FREE LAW JOURNAL

VOLUME 2, NUMBER 4 - OCTOBER 18, 2006
ISSN 1712-9877

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Cited as (2006) 2(4) Free L. J.

ISSN 1712-9877

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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.

LE CONFLIT NON-INTERNATIONAL À CARACTÈRE INTRA-NATIONAL

PAR LE DR ANWAR FRANGI [1]

1. Introduction: Le conflit non-international se décompose, selon le droit humanitaire international, en deux sens. (1) Le sens prévu par l'article 3 Commun aux 4 Conventions de Genève de 1949, et (2) celui prévu par l'article premier du Protocol II de 1977. Le premier sens entraîne des situations où une faction armée s'oppose à une autre faction armée, et où le gouvernement n'est pas nécessairement une Partie au conflit. Le second sens couvre des situations où le gouvernement s'oppose à des forces armées nationales dissidentes.

Je dis que le conflit non-international a un troisième sens, à savoir le Conflit non-international à caractère intra-national.

2. Concept: Le Conflit non-international à caractère intra-national est un conflit généré par un acte international par soi non-conflictuel ou par un conflit international. Il couvre les mêmes situations que couvre le conflit non-international 'positif', dans ses deux sens, c'est-à-dire des situations où une faction armée s'oppose à une autre faction armée, ou des situations où le gouvernement s'oppose à des forces armées nationales

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dissidentes; seulement son caractère intra-national entraîne des conséquences juridiques sérieuses que ne peut emporter le caractère national du conflit non-international 'positif'. Nous y reviendrons au paragraphe (4) infra.

Le Conflit non-international à caractère intra-national diffère du Conflit non-international 'positif' par le fait que l'origine de ce dernier est nationale, alors que celle du Conflit non-international à caractère intra-national est internationale. J'entends par 'origine' la 'dérivation' du conflit non-international à partir d'un conflit ou d'un acte international. Le concept 'origine' évoque donc celui de 'mouvement' où le conflit ou l'acte passe d'un niveau international à un niveau non-international en parcourant une série d'étapes intermédiaires allant de la génération des réfugiés, des tensions, des troubles à celle des conflits non-internationaux. Lorsqu'il est le résultat d'un conflit international, le Conflit non-international à caractère intra-national prend 'l'aspect non-international' du Conflit international intra-nationalisé (v° « The Intra-Nationalized International Conflict », *Free L.J.* 2005 1(2), p. 43). Ainsi le Conflit non-international à caractère intra-national englobe t-il le sens d'un conflit non-international engendré par un conflit international et le sens d'un conflit non-international engendré par un acte international par soi non-conflictuel. Voici des exemples du conflit non-international pouvant être généré par un acte initial international par soi non-conflictuel. (a) Le processus de démocratisation qui se matérialise dans des constitutions nationales que les grandes puissances aident les pays en voie de démocratisation à rédiger, et qui dégénère dans la plupart des cas en un conflit non-international, dès lors que les principes par soi démocratiques sur lesquels se repose la nouvelle constitution nationale ne s'accorde pas harmonieusement avec les coutumes nationales, ce qui exige de la part des autochtones un effort d'adaptation et encore défaillant. (b) Les Résolutions du Conseil de sécurité des Nations unies, telle que la Résolution 1701, qui peuvent dégénérer en un conflit non-international, dès lors que leur compréhension commande plusieurs interprétations. (c) L'acte discriminatoire: le

conflit non-international israélo-palestinien en Palestine dans les années 40 est l'aboutissement de l'acte discriminatoire dans plusieurs pays européens envers les juifs qui a dégénéré en flux migratoires des juifs d'Europe orientale vers la Palestine. (d) L'acte de paix, tel que la paix séparée entre l'Egypte et l'Etat d'Israël qui a relancé les conflits non-internationaux au Liban après un court répit en 1977.

Aussi le Conflit non-international à caractère intra-national diffère-t-il des concepts tels que « la guerre pour les autres », « la guerre par les autres », « la guerre des autres » ou « la guerre par procuration ». « La guerre pour les autres » et « la guerre par les autres » ne représentent qu'une seule et même chose. « La guerre pour les autres » implique un conflit armé, international ou non, mais commandé ou dirigé par des Etats qui ne sont pas impliqués directement dans le conflit. Dans la plupart des cas les Parties impliquées directement dans le conflit sont des agents des Etats étrangers pour qui la guerre se fait, et leur allégeance à leur Etat est mise en doute. Car la décision des options de guerre ou de paix n'est pas prise par eux, mais par ceux pour qui la guerre est faite. Aussi, « la guerre par les autres » signifie que les Parties indirectement impliquées dans la guerre sont à l'origine du conflit qui se déroule. Mais différemment de « la guerre pour les autres », « la guerre par les autres » peut avoir le sens de l'internationalisation, pas l'intra-nationalisation, dès lors que, étant donné un conflit non-international à l'origine, des Etats étrangers au conflit aident matériellement les Parties impliquées dans le conflit non-international l'exacerbant ainsi et y vidant leur propre conflit. Le cas où les Parties au conflit apparemment non-international seraient des agents des Etats étrangers, le conflit serait donc qualifié plutôt de conflit international que de conflit à caractère intra-national. Ainsi « la guerre par les autres », le cas où elle aurait la forme d'un conflit non-international, peut-elle se rapprocher seulement de l'internationalisation, pas de l'intra-nationalisation. L'expression « la guerre des autres » s'aligne sur le sens général des deux autres expressions, « la guerre pour les autres » et « la guerre par les autres ». Elle peut être ou bien faite

