in the trial can also be a witness, in the Romanian law, the victim who chooses to participate in his or her own trial, can not participate as a witness. Only the victim who doesn't participate in the trial as a part, can participate as a witness. On the other hand, the victim, can become a part in the trial, only untill a specific moment, which is the confirmation of charges. After this moment, the victim can participate only as a witness and not as a part, not in his or her own name.

[35] Injured part.
[36] Injured person.

The participation regime under the ICC is potential and also limited[37]. The victim may personally take part in the hearing but he or she does not enjoy the same rights as the other parties to the proceedings. The victim may not participate in the investigation of the Prosecution, have access to the evidence gathered by the parties nor call witnesses to testify. The victim has no right of appeal and cannot on that basis, present his or her arguments against the accused to the Appeals Chamber[38].

ICC already confrunted with some victims

[37] See C. Jorda and J. de Hemptinne, 'The Status and the Role of the Victim' in A. Cassese, P. Gaeta and J.R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: a Commentary*, vol. 2, (2002), 1382 at 1419.
[38] Ibidem at.1406.

applications to participate in the proceedings. On 14 June 2005 six persons asked to participate in the proceedings[39] and on 17 January 2006 the Pre-Trial Chamber I[40] decided that in order to permit the victims to participate in the proceedings, first has to be recognised the quality of victims to those persons[41]. That is why on 28 March 2006, the Chamber gave the possibility to the Office of the

[39] ICC-01/04-75-Conf.

[40] ICC-01/04-101.

[41] ' aussi longtemps que toute personne physique ou juridique demandant la qualité de victime en relation avec une situation demande également de se voir accorder la qualité de victime dans toute affaire découlant de l'enquête d'une telle situation, la Chambre, dès qu'une telle affaire existe, prend automatiquement en compte cette seconde demande sans qu'il soit nécessaire de présenter un second formulaire', ICC-01/04-101, para 67.

Prosecutor and the Counsel of Defence to present their observations regarding the recognition of the quality of victim for the 6 persons[42]. On 7 April 2006 the prosecution requested the Pre-trial Chamber I to deny the applications of VPRS 1 to 6 to participate as victims in the case against *Mr. Thomas Lubanga Dyilo*[43]. The Prosecution's base was that the six persons did not provide sufficient evidence that they suffered losses directly linked to the crimes constituted against Mr. Lubanga Dyilo[44]. The

[42] Décision autorisant Procureur et la Défense à déposer des observations au sujet du statut de victime des Demandeurs VPRS1 à VPRS 6 dans le cadre de l'affaire le *Procureur c. Thomas Lubanga Dyilo.*

[43] Prosecution's Observations concerning the Status of Applicants VPRS 1 to 6 and their Participation in the Case of The *Prosecutor v. Thomas Lubanga Dyilo*, para. 23.

[44] See *Prosecutor v. Dusan Tadic*, supra note 16, para. 21.

Counsel of Defence pronounced in the same way[45].

The Legal Representative of the Victims answered to these observations and on 31 May 2006 provided more arguments in favour of the status of victims for the six applicants[46]. As a consequence, with some exceptions, the Prosecution recognised the status of victims for the applicants and requested the Chamber

[45] Observations du conseil de permanence au sujet du statut de victime des demandeurs VPRS 1 á VPRS 6 conformément á la decision du 28 mars 2006.

[46] Observations du Répresentant legal des victims VPRS 1 á 6 suite aux observations du Procureur et du Conseil de la defense, au sujet du statut de victime des demandeurs VPRS 1 á VPRS 6 dans le cadre de l'affaire Le *Procureur c. Thomas Lubanga Dyilo*.

to grant it to them[47]. Even if the Chamber did not allow them to participate[48], it reminded the victims their right to apply again in another stage of the trial, as the Rule 89 (2) provides[49]. Only one month later, the Chamber recognised the status of victim for three persons[50]. The victims asked to be present at the

[47] Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, para. 23, 6 June 2006.

[48] Décision sur les demandes de participation á la procedure preésentees par les Demandeurs VPRS 1 á VPRS 6 dans l'affaire Le *Procureur c. Thomas Lubanga Dyilo*, 29 June 2006, at 9.

[49] 'RAPPELLE que tout Demandeur dont la demande a été rejetée peut en déposer une nouvelle à une phase ultérieure de la procédure, en vertu de la règle 89-2 du Règlement', see supra note 42, at 10.

[50] Décision sur les demandes de participation á la procedure a/0001/06, a/0002/06 et a a/0003/06 dans le

hearings when the confirmation of charges would take place and the Chamber invited their Legal Representative to present the legal methods which they intend to use.

As we can see, the participation of victims became a reality within ICC. The Victims' Representatives "have requested that they participate in the confirmation hearing, specifically by being entitled to make oral interventions, in particular opening and closing statements, and by being permitted to question the accused. The Victims' Representatives have also stated that they propose submitting documents in response to those filed by the

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cadre de l'affaire le *Procureur c. Thomas Lubanga Dyilo* et de l'anquete en République démocratique du Congo, 28 July 2006, at 16.

Prosecution and the Defence"[51]. The Chamber decided on this matter on 22 September 2006[52].

Victims' requests to participate in the proceedings were also made by persons who suffered harm in Darfur, Sudan. Raymond M. Brown and Wanda M. Akin-Brown, in conjunction with Darfur Rehabilitation Project, Inc. (DRP), a not-for-profit organization formed by Darfurians in response to the human rights violations in their homeland, submitted the first applications on behalf of victims of the Darfur Crisis to participate in the criminal

[51] Prosecution's Response to 'Observations concernant les modalités de la participation des Victimes, 25 August 2006, at 8.

52 Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l'audience de confirmation des charges.

proceedings before the ICC[53].

6. Reparation regime under ICTY. Theory and Practice

ICTY recognize a limited role to the victim's right to reparation. Article 24 (3) foresees that "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by mains of duress, to their rightful owners." Rule 105 reads the right to the restitution of property and rule 106 establishes the right to compensation. The tribunal can take some measures to ensure the preservation and the protection of the property. A very interesting

[53] See 'Darfur Victims sue Sudanese Government in ICC' in *Sudan Tribune*, 24 October 2006, available at http://www.sudantribune.com/spip.php?article18196

situation is when the Trial Chamber can not determine the ownership of the property, and then, this power goes to the national authorities. This is not always a good solution for the victims, because sometimes the national systems don't work appropriately and the victims risk not getting back their goods. As for the compensation, it is also left into the care of the national authorities.

The person convicted does not have to be in actual possession of the property which leads to the fact that the convicted person does not have to be the main perpetrator of the unlawful taking of property and also, the Tribunal can order that the property "in the hands of third parties otherwise not connected with the crime"[54] be restituted. The decision to initiate such a restitution procedure rests with the Prosecutor

[54] Rule 105 (C).

or the Chamber[55].

In the *Milosovic* case the judge ordered the freezing of assets under article 19(2) of the Statute and Rules 47 (H) and 54[56], and the *Naletilic and Martinovic* case might be the first when in the pre-trial phase the prosecution has expressed an intention to raise the issue of restitution[57]. Unfortunately the Rules 105 and 106 seem not to be invoked in front of the national authorities.

7. Reparation regime under ICC. Theory and Practice

[55] See supra note 7, at 101.

[56] See *Prosecutor v. Milosevic*, Decision on Review of Indictment and Application for Consequential Orders, Case no. IT-99-37-I, 24 May 1999, para.27.

[57] See supra note 7.

ICC is the first international court which can oblige an individual to pay reparation to another individual, as until now this fact was left into the concern of the states and not individuals. As article 75[58] provides,

[58]'1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may

reparation can be provided including restitution, compensation and rehabilitation. Rules 94-99 contain dispositions concerning the reparation to the victims. The reparation can be paid through the Victims' Fund and can be individual or collective. In this latter case,

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invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law'.

the reparation can be paid to an inter-governmental, national or international organization.

The Trust Fund was established by the Assembly of States parties and its aim is to get money for victims. A person found guilty may be in an impossibility of compensating the victims, and that's why the Trust Fund can help. The funds can come from grants from different governments, individuals or organizations[59]. One of the Court basic principles is the one of the complementarity. In order to succeed, ICC needs the help of the states parties. Rule 217[60] refers to the

[59] Situation of Contributions and Pledges to the Trust Fund for Victims as of 29 August 2006: Amount received: EURO 1 630 237.20 Amount pledged: EURO 275 000.00 Source: http://www.icc-cpi.int/vtf.html

[60] 'the Presidency shall, as appropriate, seek cooperation and measures for enforcement […] as well as transmit

cooperation and measures for enforcement of fines, forfeiture or reparation orders and rule 219 foresees that national authorities do not have the ability to modify the reparations specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order. As the right to participate in the trial, the right to reparation is also potential and limited[61]. By establishing such rules, ICC is trying not only to make justice by punishing the criminals, but also by

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copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection'.

[61] See supra note 37, at 1407.

helping victims to get justice for themselves[62].

The situation in DRC is the first one to offer examples of such measures which can help in restitution, compensation or rehabilitation. After the Pre-Trial Chamber I issued a warrant of arrest for Mr. Thomas Lubanga Dyilo on February 2006, it was taken the decision of identification, tracing and freezing or seizure of his property and assets[63]. This

[62] Still, some aspects require improvement, e.g. issues regarding the provisional measures or enforcement of reparation orders. See Carla Ferstman 'The Reparation Regime of the International Criminal Court: Practical Considerations', in 15 *Leiden Journal of International Law* 667–686 (2002).

[63] Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the

decision was made by taking also into account the paragraph 15 of United Nations Security Council resolution 1596[64], which states that " […] all States shall, […] immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated by the [Sanctions] Committee pursuant to paragraph 13 above, or that are held by entities owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction […]".

For this purpose, the Chamber requested the States Parties to the Statute "to take all necessary measures,

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property and assets of Mr. Thomas Lubanga Dyilo, 31 March 2006.

[64] UN document S/RES/1596 (2005).

in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr. Thomas Lubanga Dyilo on their territory, including his movable and immovable property, bank accounts or shares, without prejudice to the rights of bona fide third parties". Mr. Thomas Lubanga Dyilo is charged with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. Child soldiers is a very sensible issue because most of the times the children are not only victims but perpetrators also[65].

[65] See e.g. Redress "Victims, Perpetrators or Heroes? Child Solders before the International Criminal Court", September 2006.

8. Conclusions:

Compared to the ICTY Statute, the Rome Statute and the ICC Rules represent a significant step forward in the recognition of the rights of victims in international criminal proceedings. Although the victim is not formally a party in the trial, he or she enjoys the right of being heard and of being represented in the proceedings[66].

Still, there are some difficult aspects which have to be improved and with this respect, specialists made more suggestions[67]. More questions[68] needs to be

[66] See supra note 37, at 1408.
[67] Ibidem, at 411-417.
[68] These aspects were discussed by Carla Ferstman and the participants of the first Marie Curie Top Summer School, held in 3-14 July 2006 in The Hague.

answered:

What effects would have an amnesty for the victims? Currently in Uganda the authorities are negotiating a conditional amnesty for the five LRA leaders for whom ICC issued warrants of arrest. If there will be an amnesty, who is going to compensate the victims? The five LRA leaders? The Ugandan Government?

Who is going to compensate the persons who are victims of a "situation" but who are not victims of a "case"? For example, at the beginning, ICC was seized with the situation in Congo. A lot of victims were considered for participation or compensation. After the situation became a case, and Mr. Thomas Lubanga Dyilo was accused, the number of victims to fulfil the criteria requested by the Rome Statute suddenly became lower. Only the persons who suffered harm or loss as a consequence of one or

more of the three accusations can submit for participation and compensation. What about the others victims? The ones who suffered harm because of a crime committed by someone else in Congo? What about the persons who suffered harm after a crime committed by Mr. Thomas Lubanga Dyilo, crime which is not under the jurisdiction of the ICC, or even if it would be, there is not enough proof for the Prosecution to charge with? What about these victims? Who is going to offer them reparations?

What will happen with the indirect victims? The ones who remained on a territory marked by the terrible crimes? The victims of hunger and disease?

NOTION AND BASIC CHARACTERISTICS OF CRIMINAL OFFENCE IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA

PROFESSOR DRAGAN JOVAŠEVIĆ, PHD*

Word of introduction

After almost three decades of divided juridical competences in the sphere of material criminal law among the federation, republic and the province, and after more than half of a century since the Criminal codex of the Federative national republic Yugoslavia in 1951 there was the law enacted, the national parliament of the Republic of Serbia passed the new, unique Criminal code of the Republic of Serbia[1]

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Altogether with the Codex about criminal processes[2], the Codex for juvenile crime committers and legal criminal protection of juveniles[3] and the Code about criminal sanction execution[4] there was made a great, fundamental and radical reformation of the whole national criminal law – the material, the processing and the executive.

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[1] The Official journal of the Republic of Serbia No. 85/2005 from 6.10.2005. More: D. Jovašević, Krivični zakonik Republike Srbije sa komentarom, Službeni list SCG, Beograd, 2006.

[2] More : D. Jovašević, Zakonik o krivičnom postupku, Službeni list SCG, Beograd, 2004.

[3] More : D. Jovašević, Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica sa komentarom, Službeni list SCG, Beograd, 2005.

[4] More : D. Jovašević, Zakon o izvršenju krivičnih sankcija sa komentarom, Službeni list SCG, Beograd, 2006.

Here are the basic reasons why there was necessary the new Criminal code to be passed in:

1) the social-economic and political changes that happened in the Stet union of republics Serbia and Montenegro, actually in the republic of Serbia in the last decades;

2) the appearance and variety of new, specially hard and dangerous forms of the contemporary criminal (organized, computer, violent, cross border etc);

3) the achieved level of the national criminal law development and actual court practice that demands answers to a numerous practical questions;

4) accepted obligations and duties, according to the accepted and ratified international contracts, agreements and conventions;

5) the solutions and achievements of the comparative criminal legislature with the highlighted request for the unification of some specific solutions and

6) the necessity of the fundamental man's rights protection.

In this way the acceptable basis for the competent state organs activities in standing against different kinds and types of crimes is established. On the other hand in this way was achieved the high level of protection and guarantee for the fundamental men's and citizens rights and freedoms in accordance with the international standards.

So, Republic of Serbia joined most of the contemporary countries that in order to protect the most important social goods and values are trying to prevent and repress criminality, using measures,

provisions and means that are in accordance with the scientific results, the highlighted principles and criminal policy requirements.

The crime (Criminal offence)

The crime is a negative, hazardous, dangerous men's activity that is prohibited by the juridical system under the threat of the criminal sanction application[5]. It is a product of men's behavior so it could be defined also as a men's behavior that produces violate consequence for the society because of which the society applies criminal sanctions towards committers of such actions. In the same moment the crime can be considered as a social occurrence.

[5] More : M. Djordjević, A. Mihajlovski, Delikti kaznenog prava, Beograd, 1978. ; A. Mihajlovski, O pojmu krivičnog dela, Beograd, 1985. p.79-85

Outside the people's society there is no crime. It is a negative social occurrence because of which the society applies criminal sanction towards committers of such actions. It could be said that the crime's social occurrence regulated with the inhibitive legal provisions[6].

The contemporary theory and the legislature, when determine the idea of the crime, begin from the union of material and formal elements[7]. The Criminal code of he Republic of Serbia, accepting the objective-

[6] Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. p.33

[7] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.57-59; N. Srzentić, A. Stajić, Krivično pravo, Opšti deo, Beograd, 1957. p.99; T. Živanović, Osnovni problemi krivičnog prava, Beograd, 1930. p.19-23; Z. Stojanović, Krivično pravo, Opšti deo, Beograd, 2005. p.100

subjective conception in the article 14., defines the crime as an action (active or passive, that is by the law determined as the criminal action, executed against the law with the premeditation or by the negligence)[8]. This definition is supplemented in the paragraph 2 of the same article, that there is no crime if the unlawfulness or the committer guilt is excluded.

[8] The notion of the crime (criminal offence) prescribes on similar way in other modern criminal codes : article14 of the Criminal code of the Russian Federation, article 7 of the Criminal code of the Republic of Slovenia, article 7 of the Criminal code of the Republic of Ukrain, article 13 of the Chinese Criminal code, article 10 of the Spain Criminal code, article14 of the Greek Criminal code, article 3 paragraph of Criminal code of the Czech Republic, article 7 of the Criminal code of the Republic of Macedonia and article 7 of the Criminal code of the Republic of Belarus

It means that the general idea (general being) of the crime consists of four elements (due to the fact that there is no social danger any more as a relict of the old socialistic legislature):

1) men's action,
2) unlawfulness,
3) the crime determination in the law and
4) the guilt.

The basic element as a precondition for some crime existence is the action[9]. Without it there is not possibility for the crime to be undertaken. In the literature there is possible to find opinions that there are some crimes without expressing behavior. Those

[9] B. Petrović, D. Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Pravni fakultet, Sarajevo, 2005. p.73-79

are crimes of the attitude. The criminal action can be executed in two ways: by acting and by not acting. The crime acting understands conscious and willing body movements and crime not acting understands lacking the movement of the body. But, by not acting[10] can be committed the crime also when the committer by missing the obliged action creates characteristics of some crime (article 15, paragraph 2 of the Criminal code of the Republic of Serbia).

Regularly body movements create the action, first of all hands. But it can be executed also by words expressing (verbal delict) and with some other kinds

[10] This form of action prescribes some of modern criminal codes : article 15 of the Greek Criminal code, article 2 of the Criminal code of the Republic of Austria, article 11 of the Spain Criminal code and article 13 of the Criminal code of the Federal Republic of Germany

of behavior (symbols). The action can contain only one movement, one activity or more successive, connected activities, which determine whether the activity is simple or complex[11].

Depending on the contribution to the crime occurrence, the action can be:

1) the activity of execution,
2) the activity of agitation and
3) the activity of help.

The executive activity produces the characteristics of the crime causing the consequence. It is an element of

[11] P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.122-124; Z. Stojanović, Krivično pravo, Opšti deo, Beograd, 2005. p.105-108; D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.62-65

the crime and it is a contented in the crime description. That action of the crime execution can be determined cumulatively and alternatively. When there is the cumulative determination, it is necessary for all actions from the crime description to be done, because they compose the crime all together. That is so called multi action activity.

When the legislator assumes more actions alternatively, the crime exists if any of anticipated action is done, because any of them even alone represents the activity of execution. The activity of agitating and helping activity assume that in the rime committing there are more persons who takes part in it, so by these activities there is a specific contribution to the crime execution.

With the action of execution the undertaken, the crime consequence is realized. That is the produced

change or condition in the outside surrounding, which is a result of the criminal activity impact. Without the consequence there is no crime. It is an element of the action as well as the action of execution. The consequence in the form of some change or produced condition in the outside environment has impact to the object of the criminal action and affects the passive subject (physical or legal person). According to some authors' opinion, the consequence has to be perceived by senses[12].

The crime consequence[13] can occur as:

1) the injury and

[12] T. Živanović, Krivično pravo, Opšti deo, Beograd, 1910. p.54

[13] M. Djordjević, Dj. Djordjević, Krivično pravo, Beograd, 2005. p.22-23

2) the threat.

The injury consists of destruction, damage or making useless of some legal good, and the consequence of threatening in causing danger for some good.

The crime is done in the place where the committer was acting or was obliged to do and the location where the consequence (total or partial) occurred. When the crime is attempted to be done, the place of its execution is considered that place where the committer was doing as well as the location where the consequence (according to his intention) should or could have occur (article 17 Criminal code). The time when the crime is executed is considered the time when the committer was doing or was obliged to do, no matter when the consequence occurred (article 16 Criminal code).

The unlawfulness[14] is the next characteristic of the crime idea. That is the opposition towards norm that is a content of any actual legislative of a specific state. The norm opposite to the committed crime does not have to be a part of the criminal legal prescription, but it has to be a content of any prescription of the positive juridical system of the country. By the rules, those norms are parts of the other law branches and they are used as a basis for the social dangerous actions incrimination. According to this, there can be concluded that the unlawfulness represents a legal institute for the criminal action determination. Through the unlawfulness the society determines the attitude towards some people's

[14] N. Srzentić, A. Stajić, Lj. Lazarević, Krivično pravo SFRJ, Opšti deo, Beograd, 1996. p.175 ; LJ. Jovanović, D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2003. p.89-91

behavior with which they break some demands and prohibition of the society.

The crime attempt

From the moment of the idea about some crime execution occurs in the committer's mind up to its undertaking, there can pass more stages[15]. The first stage is the making decision about the action execution. Then the committer starts with the crime execution – the activity of acting or not acting that is in the law anticipated as the action compatible to cause legal relevant consequences. Executing of such activity the forbidden consequence can occur totally or partially. But it also can be lacking. Then the

[15] D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. p.68-76 ; LJ. Bavcon, A. Šelih, Kazensko pravo, Splošnij del, Ljubljana,1987.p. 213

criminal action is only in attempt. That is why there are two forms of the crime occurrence in the outside world – the terminated and the attempted criminal action[16].

The attempted or unfinished crime occurs when the crime execution starts with the premeditation, but it is not terminated (article 30 Criminal code of the Republic of Serbia). That is premeditated initiated execution of the criminal action that does not cause the crime characteristics, respectively the crime being is not realized completely but partially. That partial crime realization undertaking the attack towards the protected good, represents the essence of the attempt. So the attempt represents the attack towards goods protected by the criminal law with aim to cause the

[16] F. Liszt, Lehrbuch des Deutschen Strafrechts, Leipzig, 1922. p. 98

change on the object – realization of the forbidden consequence.

Right that lacking of the aimed consequence forms the attempt as the unlawful and forbidden activity, though without any result. The criminal activity undertaking by which the protected object is attacked and the consequence lacking that was aimed to be realized by the undertaken action, are the elements of the attempt no matter the attack was convenient for the consequence realization or not.

For the attempt existence[17], the following conditions

[17] This institut also prescribes several modern criminal codes : articles 30-31 of the Criminal code of the Russian Federation, article 23 of the Chinese Criminal code, article 8 of the Czech Criminal code, article 16 of the Criminal code of the Republic of Bulgaria, article 21 of the Swiss

should be fulfilled:

1) the premeditation of the activity, respectively the made decision for the crime execution,

2) that the action was initiated that means that there was one or more undertaken actions, which are executive actions of the crime according to the law and

3) the action was not terminated respectively the

Criminal code, article 22 of the Criminal code of the Republic of Slovenia, article 2 of the French Criminal code, article 22 of the Criminal code of the Federal Republic of Germany, article 15 of the Criminal code of the Republic of Austria, article 56 of the Criminal code of the Italia and article 32 of the Criminal code of the Republic of Israel

consequence of the crime did not occur[18].

So, non existence of the consequence, its lacking respectively the absence is the most important element of the attempt. For the attempted crime, the committer is punished only in those cases where for such crime there is anticipated the punishment as a 5 years of prison or stricter respectively when it is specifically prescribed by the law. Such person is sentenced the prescribed punishment, but it can be punished smoother. The juridical theory recognizes the qualified attempt[19]. It is that attempt of the crime when undertaking of some action, by which the crime wanted to be realized, caused some other crime

[18] B. Čejović, Krivično pravo u sudskoj praksi, Prva knjiga, Opšti deo, Beograd, 1985. p.170-172

[19] A. Mayer, Lehrbuch, Leipzig, 1922.p.192; G. Bettiol, Diritto penale, Padova, 1982. p.561

being.

Inconvenient attempt

Inconvenient attempt[20] occurs when there was no consequence as the result of inconvenient means used for the crime execution or the inconvenient object towards which the crime execution was undertaken,

[20] This institut also defines several modern criminal codes : article 43 of the Greek Crimial code, article 23 of the Criminal code of the Swiss Federation, article 33. paragraph 3 of Criminal code of the Republic of Croatia, article33. paragrapf 3 of the Criminal code of the Republic of Israel, article 23 of the Criminal code of the Republic of Slovenia, article 20 of the Criminal code of the Republic of Macedonia, article 15, paragraph 3 of the Criminal code of the Republic of Austria and article 23, paragraph 3 of the Criminal code of the Federal Republic of Germany

so the crime could not have been realized at all (article 31 Criminal code). Practically the inconvenient attempt occurs because the means do not have such characteristics that could cause the consequence or the subject is insusceptible and inconvenient for the consequence that was desired to be caused. It means that by these means or on that object under such condition not only the committer but also any other person can not execute the intended crime. For the inconvenient attempt, the committer can be totally released of the sentenced punishment.

The willing quit-claim

The willing quit-claim[21] (article 32 Criminal code)

[21] This institut defines some of the modern criminal codes on similar way : article 18 of the Criminal code of the

occurs when the committer attempted to execute the crime but he desisted willingly of the further executive action undertaking or prevented the circumstance occurrence. In order to that quit - claim to be relevant, it is necessary that it is willing and final. It is willing when the committer decides to stopping the initiated activity or to preventing the expected consequence. Therefore there is no willing quit – claim if the committer did not terminate the crime because of the circumstances that disable or aggravate significantly the crime execution, or

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Republic of Ukrain, article 24 of the Criminal code of the Republic of Slovenia, article 16 of the Criminal code of the Republic of Austria, article 24 of the Criminal code of the Federal Republic of Germany, article 31 of the Criminal code of the Russian Fedeartion, article 21 of the Criminal code of the Swiss Fedeartion and article 16, paragraph 2 of the Spain Criminal code

because he supposed that such circumstances existed.

The situation is the same – there is no willing quit – claim if the committer stops the initiated activity because of the inconvenience of the conditions in order to continue when more convenient conditions are accomplished, respectively if he postpones the action execution because of the same reasons. Also there is no willing quit – claim if the committer desisted only of the initiated activities in order to replace them with some more suitable[22].

In the case of the committer of such crime can be released of the sentenced punishment. The same possibility is available to the court in the following

[22] F. Haft, Strafrecht, Allgemeiner teil, Munchen, 1980. p.191

cases[23]:

1) if the committer, the accomplice or the helper willing prevented the crime execution and

2) if the committer, executing the crime, accomplished the characteristics of some other single crime that was not comprised with the action from which he willingly desisted.

The crime conjuncture

The crime conjuncture occurs when some person

[23] LJ. Lazarević, B. Vučković, V. Vučković, Komentar Krivičnog zakonika Crne Gore, Cetinje ,2004. p.85-87; D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.161-163

with one or more activities executed more crimes because of which he was not legally processed so he is processed in one process, one adjunction is brought and one main punishment is sentenced (article 60. paragraph 1. Criminal code of the Republic of Serbia)[24]. For the existence of the crime conjuncture it is not important if there was one or more committers[25]. When the committer undertaking one

[24] T. Živanović, Krivično pravo, Opšti deo, Beograd, 1910. p.49; J. Tahović, Krivično pravo, Opšti deo, Beograd, 1961. p.256; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.315

[25] Crime conjuction prescribes as general institut of criminal law also other modern criminal codes : article 60. of the Criminal code of the Republic of Croatia, article 47 of the Criminal code of the Republic of Slovenia, article 44 of the Criminal code of the Republic of Macedonia, article 42 of Criminal code of the Republic of Ukrain,

action executes more crimes, there are:

1) the ideal and

2) the realistic conjunction.

The ideal conjunction occurs when the committer undertaking the action executes more crimes. Depending on the caused consequences they can be:

1) homogenous and

2) heterogeneous.

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article 28 of the Criminal code of the Republic of Austria, articles 17 and 69 of the Criminal code of the Russian Federation and articles 52-53 of the Criminal code of the Federal Republic of Germany

The homogenous ideal conjuncture occurs when the committer undertaking the action executes more crimes of the same type.

The heterogeneous conjuncture occurs when the committer undertaking the action executes more crimes of different type.

The realistic conjuncture exists when the committer with more activities causes more crimes, under the term that the committer was not sentenced any legally binding adjunction for any of the executed crimes. For the existence of the realistic conjuncture it is necessary at least two crimes to be realized, with special activities and that according to any of them there is no adjunction, so the committer is persecuted in the same process for all the crimes and there is only one decision to be made and only one main punishment to be sentenced. If the committer

executed two crimes, but for one of them he was sentenced the legally binding adjunct, no matter he served it or not, the realistic conjuncture can not exist but the restoring.