« par les autres » sur le territoire de l'un de ces derniers, ou bien faite en sorte que le conflit soit fait « pour les autres ». Mais, différemment de « la guerre pour les autres » et de « la guerre par les autres », « la guerre des autres » peut être faite par les Parties au conflit elles-mêmes sur le territoire d'un tiers. « La guerre par procuration » peut être similaire à « la guerre pour les autres », les Parties impliquées directement dans un conflit armé, international ou non, étant Parties à ce conflit plutôt pour le compte des autres que pour leur propre compte. « La guerre par procuration » peut aussi être similaire à « la guerre par les autres », dès lors que les Parties impliquées dans un conflit le font par soumission à la volonté des Etats étrangers, et que l'implication de ces derniers dans le conflit n'est pas faite après le déclenchement des hostilités, le cas où le conflit serait à caractère non-international, sinon le conflit serait qualifié de conflit non-international internationalisé comme nous avons déjà mentionné.

Le Conflit non-international à caractère intra-national se distingue de l'ensemble de ces genres de guerre par le fait que selon ces derniers une intention spéciale internationale est requise à l'origine du conflit, international ou non, alors que selon le Conflit non-international à caractère intra-national il est requis des Parties au conflit ou à l'acte international une conscience des conséquences naturelles nuisibles de leur conflit, pas nécessairement l'intention en tant que telle (v° paragraphe (4) infra.).

En effet, tout conflit armé international engendre une situation où des personnes fuient le lieu qu'elles habitaient afin d'y échapper. Et la situation des réfugiés qui se produit immanquablement du conflit armé international engendre à son tour, et naturellement, une tension non-internationale dans le territoire d'une des Parties au conflit international ou dans le territoire d'un tiers. La situation des réfugiés engendrant une tension internationale pourrait être limitée le cas où elle serait réglée immédiatement, et pourrait dégénérer naturellement en une tension non-internationale le cas où elle ne le serait pas

immédiatement. L'observation historique des tensions non-internationales provoquées par des conflits internationaux, comme la situation des réfugiés provoquée par le conflit armé israélo-arabe de 1948, affirme que des troubles intérieurs ou un conflit armé non-international seront naturellement suivis. Le cas de Jordanie à la fin des années 60 ou celui du Liban durant les années 70, en fournit un exemple typique. Ce sont les conséquences nuisibles naturelles d'un conflit international qui exigent que les Parties au conflit en prennent conscience et donc, en assument responsabilité. Car les Parties au conflit armé international n'ont le droit de décliner toute responsabilité pour les conséquences nuisibles de leur conflit dès lors que ces conséquences découlent naturellement de leur conflit. De là les pays arabes et l'État d'Israël assument responsabilité de la tension non-internationale et du conflit armé non-international en Jordanie générés par leur conflit armé international. Aussi assument-ils, seulement indirectement, responsabilité des conflits armés non-internationaux générés au Liban par l'expulsion des Palestiniens de la Jordanie. Et le conflit non-international en Jordanie à la fin des années 60 qualifié d'abord de troubles intérieurs à cause de la présence armée des réfugiés palestiniens, aboutissant par la suite à un conflit armé non-international, ou le conflit non-international au Liban dans les années 70 qualifié d'abord de troubles intérieurs à cause de la présence armée des réfugiés palestiniens, se développant par la suite en conflits armés non-internationaux, est ce que j'appelle Conflit non-international à caractère intra-national.