For the realistic conjuncture existence it is not important how long time passed between the crimes executed in conjunction. There is no importance whether the location and the moment of all the crimes are the same or different. For the realistic conjuncture existence it is not necessary that all the crimes are sentenced – some of them can be terminated ant the others can be attempted. Also the realistic conjuncture depending on the realized consequences, can be homogenous or heterogeneous. The homogenous realistic conjuncture occurs when the committer with more actions realizes more crimes of the same type. The heterogeneous realistic conjuncture occurs when the committer with more

actions realizes more crimes of different crimes.

The apparent conjuncture[26] exists when the committer with one or more activities causes more consequences, but the common one comprises all of them, so there is only one crime. The apparent ideal conjuncture in theory is considered as the law conjuncture, respectively the conjuncture of the legal criminal prescriptions. The apparent realistic conjuncture in the form of consumption occurs in the case of the complex, extended and collective crime, when there is one crime no matter the number of the caused consequences.

[26] Dj. Lazin, Prividni idealni sticaj krivičnih dela, Beograd, 1982. p.45-48; P: Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.318; D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.166-168

The extended crime

The extended crime[27] (article 61. Criminal code) exists when one person with more activities executes more crimes, same or different, timely connected, which represent the whole so they supervene to each other and creates the unique crime. For the existence of the extended crime construction on the basis of apparent realistic conjuncture, it is necessary at least two of the following variability[28]:

[27] More : J. Buturović, Produženo krivično delo, Beograd, 1980, p.123-129; D. Jovašević, Produženo krivično delo, Glasnik AK Vojvodine, Novi Sad, No. 12/1996. p.494-507

[28] This institut prescribes some of modern criminal codes : article 81 of the Criminal code of the Republic of Italy, article 26 of the Criminal code of the Republic of Bulgaria, article 45 od the Criminal code of the Republic of

1) the impaired equivalence;

2) the crime object equivalence;

3) use of the same situation or the same time relation;

4) the union of the location of the crime execution and

5) the unique committer premeditation.

Thereat the code specifically determines that the crimes directed towards the personality can be in extended form only if they are undertaken towards the same person. If the extended crime comprises lighter and heavier forms of the same crime, then

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Macedonia and article 61 of the Criminal code of the Republic of Croatia

when determining the crime qualification the heaviest form is considered as relevant. In the case of the extended crime which being element is the penalty, then for this qualification is taken in consideration the sum of the penalties accomplished by the single crimes, if it is comprised with the unique premeditation of the committer.

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L'İMPORTANZA DELL'İNTERPELLAZİONE NEL DİRİTTO DELL'OBBLİGAZİONE ROMANA

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Le trattazioni di diritto romano[1] presantano, generalmente, l'interpellatio del debitore ad opera del creditore come una conditio sine qua non, un requisito essenziale della costituzione in mora. [2]

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[1] V. ARANGIO-RUIZ: Istituzioni di diritto romano (Napoli 1995) 322ss; M. KASER: Das Römische Privatrecht I (Berlin 1997) 429 ss.

[2] P.VOCI: Istituzioni di diritto romano (Milano1996) 391 s; A. GUARINO: Diritto privato romano (Napoli 1988) 895 ss.

Mentre pero' gli scrittori piu' antichi [3] non sollevano dubbi sula classicita' di tale requisito, la dottirina piu' recente [4] é di avviso contrario: L'argomentazione dal Siber[5] essa si schiera per la non classicita' della regola che per costituire in mora il proprio debitore occorre interpellarlo.

I pratici del diritto comune ricavarano la regola da un diretto ed immediato esame delle fonti e, nel dare ad essa sua prima formulazione dottrinaria , tennero a precisare che , se nei casi normali era necessario per

[3] E.ALBERTARIO: Corso di diritto romano: le obbligazioni, *(Pavia, 1927) 257 s.*

[4] C. SANFILIPPO: Istituzioni di diritto romano (Catania 1964) 166 ss. P. VOCI: Istituzioni cit 392.; A. GUARINO :cit. 896; A. BURDESE: Manuale di diritto privato romano (Torino 1987) 604 ss.; M.TALAMANCA: Istituzıoni di diritto romano (Milano 1990), 654 ss.

[5] SIBER: Interpellatio und Mora , ZSS,29 (1908) ss .206 .

il creditore che volesse costituire in mora il suo debitore procedere alla rituale *interpellatio, non era esclusa l'eventualita' di qualche deroga nei casi eccezionali . Il requisito dell'interpellatio si inseriva nella dinamica dell'istituto mora debitoris. Si puo' costituire il criterio distintivo della fondementale bipartizione della mora.La mora ex persona costituiva la regola e pertanto era fondata sula necessita' del requisito dell'interpellatio; la mora ex re costituiva l'eccezione e pertanto rimaneva caretterizzata dall'assenza di tale requisito*[6]
In periodo classico, non occorreva il requisito formale dell'interpellatio o meno,che era giunto il tempo di adempiere.

A qualunque conclusione portasse una indagine in

[6] Si ha l'equivalenza tra mora ex persona e mora ex interpellatione; tra mora ex re e mora sine interpellatione.

proposito della classicita' della regola dell'interpellatio non sarebbe certo intaccata: Si tratterebbe solo di ammettere, in periodo classico, accanto alla categoria generale della mora ex persona fondata sul requisito dell'interpellatio, l'esistenza o meno della categoria eccezionale della mora ex re. L'interpellatio fu costantemente considerata l'unico requisito formale necessario. Per la costituzione in mora. Per ben chiarire che la presente indagine e' limitata soltanto al riesame della questione della genuinita' o meno dele fonti che indicano l'interpellatio come requisito necessario della mora ex persona.

A qualunque conclusione portasse una indagine in proposito, la dimosrazione della classicita' della regola dell'interpellatio non sarebbe certo intaccata; si tratterebbe solo di ammettere, in periodo classico, accanto alla categoria eccezionale della mora ex re.

Con questo non si vuol dire che la questione e' in generale priva di interesse tutt'altro. L'esame di uno questo i presunti casi di mora ex re darebbe anzi il modo di penetrare piu' a fondo nel pensiero dei classici circa i requisiti della mora ex persona; inoltre permetterebbe di indagare su uno dei precedenti immediati dell'articolo sull'interpellazione del Siber[7]

La mora non si puo' avere sen on e' preceduta dall'interpellatio, che ne costituisce pertanto uno dei requisiti necessari, e non semplicemente una dele possibili fonti.

Il ragionamento fatto da Pomponio e' dunque semplicissimo: per accertare la responsabilita' per mora del debitore, indagine da compiere e' quella circa l'esistenza o meno dell'interpellatio:in assenza

[7] H. SIBER: Interpellatio und Mora, ZSS,29 (1908) 207 ss.

di questa, non deve, ne si puo' parlare di responsabilita' del debitore.

L'interpellatio, requisito necessario della mora, e' direttamente a questa connessa, mirando ad appunto ad assicurare al creditore i vantaggi di tale situazione che in primo luogo la "perpetuatio obligationis", per qui si ha responsabilita' del debitore inottemperante all'interpellatio anche in caso di perimento fortuito della cosa.[8]

Infatti, l'effetto della prima petitio non era stato certo quello del'interpellatio cioe' di costituire in mora un debitore il cui debito fosse gia' scaduto e non fosse stato adempiuto' che in tal caso non poteva proprio aver luogo 'data la pendenza della condicio', ma

[8] E. NARDI: Istıtuzıoni di diritto romano (Milano 1975) 263 ss.

quello di manifestare al debitore la volonta di accettare il fedecommesso, che pertanto avrebbe potuto da allora in poi richiedersi sempre a condizione avverata e sempre che fosse ancora possibile.

Si tratterebbe, pero', sempre di effetti rientrati nella generale regola della " *perpetuatio obligationis*" : se il debitore cade in moranell effettuare la collazione, questa potra' sempre effettuarsi dopo, senza pregiudizio per gli aventi diritto.

Nel caso della " *lex commissoria* "infatti, e' finita col prevalere la tesi che aggravava la responsabilita del debitore, richiedendo per la sua liberazione l'oblatio e non l'interpellatio; mas e d'*interpellatio* si era parlato 'molto probabilmente cio' dipendeva dal fatto che alla metne dei giuristi era presente quella che era la disciplina normale della responsabilita' del

debitore: cioe' che si poteva parlare di responsabilita' di costrui solo nel caso in cui "interpellatus non solverit "Il non pagare dopo l'*interpellatio* era, dunque, il comune criterio per stabilire la mora del debitore, il "*per eum stare quominus" L'interpellatio quindi , come si deduce ancora una volta, costituiva il generale requisito necessario della mora.*

Un passo che apartiene ad Ulpiano[9] *grande valore indicativo ha avuto. L'applicazione della "lex commissoria" risolto poi da Ulpiano nel senso che per liberarsi dal pericolo della risoluzione del*

[9] Dig. 18.3.4.4 (Ulp. 32 ad ed.) Marcellus libro vicensimo dubitat, commissoria utrum tunc locum habet, si interpellatus non solvat, an vero si non optulerit. et magis arbitror offerre eum debere, si vult se legis commissoriae potestate solvere: quod si non habet cui offerat, posse esse securum.

contratto, il compratore deve offrire spontaneamente il prezzo entro il tempo stabilito, se dimostra chiaramente quale sia stata l'evoluzione della giurisprudenza Romana circa l'istituto della "lex commissaria", vale d'altro canto a confermare implicitamente la tesi che veniamo dimostrando.

L'interpretazione dell'interpellazione congiunta del passo di Paolo[10] .

[10] Dig. 36.2.24pr.(Paul 6 ad l. iul. et pap.) Si penum heres dare damnatus sit vel fundum et, si non dedisset, decem, ego accepi et penum legatam et translatam esse in decem, si noluerit penum heres dare, et tunc pecuniam deberi, cum interpellatus fundum non dedisset, et, si interea decesserit legatarius, tunc heredi eius non nisi fundum deberi. namque cum dictum est: " at publicius fundum dato", perfectum est legatum et cum dicit: " si non dederit, centum dato", sub condicione fundi legatum ademptum videri eo casu, quo centum deberi coeperint. quorum quia

Paolo nel frammento D.36.2.24 sostiene che un legato alternativo,espresso con queste parole "penum heres damnatus sit dare si non dederit decem" si deve intendere nel senso di un legato di "penus" sottoposto a condizione risolutiva nel caso che "*pecunia deberi cooperit*" il che , secondo Paolo, si verifica solamente se il debitore "*interpellatus fundum non dedisset*"

Evidentemente per Paolo le due espressioni "*interpellatus fundum non dederit* "e" *mora facta*" sono perfettamente equivalenti. Percio' anche per lui, per aversi mor, occorre espressamente e solamente l'*interpellatio.*

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condicio vivo legatario non exstiterit, forte quia interpellatus heres non sit, evenit, ut ademptio nihil egerit fundique legatum duraverit.

Dopo la dimostrazione fatta in pracedenza non si potrebbe ritenere che oltre che non l'intepellare, sia possibile costituire in mora in qualche altro modo:resta percio' l'*interpellatio* l'unico modo possibile di costituzione in mora e pertanto si presenta come un requisito necessario della mora.

In conclusione, i frammenti esaminati sono quelli che direttamente o indirettamente prendono posizione circa il problema dell'*interpellatio* e lo risolveno nel senso che e stato indicato: essere cioé l'*interpellatio* requisito necessario della mora.

Tutti gli altri passi in qui nel Digesto ricorre l'uso del vocabolo "*interpellatio*' (sempre nel senso di "richiesta dell pagamento fatta all debitore") sono: D.44.7.23; D.47.10.19; D.46.3.81.1; D.22.2.2; D.34.3.8.1

Loro non prendono posizione circa la relazione tra *interpellatio* e *mora*: tuttavia dalla loro attenta lettura qualche utile indicazione può trarsi circa la questione.

L'inoltre esame di tali frammenti vale a completare ad esaurire l'indagine condotta sul Digesto circa la questione che ci interessa.

Il primo passo é importantissimo e interessantissimo.[11] Si sostiene che nel caso di

[11] Dig. 44.7.23 (Africanus 7 quaest).Traiecticiae pecuniae nomine, si ad diem soluta non esset, poena (uti adsolet) ob operas eius qui eam pecuniam peteret in stipulationem erat deducta: is qui eam pecuniam petebat parte exacta petere desierat, deinde interposito tempore interpellare instituerat. consultus respondit eius quoque temporis, quo interpellatus non esset, poenam peti posse: amplius etiamsi omnino interpellatus non esset: nec aliter non committi stipulationem, quam si per debitorem non stetisset, quo

stipulatio poenae, cioé di una clausolapenale aggiunta ad un contratto " *si ad diem pecunia* solute *non esset, poena in stipulationem deducta erat* " non occorra *interpellatio*, ma basti la sola scadenza senza aver adempiuto a far sorgere l'obbligo di pagare la penalitá. Tale affermazione delle fonti va inquadrata

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minus solveret: alioquin dicendum et si is, qui interpellare coepisset, valetudine impeditus interpellare desisset, poenam non committi. de illo sane potest dubitari, si interpellatus ipse moram fecerit, an, quamvis pecuniam postea offerat, nihilo minus poena committatur: et hoc rectius dicitur. nam et si arbiter ex compromisso pecuniam certo die dare iusserit neque per eum, qui dare iussus sit, steterit, non committi poenam respondit: adeo ut et illud servius rectissime existimaverit, si quando dies, qua pecunia daretur, sententia arbitri comprehensa non esset, modicum spatium datum videri. hoc idem dicendum et cum quid ea lege venierit, ut, nisi ad diem pretium solutum fuerit, inempta res fiat.

nel particolare regime che regolava nel periodo classico la scadenza di un'obbligazione *"dies cedit atque venit"*, cioé il momento in qui la prestazione del debitore diveniva esigibile da parte del creditore.

In primo luogo, era determinabile, in caso di silenzio delle parti, dalla natura stessa prestazione, che pertanto poteva essere esigibile subito o divenirlo in un momento successivo e non prima (per esempio l'obbligazione di consegnare I frutti del proprio fondo diveniva esigibile al momento del raccolto[12]

[12] Dig. 45.1.73 pr. (Paulus 24 ad ed.) Interdum pura stipulatio ex re ipsa dilationem capit, veluti si id quod in utero sit aut fructus futuros aut domum aedificari stipulatus sit: tunc enim incipit actio, cum ea per rerum naturam praestari potest. sic qui carthagini dari stipulatur, cum romae sit, tacite tempus complecti videtur, quo perveniri carthaginem potest. item si operas a liberto quis stipulatus sit, non ante dies earum cedit, quam indictae fuerint nec

Se, le parti avessero apposto una condizione sospensivo a favore del debitore,[13] l'obbligazione era perfezzionata e conseguentemente esigibile al verificarsi della condizione o alla scadenza del termine[14] In particolare, se fosse stato apposto un termine occorreva esaminarne il valore: se si poteva essere, e lo era normalmente, in caso di silenzio delle parti, "favore debitoris", il che significava che prims delle scadenza delle termine, il creditore non poteva

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sint praestitae.

[13] V. ARANGIO-RUIZ: Istituzioni di diritto romano (Napoli 2000), 82 ss

[14] Dig. 50.16.213 pr. (Ulpianus 1 reg.) "cedere diem" significat incipere deberi pecuniam: "venire diem" significat eum diem venisse, quo pecunia peti possit. ubi pure quis stipulatus fuerit, et cessit et venit dies: ubi in diem, cessit dies, sed nondum venit: ubi sub condicione, neque cessit neque venit dies pendente adhuc condicione.

esigere[15] Poteva eserse, invece, aggiunto, in qualche casi, espressamente a favore del creditore, il che significava che entro quell termine l'obbligazione doveva essere adempiuta, con le conseguenze, in caso di adempimento, al regulate conclausole aggiunte dale stesse parti[16]

[15] Dig. 45.1.41.1 (Ulpianus 50 ad sab). Quotiens autem in obligationibus dies non ponitur, praesenti die pecunia debetur, nisi si locus adiectus spatium temporis inducat, quo illo possit perveniri. verum dies adiectus efficit, ne praesenti die pecunia debeatur: ex quo apparet diei adiectionem pro reo esse, non pro stipulatore.

[16] Dig. 44.7.23 (Africanus 7 quaest). Traiecticiae pecuniae nomine, si ad diem soluta non esset, poena (uti adsolet) ob operas eius qui eam pecuniam peteret in stipulationem erat deducta: is qui eam pecuniam petebat parte exacta petere desierat, deinde interposito tempore interpellare instituerat. consultus respondit eius quoque temporis, quo interpellatus non esset, poenam peti posse: amplius etiamsi omnino

Alla scadenza dell'obbligazione "subito o dopo un certo tempo, dopo il verificarsi della condizione sospensiva o del termine apposto "favore debitoris" al creditore restava da chiedere l'esecuzione della

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interpellatus non esset: nec aliter non committi stipulationem, quam si per debitorem non stetisset, quo minus solveret: alioquin dicendum et si is, qui interpellare coepisset, valetudine impeditus interpellare desisset, poenam non committi. de illo sane potest dubitari, si interpellatus ipse moram fecerit, an, quamvis pecuniam postea offerat, nihilo minus poena committatur: et hoc rectius dicitur. nam et si arbiter ex compromisso pecuniam certo die dare iusserit neque per eum, qui dare iussus sit, steterit, non committi poenam respondit: adeo ut et illud servius rectissime existimaverit, si quando dies, qua pecunia daretur, sententia arbitri comprehensa non esset, modicum spatium datum videri. hoc idem dicendum et cum quid ea lege venierit, ut, nisi ad diem pretium solutum fuerit, inempta res fiat.

prestazione (se questa non avvenisse spontaneamente da parte del debitore) con l'esperimento delle azioni che erano nel suo potere: ma prima di precedere in giudizio, poteva costituire in mora il debitore (interpellandolo) e cosi perpetuava obbligatio, conservando inalterate le sue azioni[17] (se fosse la sorte toccata all'oggetto di qualquno: perimento della cosa dovuta), le quail avrebbero potuto, se non fosse intervenuta la *perpetuatio*, cadere nel nulla con conseguente liberazione del debitore.

La regola imperante il periodo classico era che a costituire in mora ed a creare gli effetti propri di questa, cioé la *perpetuatio obligationis*, fosse sempre necessaria *l'interpellatio*: sia nei casi più comuni di obbligazione alcuna (intendendosi in tal caso apposto

[17] Per l'indipendenza dei due atti di costituzione in mora e di citazione giudiziale.

"favore debitoris") sia nei casi, invece, in cui un termine fosse stato apposto espressamente *"favore creditoris"*.

In tali ultimi casi, normalmente, per rafforzare l'obbligo del debitore di pagare entro e non dopo quel termine, soleva stipularsi una clausola penale.[18]
Alla sola scadenza del termine, non c'era ovviamente clausola penale operante , né dall'altro canto c'era la possibilita' della mora (almeno fino a che non fosse intervenuta l'*interpellatio).*Tuttavia il diritto romano conosceva rimedi vari, in relazione alle single fattispecie contrattuali concrete. Per esempio nel caso della compravendita' l'unica difesa possible che

[18] B. BERTOLINI: Teoria generale della pena convenzionale in SDHI 15 (1894) 2 ss; F. NANI: Sulla regola dies interpellat pro homine in AG 2 (1873), 229 ss.; A.GUARINO: Collatio bonorum in ZSS 59 (1939) 509 ss.

rimaneva al compratore era *l'actio empti*,[19] che fu resa, comincio' il primo mutamento dell'istituto, particolarmente favorevole al compratore con l'estendere la valutazione del quanti interest non,

[19] Dig. 19.1.1.1 (Ulpianus 28 ad sab.) Venditor si, cum sciret deberi, servitutem celavit, non evadet ex empto actionem, si modo eam rem emptor ignoravit: omnia enim quae contra bonam fidem fiunt veniunt in empti actionem. sed scire venditorem et celare sic accipimus, non solum si non admonuit, sed et si negavit servitutem istam deberi, cum esset ab eo quaesitum. sed et si proponas eum ita dixisse: " nulla quidem servitus debetur, verum ne emergat inopinata servitus, non teneor", puto eum ex empto teneri, quia servitus debebatur et scisset. sed si id egit, ne cognosceret emptor aliquam servitutem deberi, opinor eum ex empto teneri. et generaliter dixerim, si improbato more versatus sit in celanda servitute, debere eum teneri, non si securitati suae prospectum voluit. haec ita vera sunt, si emptor ignoravit servitutes, quia non videtur esse celatus qui scit neque certiorari debuit qui non ignoravit.

come avveniva comunemente, al momento della richiesta giudiziale, ma al momento in cui la cosa doveva essere consegnata e non lo era stata, cioé alla scadenza del termine.[20]

La conseguenza fu che praticamente anche se non si parlò di mora e di *perpetuatio obligationis* nel caso di scadenza del termine apposto *favore creditoris* all'obbligazione del venditore, con l'attribuire al creditore l'*actio empti* cosi formulatasi fini col ritenere perpetuata l'obbligazione alla scadenza.

In quel modo, con la sola scadenza del termine e

[20] CJ.4.49.10 (Imperatores Diocletianus, Maximianus): Cum venditorem carnis fide conventionis rupta tempore placito hanc non exhibuisse proponas, empti actione eum quanti interest tua tunc tibi praestitam fuisse apud praesidem provinciae convenire potes. * diocl. et maxim. aa. et cc. titio attalo. * <a 293 s. xvii k. ian. aa. conss.>

senza più bisogno d'*interpellatio* e conseguente costituzione in mora si aveva *perpetuatio obligationis:*a ritenere che in qualche caso si fosse avuto mora (senza *interpellatio* ma con il *dies* sostitutivo dell'*interpellatio*) il passo era breve.Nel diritto postclasico da Giustiniano che, contro ogni diversa attestazione dele fonti, C.8.37.12[21] poneva la

[21] CI.8.37.12 (Imperator Iustinianus): Magnam legum veterum obscuritatem, quae protrahendarum litium maximam occasionem usque adhuc praebebat, amputantes sancimus, ut, si quis certo tempore facturum se aliquid vel daturum se stipuletur vel quae stipulator voluit promiserit et addiderit, quod, si statuto tempore minime haec perfecta fuerint, certam poenam dabit, sciat minime posse ad evitandam poenam adicere, quod nullus eum admonuit: sed etiam citra ullam admonitionem eidem poenae pro tenore stipulationis fiet obnoxius, cum ea quae promisit ipse in memoria sua servare, non ab aliis sibi manifestari poscere debeat.

regola << dies interpellatio pro nomine >>.

Gli altri frammenti in cui nel Digesto, ricorre l'uso del vocabolo " interpellatio " sono: D. 47.10.19 8[22] relativo ad una interpellatio rivolta ai fideiussori, D .46.3.81.1[23] relativo ad un'interpellatio effettuata solo da una parte di più concreditori, D . 22.2.2 [24]

[22] Dig. 47.10.19 (Gaius 22 ad ed. Provinc) Si creditor meus, cui paratus sum solvere, in iniuriam meam fideiussores meos interpellaverit, iniuriarum tenetur.

[23] Dig. 46.3.81.1 (Pomponius) Si lancem deposuerit apud me titius et pluribus heredibus relictis decesserit: si pars heredum me interpellet, optimum quidem esse, si praetor aditus iussisset me parti heredum eam lancem tradere, quo casu depositi me reliquis coheredibus non teneri. sed et si sine praetore sine dolo malo hoc fecero, liberabor aut (quod verius est) non incidam in obligationem. optimum autem est id per magistratum facere.

[24] Dig. 22.2.2 (Pomponius 3 ex plaut.)Labeo ait, si nemo

relativo ad impossibilitá di effettuare *l'interpellatio in assenza del debitore e* D . 34.3.8.1 [25] relativo ad un particolare tipo di *legatum liberationis.*

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sit, qui a parte promissoris interpellari traiecticiae pecuniae possit, id ipsum testatione complecti debere, ut pro petitione id cederet.

[25] Dig. 34.3.8.1 (Pomponius 6 ad sab.) Potest heres damnari, ut ad certum tempus non petat a debitore: sed sine dubio nec liberare eum intra id tempus debebit, et, si debitor decesserit, ab herede eius intra id tempus peti non poterit.

BASIC CHARACTERISTICS OF SYSTEM OF CRIMINAL SANCTIONS IN NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA

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Word of Introduction

The new Criminal code of the Republic of Serbia[1] entered into force at the beginning of 1 st January 2006, as a uniform substantive criminal law act which regulates the entire area of both general and special part of criminal law on new, modern grounds.

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[1] D. Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Službeni list, Beograd, 2006. godine, p 5-14

Thus, after a period of 145 years, Serbia has obtained its criminal codification. Among the most significant novelties contained in this Code is certainly the development of the system of criminal sanctions, particularly the penal system and rules for determining penalty.

In this paper, the author analyses the new system of criminal sanctions in the Republic of Serbia. This implies that a criminal sanction, as a coercive measure aimed at protecting the society from crime, is determined and pronounced to the offender by the court in the prescribed proceedings and under conditions provided by the law ; it entails either renouncing or restraining the offender's freedom and rights, or issuing a warning to the offender that his freedom or rights will be renounced or restricted provided that the offender committed the criminal offence again.

Contemporary criminal law recognizes a number of criminal sanctions different in their content, nature and effect[2]. Each criminal sanction is a special measure of social reaction in fighting crime, whereas collectively they all constitute a set of related measures making an integral whole – a system of

[2] Criminal law of countries of former SFR Yugoslavia - in Bosnia and Herzegovina - B. Petrović, D. Jovašević, Krivično pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. godine ; in Macedonia - G. Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. godine; V. Kambovski, Kazneno pravo, Opšt del, Skopje, 2004. godine; in Croatia - P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. godine, Ž. Horvatić, Krivično pravo, Opći dio, Zagreb, 2003. godine; in Slovenia - B. Penko, K. Strolig, Kazenski zakonik z uvodnimi pojasnili, Ljubljana, 1999. godine and in Montenegro – Lj. Lazarević, V. Vučković, B. Vučković, Komentar Krivičnog zakonika Republike Crne Gore, Obod, Cetinje, 2004.godine

criminal sanctions. Accordingly, the system of criminal sanctions is an aggregate of all coercive measures envisaged in the criminal legislation of a country and applied against criminal offenders under the conditions and in the manner prescribed by the law. In article 4. the Criminal Code of the Republic of Serbia prescribes different kinds of criminal sanctions :

1) penalties,
2) warning measures,
3) safetuy (security) measures and
4) educative (corrective) measures[3].

Pursuant to article 42. of the Criminal Code of the Republic of Serbia enforced on 1st January 2006, the purpose of punishment within the framework of the

[3] More : D. Jovašević, Krivično pravo, Opšti deo, Nomos, Beograd, 2006. godine, pp. 245-263

general objective of criminal sanctions is :

1) to prevent the offender from committing criminal offences and to deter the offender from committing further criminal offences,
2) to deter others from committing criminal offences and
3) to communicate the social disapproval of the criminal act and thus strengthen the moral and reinforce the obligation to abide by the law[4].

In the Republic of Serbia, the legislator has set off from the conception that the ultimate aim of penalty is to protect the society from crime, whereas its immediate goal is to prevent the offender from committing criminal offences and to enable the offenders's resocialization – which is envisaged as

[4] Lj. Bavcon, Družbena funkcija kazenskih sankcij, Pravnik, Ljubljana, No. 9/1961. godine, pp.253-262

specific prevention ; the ensuing general prevention includes deterring others from committing criminal offences, communicating the social disapproval of the perpetrated criminal offence and strengthening the public moral and reinforcing the citizens' obligation to abide by the law. It implies that the ultimate aim of punishment is to protect the society from crime, which is achieved both by specific and general prevention.

Criminal sanctions

Criminal sanctions are measures of social reaction of coercive character against the criminal deed offender undertaken by the state aiming to protect the society from criminality. They represent reaction against the offender because of pursuing criminal deed by which damage to the society has been done but also a reaction which has an aim to prevent the offender to do criminal deeds in the future as well as to influence

other prospective doers to restrain from doing such acts.

That means that criminal sanction is a corrective measure for protection of the society from criminality which is passed by the court to the criminal deed offender, in the procedure and under conditions that are defined by the law and which consists in dispossessing or restricting freedom and rights or warning to the offender that his freedom or rights shall be dispossessed or restricted in case he performs a criminal deed again.

Criminal sanctions have a number of common characteristics[5]:

[5] Lj. Jovanović, D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2003. godine, pp.214-216 ; D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Službeni glasnik, Beograd, 2002. godine, pp.342-346; G.

1) they may be applied only toward the person who performed the criminal deed and for which it has been proven in the criminal procedure by competent court,

2) they have to be determined in the law. The criminal deed offender cannot be given a sanction which is not determined by the law according to the kind and measure and if an authority has not been determined for its passing (principle of rule of law of the criminal sanction which offers protection to citizens from possible abuse and arbitrarity of state authorities),

3) they may be passed only by the court within a procedure law-defined which makes it possible for

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Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. godine,pp.261-264; Ž. Horvatić, Kazneno pravo, Opći dio, Zagreb, 2003. godine,pp.134-136

the criminal sanction to coincide to the weight and circumstances of performing criminal deed and social danger of its doer. In our country sanctions are passed by a regular court. Those are: in the first degree – municipal and regional courts and in the second degree – courts of appeal whereby at the Regional court in Belgrade there have been formed "separate" wards,

4) they have a coercive character against the deed offender because they are applied against his will and consist of dispossessing or restricting his freedoms or rights and

5) they have the same purpose and that is according to Article 4 Item 2 repression of the deeds that hurt or jeopardize values protected by criminal statute law.

Contemporary criminal law knows several criminal sanctions that are different as per the contents, nature

and character of action. Each criminal sanction represents a separate measure of social reaction for struggling against criminality while they all together make a number of measures connected within one entity into a system of criminal sanctions. Therefore, the system of criminal sanctions is collections of all coerce measures foreseen in the criminal statute law of one country which are applied according to the offenders of criminal deeds under the conditions and in the way as determined by the law.

New Criminal Code (statute law) of the Republic of Serbia from 1st January 2006. year, in Article 4 foresees quite a number of kinds of criminal sanctions:

1) penalties,

2) warning measures,

3) safety measures and

4) educative measures.

Other contemporary criminal rights also know a number of kinds out of which these are best known[6]:
1) penalties,

[6] This system of criminal sanctions have prescribed severall criminal laws of countries of former SFR Yugoslavia - B. Petrović, D. Jovašević, Krivično pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. godine ; V. Kambovski, Kazneno pravo, Opšt del, Skopje, 2004. godine; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. godine, Ž. Horvatić, Krivično pravo, Opći dio, Zagreb, 2003. godine; B. Penko, K. Strolig, Kazenski zakonik z uvodnimi pojasnili, Ljubljana, 1999. godine; G. Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. godine

2) safety measures,

3) educative measures,

4) suspended conviction,

5) court warning and

6) various parapenal sanctions.

Penalties

A penalty is a coerce measure foreseen in the law which has been passed by the court to the guilty doer of a criminal deed aiming to protect most eminent social goods and values and which consists in dispossessing or restricting of his freedoms and rights. As per Article 2 of the Criminal code of the Republic of Serbia, the punishing purpose is within a framework of general purpose of criminal sanctions:

1) prevention of the doer to perform criminal deeds and influencing him not to perform criminal deeds in the future,

2) effecting the other ones not to perform criminal deeds and

3) expressing social conviction for a criminal deed as well as strengthening morality and fixing the obligations of obeying the law.

Our legislature starts with the understanding that the end objective of penalties is protection of the society from criminality while its immediate aim is preventing the doer to perform criminal deeds and his recovery – as a specific, social prevention and then having effect to other citizens not to perform criminal deeds, expressing social conviction due to the performed deed and strengthening of morality of citizens and fixing their obligations to respect the law

– as a common or general prevention. That means that the end objective of punishing is protection of the society from criminality, which is achieved by separate and common prevention. In addition, many contemporary criminal statutes explicitly determine the purpose of punishing.

All penalties may be divided according to different criteria:

1) considering the independence in passing them, penalties are divided into main ones and accessory. Main penalties are those which may be passed independently and accessory penalties are those that cannot be passed independently but only with the main penalty;

2) considering the duration, penalties are divided into permanent and timely. Permanent penalties are those that are passed for the entire life of the convicted and

are therefore called life sentences as well. Timely penalties are those passed with the court conviction for a definite time;

3) considering the things concerned with the penalty the penalties are divided into: penalties against life, against bodily integrity, against freedom, against property, against civil rights etc. and

4) considering the way of pronouncing the penalties, there may be alternative or cumulative ones. When penalties are alternatively given then the court passes only one of them. Cumulative penalties are given when the court pronounces all given penalties according to the doer of he criminal deed.

The criminal code of the Republic of Serbia in Article 3 foresees the following kinds of penalties[7]:

[7] Lj. Lazarević, Sistem krivičnih sankcija, Jugoslovenska

1) prison penalty[8] - prison penalty can, in the sense of Article 45 of the Criminal code of the Republic of Serbia being the main punishment, can be passed only when it is regulated by the law for a definite deed lasting from thirty days to twenty years. It is passed for full years and months and up to six months for days. For the hardest forms of heavy criminal deeds, there can be exceptionally regulated, along with punishment, also he prison punishment from

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revija za kriminologiju i krivično pravo, Beograd, No. 2/1987. godine,pp.28-45

[8] V. Vidović, Kazna lišenja slobode, Beograd, 1981. godine,p 67-81; V. Grozdanić, Kazne – nova rješenja u kaznenom pravu i njihova provedba u sudskoj praksi, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 7/2000. godine,pp.327-348; D. Jovašević, Pojam i karakteristike kazne zatvora u jugoslovenskom pravu, Zbornik radova Pravnog fakulteta u Nišu, Niš, 2002. godine, pp. 177-198

thirty to forty years provided this kind and measure of punishment cannot whatsoever be regulated as an only punishment. The law has explicitly excluded the possibility of passing this heaviest punishment towards persons who, in the time of performing the criminal deed, have not had 21 years of life (younger adults),

2) monetary penalty (fine)[9] - monetary penalty in the sense of Article 48 of the Criminal code of the Republic of Serbia can be pronounced as a main and

[9] D. Jovašević, Novčana kazna u jugoslovenskom krivičnom pravu, Pravni zbornik, Podgorica, No.1-2/2001. godine, pp.230-243; ; Đ. Đorđević, Odmeravanje novčane kazne, Jugoslovenska revija za kriminologiju i krivično pravo, Beograd, No. 3/1998. godine, pp.101-114; D. Jovašević, Imovinske krivične sankcije kao sredstvo prevencije imovinskog kriminaliteta, Kriminalističke teme, Sarajevo, No, 3-4/2004. godine, pp.131-151

as an accessory penalty this being in two ways: 1) in daily amounts and 2) definite (fixed) amount. As a main penalty it can be pronounced when in the criminal law it is determined alternatively with penalty of prison. As an accessory penalty it can be pronounced when it is in the law cumulatively determined with penalty of prison but also when it is not at all pronounced if the criminal deed has been done out of self-interest. Monetary penalty in daily amount (Article 49 of he Criminal code of the Republic of Serbia) is weighed by the court by first determining the number of daily amounts which ranges from ten to 360 days then defining the height of a single daily amount in money. Therewith the law has foreseen the rules for determining the daily amount of the monetary punishment. This height actually represents a difference between income and necessary expenditure of the criminal deed offender in the previous calendar year which is divided by the number of days in the year. Thus weighed daily

amount cannot move less than 500 or more than 50,000 dinars. Just aiming to determine the height of daily amount of monetary penalty, the court is authorized to request from banks and other financial organizations, establishments, state authorities or legal persons who are obliged to submit required data whereupon they cannot refer to the protection of business or other personal secret. Actually, the height of monetary penalty, in the way, the court will reach by multiplying weighed number of daily amounts with determined value of one daily amount,

3) work in public interest[10] - in Article 52 the Criminal code of the Republic of Serbia there is introducing a new kind of punishment – work in public interest – criminal sanction which is otherwise known also by many other contemporary criminal

[10] More : N. Mrvić Petrović, Đ. Đorđević, Moć i nemoć kazne, Vojno delo, Beograd, 1998. godine

statute laws (as parapenal sanction). This educative punishment consists in subjecting the convicted person to socially useful work by which his human dignity is not being insulted and which is not done with the aim of acquiring benefit. Work in public interest can last from 60 to 360 hours (at the most 60 hours during one month) whereupon a penalty pronounced like this can last from a month to up to six months. This penalty can be pronounced to the criminal deed offender for which prison punishment is due up to three years or monetary punishment and

4) motoring disqualification - the other newly introduced kind of punishment in the new Criminal code of the Republic of Serbia is foreseen in Article 53 under the heading: Motoring disqualification. It consists of dispossessing the driver's license for a definite time from the conviction from the doer of the criminal deed for whose performance or preparing the motor vehicle has been utilized. The punishment

is pronounced in time from one to three years counting from the day of validity of the court decision whereupon the time spent in prison is not calculated in the time period of duration of this punishment[11].

There are main penalties as follows: prison penalty and work in public interest. Monetary penalty and motoring disqualification can be passed also as a main and as a accessory penalty.

The new penalty system in Republic of Serbia determined in this way points to the following characteristics[12]:

[11] Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. godine, p 183-184

[12] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. godine,p 203-205

1) existence of a small amount of penalties,

2) principle of legislature in passing penalties. The court may pass only one penalty which is foreseen for a criminal deed performed by the offender. Milder or stricter penalty than the regulated may be passed only under the conditions foreseen by the law,

3) uniquely determined purpose of punishing,

4) there are no penalties against life or body and

5) for one criminal deed there can be passed only one main and one accessory penalty.

Warning measures

Suspended conviction and court warning (warning or admonitive sanctions) occur within the framework of conviction as a measure – substitutes in cases when

its fulfillment is not necessary to realize society protection purpose. The aim of their introduction is limiting retributive, infamous action of punishment and developing of individualization so that through individual prevention there can be realized protection of man and society from criminality. With time, their application with short prison punishment and towards the offenders who performed deeds within and under influence of a number of alleviating and milder circumstances, it becomes necessary and often nonreplacing[13].

New Criminal code of the Republic of Serbia in Article 64 also knows suspended conviction and court warning as kinds of warning measures (separate kinds of criminal sanctions) determining therewith that their purpose is not to apply penalty for lighter

[13] D.D. Spinelis, Esseys on Criminal sciences, N. Sakoulas, Athens Komotini, 2001. godine, p 13-15

criminal deeds to the criminal deed offender who is guilty when it can be expected that warning with threat of punishment (suspended conviction) or only warning (court warning) sufficiently effect the offender not to perform criminal deeds anymore.

Suspended conviction

Suspended conviction is postponing execution of determined punishments to the criminal deed offender under condition that he does not perform a new criminal deed for a definite time (time of checking which ranges from one to five years). If convicted with a suspended sentence person does not perform a new criminal deed within a definite term and fulfils conditions that were imposed to him by the court, then there will not be pronouncing and performing punishment respectively and he shall be deemed as if not convicted.

On the contrary, suspended conviction shall be revoked and punishment performed. Basically, suspended conviction is pardoning punishment to the deed offender by society under definite conditions, pardoning which is based on conviction that the doer shall, in the future, behave in accordance with legal rules and shall not perform criminal deeds anymore. That conviction is based on the existence of positive qualities with the deed doer and existence of such circumstances which indicate that the purpose of punishing can be realized also without application of punishment[14].

[14] The similar sanctions prescribes : article 132-31 of the Criminal code of the French, article 43 of the Criminal code of the Austria, article 51 of the Criminal code of the Republic of Slovenia, article 51 of the Criminal Code of the Peoples Republic of China, article 67 of the Criminal Code of the Republic of Croatia and article 56 of the Criminal code of the Federal Republic of Germany

Suspended conviction is shown in two forms:

1) suspended conviction in a classical sense (Article 65 of Criminal code of the Republic of Serbia) and

2) suspended conviction with protection supervision (Article 71 of Criminal code of the Republic of Serbia).

For pronouncing suspended conviction, it is necessary to fulfil conditions from Article 66 of Criminal code of the Republic of Serbia[15]:

1) that to the doer for performed criminal deed there is determined prison penalty up to two years or

[15] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. godine,p 246-248; T. Vasiljević, Uslovna osuda, Beograd, 1935. godine,p 53-64 ; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. godine, p 379-381

monetary punishment or else in case both punishments are determined cumulatively. Therewith what is excluded is: (a) those deeds for which prison punishment may be pronounced in the duration of ten years or a heavier punishment and (b) if no more than five years have passed starting from legal binding of the conviction by which the doer is pronounced punishment for malice criminal deed and

2) certificate of the court that the condemned, even without performing pronounced conviction, shall not do criminal deeds so that the purpose of punishing can be realized with the very pronouncing of the conviction. The court will come to this convincing taking into account the purpose of suspended conviction and separately take into consideration the personality of the doer, his former life, his conduct after performed criminal deed, degree of guilt and other circumstances under which the deed has been done.

Pronouncing the suspended conviction is facultative. If, with existence of legal conditions, the court decides to pronounce suspended conviction, then it determines in the conviction the conditions under which he postpones pronouncing punishment. Those conditions may be: compulsory and facultative. Compulsory condition is that the condemned within a definite time term, does not do a new criminal deed. That term, as per the law, cannot be shorter than one or longer than five years.

Facultative conditions may be general and special.

General facultative conditions concern all criminal deeds and represent obligation for condemned person to return propriety benefit acquired by criminal deed, to compensate damage caused y criminal deed or to fulfil other obligations foreseen by criminallegal stipulations.

Special facultative conditions refer to particular criminal deeds. Certain conditions must be fulfilled within a term for which execution of penalty has been postponed. Terms for fulfilling facultative conditions must be defined by a conviction ad are in the range within the boundaries of determined term of checking. The time of checking as well as terms for fulfilling conditions that the court determined start running from the moment of legally binding conviction.

Criminal code of the Republic of Serbia in Articles 67-69 foresees three reasons for revoking suspended conviction:

1) due to new criminal deed,

2) due to formerly done criminal deed and

3) due to nonfulfilment of certain obligations.

Suspended conviction with protection supervision is another form of this warning sanction. The protection supervision consists of a number of law-foreseen measures of assistance, guarding supervision and protection. This measure is facultative as well as suspended conviction for which it is pronounced. Whether the court will pronounce protection supervision for checking time or not depends on circumstances under which the criminal deed is performed, how is the personality of the doer and his former life and his conduct during and after performing criminal deed and particularly his relation towards the victim of the criminal deed i.e. on overall circumstances and convincing of the court that the purpose of suspended conviction will better be realized with supervision and rendering assistance to the suspendedly condemned. If the court evaluates, within the framework of stated circumstances, that for achieving purpose of suspended conviction it is necessary to pronounce protection supervision

towards the condemned with a suspended sentence then it will determine measures and obligations foreseen by the law which shall be performed during the checking.

Protection supervision[16] with suspended conviction can include one or more of the following obligations from Article 73 of Criminal code of the Republic of Serbia[17]:

[16] Protection supervision prescribes severall modern criminal codes : article 76 of Criminal code of the Peoples Republic of China, article 56d of the Criminal code of the Federal Republic of Germany, article 59 of the Criminal code of the Republic of Slovenia, article 73 of the Criminal code of the Russian Federation and article 25-1 of the Criminal code of the Republic of Ukrain

[17] Ž. Horvatić, Uslovna osuda sa zaštitnim nadzorom u novom jugoslovenskom krivičnom pravu, Naša zakonitost, Zagreb, No. 16/1978. godine,pp.29-39

1) turning in of the doer to the authority competent for performing protection supervision within the terms determined by that authority,

2) making the doer capable for a defined vocation,

3) accepting employment which suits capabilities of the doer,

4) fulfilling obligations to support the family, looking after and educating children and other family obligations,

5) restraint from visiting certain places, pubs or performance if that can be an occasion or impetus for redoing criminal deeds,

6) timely informing of change of residence place, address or work post,

7) restraint from utilization of drugs or alcoholic drinks,

8) treatment in a corresponding medical establishment,

9) visiting defined professional and other counseling houses or institutions and dealing as per their instructions and,

10) removal or alleviation of damage done by criminal deed and, in particular, making up with the victim of performed criminal deed.

Court warning

Court warning[18] is the mildest criminal sanction

[18] This criminal sanction prescribes following modern criminal codes : article 59 of the Criminal code of the

consisting of a reproach to the offender of criminal deed by the society due to performed deed with a warning not to perform criminal deed in the future because he will be punished for such dealing. The reproach directed to the deed offender reflects social ethical evaluation of the deed i.e. that it is harmful and not allowed and that society does not approve of it but pardons to the offenders and will not punish him.

Criminal code of the Republic of Serbia in Article 77 determines that court warning can be pronounced for criminal deeds for which prison punishment is due up to one year or monetary punishment if they are done

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Republic of Macedonia, article 59 of the Criminal code of the Federal Republic Germany, article 66 of the Criminal code of the Republic of Croatia, article 33 of the Criminal code of the Republic of Ukrain and article 61 of the Republic of Slovenia

under such alleviating circumstances that make them particularly light.. Under determined conditions this sanction may be pronounced to the offender of criminal deed for which prison penalty is due up to three years.

When deciding on pronouncing this sanction the court will be taking into consideration the purpose of court warning, particularly take into account the following circumstances: personality of deed offender, his former life, his behaviour after the performed deed, degree of guilt and other occasions under which the deed is performed. The code is therewith explicitly excluding possibility of pronouncing this sanction to a military person for criminal deeds against Army of Serbia.

Safety measures

Safety measures are a separate kind of criminal sanctions that can be pronounced to any of offenders of criminal deed. Their application is based on existence of a special state of danger that the offender carries inside himself and which may be caused biopsychic or social factors. That state represents a quality of the criminal deed offender. It is in theory called temibility or a dangerous state[19].

In fact Article 78 of Criminal code of the Republic of Serbia determined as a purpose of safety measures to have states or conditions removed which can be of influence for the doer to perform criminal deeds in

[19] More : N.Bishop, Swedish Penal Code (adopted in 1962. and entered into force in 1999.), Stokholm, 2000. ; B. Petrović, D. Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Sarajevo, 2005. godine, pp.345-355

the future. Criminal code of the Republic of Serbia in Article 79 knows several safety measures as follows:

1) compulsory psychiatric treatment and confinement in a health institution

2) compulsory psychiatric treatment outside,

3) compulsory treatment of drug addicts,

4) compulsory treatment of alcoholic addicts,

5) ban on performing vocations, activities or duties,

6) ban on driving motor vehicle,

7) depriving of items,

8) deportation of an alien from the country and

9) public announcement of conviction[20].

As a difference from earlier existing seven safety measures, today, in the Republic of Serbia, there are at the disposal to the court at the selection of corresponding safety measures nine measures whereupon the new measurer – public announcement of conviction (and this measure otherwise was not known earlier in a separate part of republic criminal

[20] The similar safety measures prescribe severall modern criminal codes : articles 62-69. of the Criminal code of the Republic of Slovenia, articles 42-44. of the Criminal code of the Swiss Federation, articles 68-77. of the Criminal code of the Republic of Bosnia and Herzegovina, articles 73-80. of the Criminal code of the Republic of Croatia, articles 21-27. of the Republic of Austria, articles 55-60. of the Republic of Belarus, articles 97-104. of the Criminal code of the Russian Federation and articles 60-69. of the Criminal code of the Republic of Macedonia

laws with certain criminal deeds against honour and reputation made in a heavier, qualified form via means of public informing, communicating or other similar means), while the measure of compulsory treatment of alcoholic addicts and narcotic addicts has been split into two independent sanctions.

The first four measures belong to curative measures or measures of treatment. The second group consists of measures by which the doer is deprived of certain rights or he is forbidden to perform certain activities because he has abused them aiming to perform criminal deed and due to impossibility to use them again with the same aim. Deprivation of the object, deportation of an alien from the country and public announcement of conviction have a special and exceptional prevention character.

Safety measure is a kind of criminal sanction and can be pronounced only to the offender of criminal deed

if in the specific case, conditions for it, for its application have been fulfilled. Pronunciation of measures of safety is facultative. Namely even when law conditions are present the court is not obliged to pronounce this measure. There is an exception in case of applying the following measures[21]:

1) compulsory psychiatric treatment and confinement in a health institution (Article 81 of Criminal code of the Republic of Serbia),

2) compulsory psychiatric treatment outside (Article 82 of Criminal code of the Republic of Serbia),

[21] More : Lj. Lazarević, Kazne i mere bezbednosti u savremenom krivičnom pravu, Beograd, 1969. godine ; G. Tomašević, Mjere sigurnosti u krivičnom pravu, Zagreb, 1986. godine; V. Jakulin, Varnosni ukrepi, Ljubljana, 1990. godine

3) compulsory treatment of drug addicts (Article 83 of Criminal code of the Republic of Serbia) and

4) compulsory treatment of alcoholic addicts (Article 84 of Criminal code of the Republic of Serbia).

Deprivation of propriety benefit acquired by criminal deed

Deprivation of propriety benefit[22] is a separate criminal legal measure foreseen in Articles 91-92 of Criminal code of the Republic of Serbia. It consists of deprivation from the doer of criminal deed money, monetary papers, objects of value and other proprietary benefits that have been acquired by criminal deed. This measure is still present in some

[22] G. Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. godine, pp.375

criminal codes as a safety measure and an accessory punishment respectively while, in our law, it is a separate criminal legal measurer *sui generis* which has double defined aim:

1) to prevent acquisition of proprietary benefit by performing criminal deeds and

2) to indemnify the person damaged by performed criminal deed (under the condition that this person is known and that he has submitted in time a request for compensation of the damage done)[23].

[23] Deprivation of propriety benefit as criminal measure prescribes several criminal codes : articles 95-98 of the Criminal code of the Republic of Slovenia, article 82 of the Criminal code of the Republic of Croatia, articles 97-100 of the Criminal code of the Republic of Macedonia, articles 20-21 of the Criminal code of the Republic of Austria and articles 73-76a of the Criminal code of the

Separation and becoming independent of deprivation proprietary benefit comes from the fact that it has no character of criminal sanction which is pronounced by the court as per prison conditions for its pronouncing[24]. Therefore it is not application of criminal sanction but an application of legal principle – of restitution or establishing former legal and fact state which simultaneously act also as a psychological forcing towards the offender that provision of benefit cannot be a motivation for undertaking criminal activity. On the basis of the application of this measure there is principle "nullum commodum caere potest de sua propria iniuria" – no one can have benefit from his own evil deed.

Proprietary benefit is dispossessed by court decision

Federal Republic of Germany

[24] F. Bačić, Krivično pravo, Opći dio, Zagreb, 1986. godine, p 493

which determines existence of criminal deed[25]. Dispossession of proprietary benefit is compulsory when there is a confirmation of its existence so that what is dispossessed is money, monetary values, objects of value and other proprietary benefit which has been acquired by performing criminal deed. In case factual dispossessing is not possible e.g. due to the fact that the object is destroyed, lost or sold to an unknown person, then the doer will oblige himself to pay the money amount which corresponds to the acquired proprietary benefit, value of the object respectively.

Proprietary benefit acquired by criminal deed can be taken away also from persons to who it is passed without indemnity or with indemnity which is not corresponding to a real value if determined that these

[25] Lj. Bavcon, A. Šelih, Kazensko pravo, Splošnij del, Ljubčjana, 1978. godine, p 334

knew or could know that propriety benefit is acquired by criminal deed. In case proprietary benefit is passed on to close relatives, it shall be taken away if they do not prove that they gave full values as compensation for it. That means that proprietary benefit is not taken away from persons when they gave full value for it or when they did not pay full value but prove that they did not know or could know that objects which make proprietary benefit are acquired by criminal deed.

Rehabilitation

After executing the pronounced punishment[26], the convicted person returns into society and enters a free social life. However his equal position with other

[26] More : D. Jovašević, Zakon o izvršenju krivičnih sankcija sa komentarom, Službeni list, Beograd, 2006. godine

citizens is reduced by two factors: 1) action of legal consequences of criminal conviction and 2) relationship of society and the convicted who is received with suspicion and distrust, disbelief even hatred. In order to remove such harmful action, there appeared the idea of rehabilitation as a criminal-political measure for rendering impetus to the condemned person to behave nicely in the future ad be a loyal and useful citizen of society unit. Through rehabilitation there is realized a balance between interest of society and interest of the condemned person[27].

Rehabilitation[28], according to Article 97 of Criminal

[27] H.H. Jescheck, Lehbruch des Strafrechts, 3. Auflage, Berlin, 1982. godine, p 731

[28] D. Jakovljević, Rehabilitacija u krivičnom pravu, Beograd, 1981. godine; M. Perović, Pravne posledice osude i rehabilitacija, Nikšić, 1990. godine;D. Jovašević,

code of the Republic of Serbia consists of abolition of legal consequences of the conviction and wiping out the conviction so that the condemned person is considered not-condemned. With the onset of rehabilitation there stop to act legal consequences and the condemned person acquires all rights possessed by other citizens. His act is not forgotten and his name is wiped out from criminal files. In the official documents it is not mentioned he has been condemned. That is how fiction is created about not-condemned convicted person with a tendency to have him be equal with other members of the society[29].

There are two kinds of rehabilitation[30]:

Amnestija i pomilovanje, Intermeks, Beograd, 2001. godine, p 7-20

[29] T. Živanović, Osnovi krivičnog prava, Opšti deo, Beograd, 1937. godine, p 423

[30] S. Janković, Pravne posledice krivične osude i

1) legal and

2) court.

Legal rehabilitation act as per law power, automatically with flow of certain time after endured punishment under a condition that the condemned person, for that period does not execute a new criminal deed.

Court rehabilitation occurs by court decision which concerns the plea of the condemned person upon passage of some time since endured punishment. Court rehabilitation is facultative. Whether the court will bring a decision on rehabilitation or ot depends on its evaluation of conduct of criminal deed offender upon exiting penal establishment and his relation

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rehabilitacija, Pravni život, Beograd, No. 9/2001. godine, pp.357-370

toward work and social values.

Legal rehabilitation[31] is given, according to Article 98 of Criminal code of the Republic of Serbia to persons who, prior to conviction that concerns rehabilitation, have not been convicted or they were as per law considered non-convicted under a condition that within a definite term do not perform a new criminal deed as well as there are no more lasting accessory punishments and safety measures

[31] Legal rehabilitation prescribes several modern criminal codes : articles 102-104 of the Criminal code of the Republic of Slovenia, articles 103-105 of the Criminal code of the Republic of Macedonia, article 86 of the Criminal code of the Russian Federation. Some of the modern criminal laws are widening to application of rehabilitation : article 118 of the Criminal code of the Kingdom of Spain and article 127 of the Criminal code of the Republic of Portugal

respectively. That term is different and it amounts to:

1) person that is pronounced guilty and freed from punishment or to whom court warning is pronounced within one year upon legal binding of the decision,

2) person to whom suspended conviction is pronounced during the checking time and one year upon expiration of this term,

3) person who was condemned to monetary punishment, punishment to work in public interest or prison punishment, up to six months in the time term of three years from executed, obsolete or pardoned punishment,

4) person that was condemned to prison punishment over six months to one year within the time term of five years from the day of endured obsolete or pardoned punishment and

5) person that was condemned to prison punishment over one up to three years, within time term of ten years from endured, obsolete or pardoned punishment.

Court rehabilitation[32] (Article 99 of Criminal code of the Republic of Serbia) may be given to the person whose prison punishment is pronounced in the duration of over three to five years under the condition that within ten years of the endured, obsolete or pardoned punishment does not make a new criminal deed. It is an interesting solution that rehabilitation may be also given to the person who has many times been convicted under the conditions foreseen by law has been fulfilled.

[32] Some of the modern criminal codes prescribe only court rehabilitation : articles 76-81 of the Criminal code of the Swiss Federation and articles 178-181 of the Criminal code of the Italy

In certain cases the conviction may draw legal consequences so that the convicted person, for a definite time, cannot perform certain rights. Then rehabilitation appears as a means to return those rights to the convicted persons before the term their action stops. Then it is court rehabilitation that is applied. As per Article 101 of Criminal code of the Republic of Serbia can, upon the plea of the convicted, it may be decided for legal consequences of the conviction to stop and these concern the ban of acquiring certain rights with the previous three years since undergone, obsolete or pardoned punishment.

Legal consequences of conviction

Legal consequences of conviction[33] represent

[33] Legal consequences prescribe several modern criminal codes : articles 38-76a of the Criminal code of the Federal Republic of Germany, articles 51-61 of the Criminal code

restrictive or banning measures of repressive character which make it harder for re-socialization to the condemned person but which may have also preventive character. They consist of stopping or loss of certain rights or in the ban to acquiring certain rights to persons who are convicted of a definite criminal deed to persons who are condemned for certain criminal deeds or definite punishment[34]. These cannot occur when for a criminal deed there is pronounced monetary punishment, suspended conviction which is not revoked, court warning or

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of the Swiss Federation, articles 99-101 of the Criminal code of the Republic of Slovenia, articles 101-102 of the Criminal code of the Republic of Macedonia and articles 115-116 of the Criminal code of the Republic of Montenegro

[34] G.Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. godine, p. 393; Ž. Horvatić, Kazneno pravo, Opći dio, Zagreb, 2003. godine,p.250

when the doer is freed from punishment (Article 94 of Criminal code of the Republic of Serbia).

There are two kinds of legal consequences of conviction:

1) legal consequences that concern stopping or loss of definite rights and

2) legal consequences of conviction that consist of the ban to acquire definite rights.

The first legal consequences that concern stopping or loss of definite rights are:

1) stopping performing public functions,

2) stopping of work relation or stopping performing definite vocations, call or profession and

3) loss of certain permits or approval that are given by decision of state authority or local self-management authorities

The second legal consequences of conviction that consist of the ban to acquire definite rights are:

1) ban to acquire definite public functions,

2) ban to acquire definite vocations, calls or professions or advancements at work,

3) ban to acquire rank of military superior and

4) ban to acquire definite permits or approvals which are given by decisions of state authorities or local self-management authorities.

Legal consequences of the conviction can be foreseen only by law and they are set as per the power of law

given to the legal binding of the conviction. Those consequences which consist of the ban to acquire definite rights last at the most for ten years starting with the day of endured, pardoned or obsolete conviction if for some of them a shorter duration is not pronounced by law. The time spent at enduring the punishment is not counted into the time of duration of the legal consequence of the conviction. By rehabilitation for some criminal deed there stop also legal consequences of the conviction.

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AGRARNA REFORMA U KRALJEVINI SRBA, HRVATA I SLOVENACA -Pojam i osnovne karakteristike-

mr Gordana Drakić*

Abstract **-The democratic land reform in Kingdom of Serbs, Croats and Slovenes**

Kingdom of Serbs, Croats and Slovenes was characteristic agrarian country. Agriculture was basic branch of the economy in all parts of the state. One of the most important issues in the Kingdom of Serbs, Croats and Slovenes was agrarian issue.

Various and specific structure of land possesion in different parts of the country and revolutionary mood

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In villages among the peasants, were the reasons which justified taking actions to organize and carry out democratic land reform in the Kingdom of Serbs, Croats and Slovenes.

The legal regulations were very important for proper execution of democratic land reform. The author explains the most important legal regulations that were passed in the course of the democratic land reform in the Kingdom of Serbs, Croats and Slovenes.

The arising of administration which was responsible for organization and execution of democratic land reform in Kingdom of Serbs, Croats and Slovenes is briefly shown in the paper.

The author explains the legal regulations which were foundation for accurate functioning of the agrarian administration. The author also points out to the reasons which initiate the changes of the agrarian administration.

The main characteristic of the democratic land reform was the, so called, temporary situation, which was established through certain clauses of some legal regulations. The peasants received their lots only in several years lasting lease instead in ownership.

This temporary situation in the course of the democratic land reform in the Kingdom of Serbs, Croats and Slovenes lasted until the law which announced the liquidation of the democratic land reform on large land properties was passed in 1931.

AGRARNA REFORMA U KRALJEVINI SRBA, HRVATA I SLOVENACA
-Pojam i osnovne karakteristike-

Agrarno pitanje, pitanje raspodele zemljišta i uređenja agrarnih odnosa u jednoj državi uvek je zauzimalo, u različitim istorijskim periodima, značajno mesto. U cilju rešavanja tog pitanja preduzimane su agrarne reforme. Svaka agrarna reforma je, posmatrano kroz istoriju, težila da zadovolji potrebu seljaka za zemljom i stvori male i srednje posede koji bi postali samostalne poljoprivredne jedinice. Obim reforme, njeni ciljevi, tok i rezultati zavisili su od jedinstvenog razvoja pojedinih država i konkretnih prilika.
Agrarna reforma predstavlja meru koju preduzimaju državne vlasti sa ciljem da se u poljoprivredi jedne zemlje promene postojeći proizvodni odnosi.

U međuratnoj jugoslovenskoj državi agrarna reforma je predstavljala dugotrajan proces, koordiniran od strane državnih vlasti, koji je ispunio ceo period postojanja te države. Neposredno nakon formiranja Kraljevstva Srba, Hrvata i Slovenaca agrarno pitanje bilo je jedno od najvažnijih koja je trebalo rešiti. Novostvorena država Srba, Hrvata i Slovenaca bila je, pre svega, tipična agrarna zemlja u kojoj se velika većina stanovništva bavila zemljoradnjom i od toga živela. Pored toga, agrarno pitanje je imalo i svoja politička i socijalna obeležja koja su imala odlučujuću ulogu u brzom pristupanju državnih vlasti njegovom rešavanju.

Klasne i političke suprotnosti na selu bile su veoma zaoštrene uoči stvaranja Kraljevstva Srba, Hrvata i Slovenaca. Nakon sloma Austro-Ugarske među seljaštvom, u svim

jugoslovenskim krajevima, vladalo je uverenje da su nestale i poslednje prepreke za ostvarivanje najznačajnijih nacionalnih i socijalnih težnji. Tako je dolazilo do samovoljnog zaposedanja veleposedničke zemlje, paljevina i pljački. Seljački pokret je predstavljao u celoj državi ozbiljnu revolucionarnu snagu koja je bila spremna da se bori za zemlju i bolje uslove života.[1]

Ubrzo nakon stvaranja Kraljevstva Srba, Hrvata i Slovenaca usledio je značajan potez regenta Aleksandra koji je uticao na smirivanje nezadovoljstva seljaka u vezi sa agrarnim pitanjem. Naime, 6. januara 1919. godine objavljen je *Manifest Regenta Aleksandra narodu*, u kojem je, između ostalog, bilo rečeno:

[1] M. Erić, *Agrarna reforma u Jugoslaviji 1918-1941 god,* Sarajevo 1958, 142.

„Ja želim da se odmah pristupi pravednom rešenju agrarnog pitanja, i da se ukinu kmetstva i veliki zemljišni posedi. U oba slučaja zemlja će se podeliti među siromašne zemljoradnike, s pravičnom naknadom dosadašnjim njenim vlasnicima. Neka svaki Srbin, Hrvat i Slovenac bude na svojoj zemlji gospodar. U slobodnoj državi Našoj može da bude i bit će samo slobodnih vlasnika zemlje. Zato sam pozvao Moju vladu, da odmah obrazuje komisiju, koja će spremiti rešenje agrarnog pitanja, a seljake-kmetove pozivam, da s poverenjem u moju kraljevsku reč, mirno sačekaju, da im naša država zakonskim putem preda zemlju, koja će u napred biti samo Božija i njihova, kao što je to već odavno u Srbiji.“[2]

[2] *Službene Novine Kraljevstva SHS* br.2 od 28. januara 1919. godine.

Manifestom su seljaci bili pozvani da mirno sačekaju dok zakonskim putem ne dobiju zemlju od države. U regentovom aktu bilo je proglašeno ukidanje kmetstva i velikih zemljišnih poseda i usvojen je princip da zemlja treba da pripadne onome ko je obrađuje. Proklamovanje navedenih načela bilo je, u tom trenutku, dovoljno da stiša nezadovoljstvo seljaka i bezemljaša. Dakle, *Manifest* je „po jednodušnoj ocjeni skoro svih savremenika doprinio privremenom stišavanju revolucionarnog raspoloženja na selu, a time učvršćenju poretka i monarhije".[3] Iako od jednog dela savremenika ocenjena kao pljačkaška i razbojnička, samoinicijativna istupanja seljaka, poljoprivrednih radnika i bezemljaša imala su izrazito revolucionarno obeležje.[4]

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[3] M. Erić, nav. delo, 155.

[4] N. Gaćeša, *Agrarna reforma i kolonizacija u Bačkoj 1918-1941*, Novi Sad 1968, 35.

Za sprovođenje agrarne reforme govorili su, pored navedenih, i sasvim objektivni razlozi koji su se ticali agrarnoposedovne strukture u Kraljevstvu Srba, Hrvata i Slovenaca. „Nigde i ni u jednoj državi u Evropi nije bilo tako raznovrsnih, zapletenih i teških agrarnih odnosa, kakvi su bili u raznim pokrajinama Jugoslavije, kada je izvršeno Ujedinjenje...svaka je pokrajina imala svoje specijalne agrarne odnose“.[5]

Značajnu karakteristiku agrara u Kraljevstvu Srba, Hrvata i Slovenaca predstavljali su nasleđeni proizvodni odnosi. U tom smislu mogla su se razlikovati tri, odnosno četiri područja. Najveći deo zauzimala su područja u kojima su dominirali kapitalistički produkcioni

[5] J. Demetrović, *Agrarna reforma u Jugoslaviji*, Beograd 1933, 4.

odnosi. To su bila područja: Srbije, Slovenije, Hrvatske, Slavonije, Međumurja i Vojvodine. Unutar ove grupe postojala je razlika između Srbije na jednoj i ostalih pokrajina na drugoj strani kada je reč o veličini poseda. Naime, u Srbiji je veličina zemljišnih poseda bila uglavnom ujednačena, dok je u ostalim područjima, u velikoj meri, postojao veliki posed, što je i uzrokovalo izvesne razlike u proizvodnim odnosima.[6]

Drugu grupu predstavljala su područja na kojima su 1918. godine još uvek postojali razni oblici kmetstva. Naime, čivčijski odnosi su egzistirali u Bosni i Hercegovini , delovima Crne Gore, na Kosovu i Metohiji i u Makedoniji. Treću grupu činili su pojedini krajevi Dalmacije i Istre

[6] S. Živkov, *Agrarno zakonodavstvo Jugoslavije 1918-1941 socijalni osnovi*, Novi Sad 1976, 14.

na kojima su postojali kolonatski odnosi.[7]

Agrarna prenaseljenost je, takođe, postojala i predstavljala problem za koji su državne vlasti smatrale da bi trebalo da se ublaži sprovođenjem agrarne reforme. Ona se, u pojedinim pokrajinama Kraljevstva Srba, Hrvata i Slovenaca, formirala pod različitim istorijskim okolnostima, odnosno, vodila je poreklo iz prošlosti. „Agrarna prenaseljenost u novoj zajedničkoj državi dobila je još složenije obeležje iskrsavanjem novih problema vezanih za tadašnju heterogenu agrarnu strukturu na selu, za posledice ratnog razaranja, ... širenje kapitalističkih odnosa na selu...".[8]

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[7] M. Mirković, *Ekonomska historija Jugoslavije*, Zagreb 1968, 204.

[8] N. Vučo, *Agrarna kriza u Jugoslaviji 1930-1934*, Beograd 1968, 43.

Dakle, agrarna reforma u Kraljevini Srba, Hrvata i Slovenaca predstavljala je svojevrsnu socijalnopolitičku meru. „Političku ulogu reforme još pre njenog izvođenja uočio je upravo S. Šećerov, poznati vojvođanski političar između dva svetska rata, i to na takav način što je tvrdio da će njena realizacija biti doprinos centralističko-unitarističkom državnom uređenju Kraljevine SHS“.[9] S obzirom na to da je najava sprovođenja agrarne reforme u *Manifestu* regenta Aleksandra imala pozitivnog odjeka u javnosti, ubrzo su preduzeti dalji koraci u tom pravcu. Sve akcije koje je vlast preduzimala radi što bržeg otpočinjanja procesa agrarne reforme

[9] N. Gaćeša, *Opšta obeležja agrarne reforme i kolonizacije u Vojvodine 1919-1941*, Radovi iz agrarne istorije i demografije, Novi Sad 1995, 239.

imale su cilj da ublaže nedzadovoljstvo seljaka i spreče socijalne nemire.

Ministarski savet je, ubrzo nakon objavljivanja regentovog proglasa, formirao komisiju koja je trebalo da pripremi nacrt akta koji će obezbediti „rešenje agrarnog pitanja“, kako je to bilo formulisano u *Manifestu*. Kao rezultat tih aktivnosti nastale su *Prethodne odredbe za pripšremu agrarne reforme*, koje je ministarski savet prihvatio i potvrdio 25. februara 1919. godine.[10] *Prethodne odredbe* su predstavljale prvi normativni akt u kojem su bila izložena osnovna načela agrarne reforme i „...tako je prevrat u proizvodnim odnosima, sankcionisan Prethodnim odredbama, dobio adekvatan pravno-politički izraz u nadgradnji tek stvorene

[10] *Službene Novine Kraljevstva SHS* br.11 od 27. februara 1919. godine.

državne zajednice jugoslovenskih naroda."[11]

Donošenje *Prethodnih odredaba za pripremu agrarne reforme* bilo je veoma značajno jer je sprovođenje agrarne reforme od početka bilo pravno utemeljeno iako su protivnici agrarne reforme osporavali ovaj pravni akt i kao njegov najveći nedostatak isticali to što ga je donela vlada, a ne narodno predstavništvo.[12] Međutim, u svim objektivnim studijama o agrarnoj reformi u Kraljevini Srba, Hrvata i Slovenaca ukazuje se na značaj koji su *Prethodne odredbe* imale u toku sprovođenja agrarne reforme, a neki autori

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[11] N. Gaćeša, *Uloga agrarnog faktora u stvaranju jugoslovenske države 1918*, Radovi iz agrarne istorije i demografije, Novi Sad 1995, 110.

[12] O tome videti: J. Lalošević, *Agrarna reforma u Vojvodini*, Sombor 1920, 15-16.

ih smatraju za najvažniji pravni akt u tom procesu, tzv. „agrarni ustav“.[13]

Prethodnim odredbama za pripremu agrarne reforme ukinuti su kmetovski, odn. čivčijski i kolonatski odnosi u onim krajevima države u kojima su još postojali, a kmetovi su proglašeni za slobodne vlasnike zemlje. Ovim pravnim propisom je, dalje, bila najavljena eksproprijacija velikih poseda i njihovo davanje u privremeni zakup onim državljanima koji su se bavili zemljoradnjom, a zemlju nisu imali ili su je imali nedovoljno. U završnom delu *Prethodnih odredaba* bilo je naglašeno da se povoljnostima, koje su tim propisom bile predviđene, neće moći koristiti lica koja budu osuđena zbog otimanja, pljačkanja ili samostalnog deljenja tuđe zemlje. Ovom odredbom je još jednom apelovano da

[13] Tako: M. Erić, nav. delo, 157.

prestanu neredi i samovlasno zauzimanje zemljišta.

Dakle, Ministarstvo za socijalnu politiku je na osnovu *Prethodnih odredaba za pripremu agrarne reforme*, koje su stupile na snagu 27. februara 1919. godine, počelo da sprovodi agrarnu reformu. Posmatrano u celini, organizacija sprovođenja agrarne reforme u međuratnoj jugoslovenskoj državi može se u osnovi podeliti u dva vremenska perioda. Prvi period obuhvata vreme od 1918. do 1931. godine u kome je agrarna reforma sprovođena delom kao privremena, a delom kao konačna mera. Drugi period podrazumeva vreme od 1931. do 1941. godine, a karakteriše ga konačna likvidacija agrarne reforme.

Prvi period u sprovođenju agrarne reforme karakterisalo je privremeno regulisanje

posedovnih odnosa putem davanja zemlje agrarnim interesentima u privremeni zakup. Zemlja je, na osnovu *Naredbe o delomičnom izvođenju Prethodnih odredaba Ministarskog Saveta za pripremu agrarne reforme* od 10. aprila 1919. i *Uredbe o izdavanju zemljišta velikih poseda u četvorogodišnji zakup* od 3. septembra 1920. godine, dodeljivana agrarnim interesentima u jednogodišnji, odnosno četvorogodišnji zakup.[14]

Po isteku tog roka, s obzirom na to da se, u međuvremenu, nisu stekli uslovi koji bi

[14] Tekst *Naredbe o delomičnom izvođenju Prethodnih Odredaba Ministarskog Saveta za pripremu agrarne reforme od 25. februara 1919. godine*, AR-I, Zagreb 1920, 18-22 i *Uredbe o izdavanju zemljišta u četvorogodišnji zakup* AR-I, Zagreb 1920, 54-63.

omogućili konačnu dodelu zemlje u svojinu agrarnim interesentima, odnosno da nije bio donesen zakon o definitivnom sprovođenju agrarne reforme, privremeni zakup bio je produžen rešenjem ministra. Naime, ministar za agrarnu reformu je 18. jula 1924. godine doneo rešenje kojim se privremeni zakupi, koji ističu 30. septembra 1924, produžavaju do donošenja Zakona o eksproprijaciji velikih poseda i kolonizaciji, kojim će se definitivno rešiti i pitanje otkupa preuzetog zemljišta. Bilo je predviđeno da se produženje izvrši po odredbama *Uredbe o izdavanju zemljišta velikih poseda u četvorogodišnji zakup* koja je u međuvremenu, 1922. godine, postala zakon.[15] Rešenje ministra bilo je u skladu sa odredbom

[15] S. Stojanović, *Šest godina naše agrarne reforme*, Jugoslavenska njiva, Zagreb 1925, 8, 249.

pomenute Uredbe u kojoj je bilo istaknuto da se zakup može produžavati sve „dok zemljište zakonitim putem ne pređe u svojinu zakupaca“ odnosno do konačnog sprovođenja agrarne reforme.[16]

Privremeni zakup kao dominantna karakteristika sprovođenja agrarne reforme u Kraljevini Srba, Hrvata i Slovenaca bio je zamišljen kao prelazno rešenje, koje bi istovremeno zadovoljilo agrarne interesente i velike posednike, do donošenja odgovarajućeg zakona na osnovu kojeg bi se sprovela definitivna deoba zemljišta u svojinu subjektima agrarne reforme, odnosno isplata odštete njegovim bivšim vlasnicima. Privremeno stanje u sprovođenju agrarne reforme je, međutim,

[16] Paragraf 1. *Uredbe o izdavanju zemljišta velikih poseda u četvorogodišnji zakup.*

potrajalo duže nego što je bilo planirano i dovelo je do nezadovoljstva i pravne nesigurnosti kod agrarnih interesenata ali i velikih posednika.

Takvo stanje su brojni savremenici ocenjivali kao veoma nepovoljno za učesnike agrarne reforme ali i državu. „Ovo trajanje zakupnog odnosa od velike je štete po narodnu privredu jer se agrarni subjekti ne osećaju dovoljno sigurni, u svome posedu. I usled te pravne nesigurnosti, sasvim prirodno je što agrarni subjekti ne ulažu dovoljno ni truda ni kapitala za podizanje proizvodnje. Zato je preko potrebno dati tu pravnu sigurnost i to prenošenjem dodeljenih zemalja u svojinu agrarnih subjekata. Ali u vezi s tim, isto je tako potrebno regulisati pitanje oštete za eksproprisane i odvojene površine..."[17]

[17] S. Šećerov, *O otkupu agrarnih zemalja*, Iz naše agrarne politike 1919-1929, Beograd 1930, 90.

Da bi problemi koje je uzrokovalo stanje stvoreno izdavanjem zemlje u privremeni zakup bili bar delimično prevaziđeni vlada je 1925. godine pokušala da omogući likvidaciju otkupa od strane agrarnih interesenata uvođenjem tzv. fakultativnog otkupa. Naime, u skladu sa ovlašćenjima datim u članu 38. *Zakona o budžetskim dvanaestinama za mesec avgust-novembar 1925. godine*, ministar finansija i ministar za agrarnu reformu doneli su 8. oktobra 1925. godine *Pravilnik o fakultativnom otkupu agrarnog zemljišta velikih posjeda i o naplaćivanju, knjiženju i utrošku 10% prinosa od kupovine*.[18] Prema *Pravilniku*, ministar za

[18] Tekst *Pravilnika o fakultativnom otkupu agrarnog zemljišta velikih posjeda* u B. Lekić, *Agrarna reforma i kolonizacija u Jugoslaviji 1918-1941*, Beograd 2002, 250-256. u odeljku

agrarnu reformu je bio ovlašćen da, do donošenja zakona o eksproprijaciji velikih poseda i kolonizaciji, odobrava prodaju i zemljišnoknjižni prenos nekretnina koje su bile stavljene pod udar agrarne reforme, a prelazile su propisani maksimum. Obradivo zemljište su mogli da kupe agrarni interesenti svih kategorija, maksimalno u veličini površine koju su, shodno propisima, imali u zakupu. Ostalo zemljište (šume, pašnjaci i neplodno) mogla su da kupe fizička i pravna lica, međutim, samo ako se radilo o višku takvog zemljišta koji je preostao nakon podmirenja agrarnih interesenata u procesu sprovođenja agrarne reforme. Prodavac je, nakon odobrenja prodaje od strane ministra, bio dužan da uplati 10% cene u kolonizacioni fond Ministarstva za agrarnu

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Dokumenta o agrarnoj reformi i kolonizaciji u jugoslaviji 1918-1941. godine.

reformu. Kupljene nekretnine se nisu nikako mogle otuđiti u roku od deset godina, a opteretiti samo nakon što ministar za agrarnu reformu to dozvoli. Međutim, ustanova fakultativnog otkupa u trenutku kada je uvedena „nije mogla da pomeri likvidaciju agrarnih poslova u Kraljevini zato, jer je baš u to vreme izbila velika i teška poljoprivredna kriza...Fakultativan otkup nije imao onakvog uspeha kao što bi mogao da ima da nije bilo ove privredne krize“.[19]

Sprovođenje pravnih rešenja o agrarnoj reformi u praksi zahtevalo je formiranje posebnih organa koji bi se bavili tim poslovima. Početkom aprila 1919. godine bio je postavljen ministar za agrarnu reformu. Ministar je, na osnovu

[19] S. Šećerov, *Fakultativan otkup i likvidacioni zakoni*, Iz naše agrarne politike 1919-1929, Beograd 1930, 82.

Naredbe od 10. aprila 1919. godine, dobio ovlašćenje da privremeno, na godinu dana, izda zemlju u zakup agrarnim interesentima. Radi realizacije tog posla bilo je, najpre, potrebno da imenuje određen broj poverenika za agrarnu reformu, ekonomskih veštaka, radi davanja stručnih mišljenja, i tehničara koji bi vršili premeravanje zemljišta koja su bila objekti agrarne reforme. Poverenici za agrarnu reformu su odlučivali o dodeljivanju zemlje u privremeni zakup na teritorijama za koje su bili nadležni. Svoje odluke su donosili poštujući pravila sadržana u *Naredbi* od 10. aprila 1919. godine, uputstva ministra za agrarnu reformu i pismeni nalaz ekonomskog veštaka.[20]

[20] § 5. *Naredbe o delomičnom izvođenju Prethodnih Odredaba Ministarskog Saveta za pripremu agrarne reforme od 25. februara 1919. godine*.

Sledeće godine formirano je Ministarstvo za agrarnu reformu. *Uredba o ustrojstvu Ministarstva za agrarnu reformu* doneta je 12. februara 1920. godine i utvrđivala je nadležnost, organizaciju i zadatke novoosnovanog ministarstva.[21] Ministarstvo je, pre svega, imalo zadatak da izrađuje zakonske predloge, uredbe i naredbe o agrarnoj reformi i da ih, potom, preko svojih organa sprovodi u praksi. Ono je, dalje, trebalo da organizuje poslove podele zemlje, kolonizacije, repatrijacije, stavljanja velikih poljoprivrednih i šumskih poseda u državnu upravu kao i da se bavi razrešenjem i uređenjem kmetskih, kolonatskih i sličnih odnosa.

U sastavu Ministarstva za agrarnu reformu

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21 *Službene Novine Kraljevstva Srba, Hrvata i Slovenaca* br. 36 od 18. februara 1920. godine.

postojala su dva odeljenja: opšte i agrarno koja su se, dalje, delila na odseke i pododseke. U Uredbi je, takođe, bilo predviđeno da se radi efikasnijeg obavljanja poslova, a zbog raznovrsnosti agrarnih odnosa, u pojedinim krajevima Kraljevstva Srba, Hrvata i Slovenaca obrazuju agrarne direkcije. U toku 1920. godine osnovane su agrarne direkcije u Zagrebu, Novom Sadu, Ljubljani i Sarajevu. Sa istim zadacima su u Skoplju, Cetinju i Splitu formirana glavna agrarna povereništva koja su bila izjednačena sa agrarnim direkcijama.[22] Kao izvršni organi Ministarstva za agrarnu reformu, agrarne direkcije su organizovale poslove oko podele zemlje, kolonizacije, dodeljivanja zemlje dobrovoljcima, kao posebnoj grupi agrarnih

[22] Đ. Bogojević, *Agrarna reforma*, Jubilarni Zbornik života i rada Srba, Hrvata i Slovenaca 1918-1928, Beograd 1928, I, 314.

interesenata, i kontrolisale vršenje državne uprave na zemljištima velikih poseda.

U januaru 1925. godine Ministarski savet je doneo rešenje o ukidanju agrarnih direkcija u Ljubljani, Zagrebu i Beogradu i glavnih povereništava u Skoplju, Cetinju u Splitu. U rešenju je bilo predviđeno i ukidanje županijskih agrarnih ureda. Kao rok za prestanak rada postojećih organa agrarne reforme bio je određen 30. april 1925. godine.[23] Ali usled posebnih prilika na teritorijama nadležnosti pomenutih agrarnih organa u poslovima sprovođenja agrarne reforme i kolonizacije,

[23] *Rešenje Ministarskoga Saveta Kraljevine Srba, Hrvata i Slovenaca Br.1046 od 14. januara 1925. godine o likvidaciji agrarnih direkcija (Glavnih povereništava) i njima podređenih organa*, AR-II, Zagreb 1925, 383-387.

nadležni ministar je zatražio od Ministarskog saveta da se likvidacija agrarne administracije odloži do kraja oktobra 1925. godine.[24]

Odlaganje ukidanja agrarnih organa ponovljeno je, potom, 1926. i 1927. godine sa obrazloženjem da je utvrđena potreba za njihovim daljim radom. Agrarna administracija je, nakon toga, nastavila da funkcioniše sve do zavođenja kraljeve diktature 6. januara 1929. godine kada je ukinuto Ministarstvo za agrarnu reformu, a poslovi koje je obavljalo i koordiniralo prešli su na Ministarstvo poljoprivrede.[25]

Sprovođenje agrarne reforme u praksi, i pored formiranog izvršnog aparata, nije bilo

[24] AR-II , 395.

[25] S. Živkov, *Agrarno zakonodavstvo Jugoslavije 1918-1941 socijalni osnovi*, Novi Sad 1976, 76.

ujednačeno u svim krajevima Kraljevine Srba, Hrvata i Slovenaca. Rad organa agrarne reforme bio je usmeravan različitim političkim uticajima i interesima ali i kvalitetom samog personala koji stručno nije uvek bio na visini zadatka. Krajnji rezultat bila je raznolikost i stanje koje se nije moglo oceniti kao uspeh pri sprovođenju agrarne reforme.

Osnovni nedostatak u procesu sprovođenja agrarne reforme u Kraljevini Srba, Hrvata i Slovenaca bio je u tome što odgovarajući zakon nije blagovremeno donesen, pa nije postojala formalnopravna podloga za rešavanje ključnih pitanja. Naime, pitanje dodeljivanja zemljišta u vlasništvo agrarnim interesentima i zabeleška o tome u zemljišnim knjigama, kao i pitanje naknade za oduzetu zemlju bivšim vlasnicima predstavljali su osnovne probleme koji su stvarali pravnu nesigurnost kod učesnika

agrarne reforme. Od samog početka agrarna reforma je izvođena kao privremena mera jer se očekivalo donošenje zakona koji bi podrobno regulisao sporna pitanja i stvorio pravne okvire za likvidaciju ove državnopravne mere. Gotovo stalna unutrašnja politička kriza bila je razlog što izrađeni predlozi zakona o agrarnoj reformi nisu stigli do parlamentarnog postupka te je privremeno stanje u sprovođenju agrarne reforme bilo produženo i pored neuspeha i problema koje je sa sobom nosilo.