Le conflit entre l'État d'Israël et le Hezbollah sur les territoires libanais ne peut être qualifié de Conflit non-international à caractère intra-national. Car pour qu'un conflit soit à caractère intra-national il faut que sa source soit un conflit international ou un acte international par soi non-conflictuel, et que le conflit non-international soit l'aboutissement naturel du conflit ou de l'acte initial international. Or l'on peut avancer l'argument que le conflit iraélo-hezbollah est qualifié de conflit international, par l'avenue des décisions récemment rendues par des corps judiciaires

internationaux. La Cour de justice internationale souligne que l'État étranger est responsable pour le comportement d'une faction impliquée dans une guerre civile si (a) la faction est un agent de facto de l'État étranger ou (b) l'État étranger, autrement, émet des ordres à la faction de commettre certains actes. Le Tribunal pénal international pour l'ex-Yougoslavie dit, dans *Tadic*, en 1997, que le critère « agent de facto » déclenche l'application des Conventions de Genève. Ainsi pour que le conflit israélo-hezbollah soit qualifié de conflit intra-national, faut-il se demander si le Hezbollah est un agent de facto de la République islamique d'Iran. Or, la doctrine du Hezbollah lui impose de se soumettre pour toutes les décisions à caractère stratégiques au « wali el-fakih », qui n'est autre que le guide suprême de la révolution islamique iranienne (présentement l'imam Khamenei, et avant lui l'ayatollah Khomeyni). Dans son livre intitulé *Le Hezbollah, orientation, expérience et avenir* (p. 70), Cheikh Naim Kassem souligne que « 'le wali el-fakih' a comme prérogatives de prendre les grandes décisions politiques concernant les intérêts de la nation (la umma), de décider des options de guerre ou de paix...» (vº *L'Orient-Le Jour*, vendredi 4 août 2006, p. 6). Ce qui implique que l'autorité du « wali el-fakih » s'étend à l'ensemble des croyants chiites, nonobstant les frontières. La décision du Hezbollah de poursuivre la guerre contre Israël et sa volonté de maintenir à tout prix son arsenal hors de tout consensus inter-libanais devraient être prises en effet dans ce contexte. Or la Constitution de la République islamique mise en place en Iran a été basée sur l'allégeance au « wali el fakih ». Et nous avons mentionné que la doctrine du Hezbollah reconnaît l'autorité religieuse et politique du « wali el-fakih ». En conséquence, l'allégeance réelle du Hezbollah au « wali el-fakih » l'empêche de décliner au profit de la fondation de l'État libanais. Dans ce contexte, la République islamique mise en place en Iran serait en cause. Le conflit entre l'État d'Israël et le Hezbollah est donc qualifié de conflit international, ce dernier étant agent de facto de la République islamique iranienne.

Ainsi le conflit israélo-Hezbollah par lui-même n'étant pas à caractère non-international, ne peut-il être considéré comme conflit intra-national. Mais le cas où un conflit entre des factions armées libanaises ou entre une faction armée libanaise et les forces armées du gouvernement libanais éclaterait, suite à des répercussions provoquées par le conflit isarélo-hezbollah, ces conflits non-internationaux seraient de nature intra-nationale dont le fait initial serait le conflit international israélo-hezbollah. Ce n'est pas le cas, cependant.

3. Caractéristiques. Trois traits caractérisent le Conflit non-international à caractère intra-national:

a. C'est *un conflit généré naturellement* par un conflit international ou par un acte international par lui-même non-conflictuel;
b. C'est *un conflit à réaction en chaîne*, c'est-à-dire se produisant par l'intermédiaire d'une série d'étapes pouvant se reproduire naturellement. Il exprime un processus de propagation, une suite de répercussions provoquée par un conflit ou un acte initial international. Le conflit israélo-arabe de 1948 fut suivi d'un exode massif des Palestiniens vers la Trabsjordanie. Le problème des réfugiés palestiniens a dégénéré en un conflit non-international en Jordanie. Expulsée de Jordanie en 1970, l'Organisation de libération de la Palestine (O.L.P.) s'établît au Liban. Celui-ci dut faire face au problème soulevé par la présence du mouvement de résistance palestinienne, qui dégénéra en un conflit non-international entre les chrétiens et les palestiniens en 1975. A partir de ce conflit d'autres conflits se reproduirent indéfiniment, comme les conflits opposant chiites et palestiniens, musulmans et musulmans, musulmans et chrétiens, musulmans et juifs, chrétiens et chrétiens, forces armées syriennes et chrétiens, forces armées syriennes et forces armées libanaises, forces armées israéliennes

et palestiniens, etc. (v° A. Frangi, "The Internationalized Non-International Armed Conflict in Lebanon, 1975-1990: Introduction to Confligology", 22 CAP.U.L. REV. 965 (1993)).

Non seulement le Conflit non-international à caractère intra-national est-il:

- Le *résultat naturel* d'un conflit ou d'un acte initial international;
- *à réaction en chaîne*; mais aussi

c. *un conflit qui s'alimente indépendamment de la source* qui l'a généré; en ce sens que l'extinction du conflit ou de l'acte initial international n'aboutira pas nécessairement à l'extinction du conflit non-international, puisque celui-ci est le produit des conséquences nuisibles engendrées par le conflit ou l'acte initial international, et qui sont difficiles à effacer. Le règlement du conflit israélo-palestinien ou du conflit israélo-arabe n'aurait pas mis un terme aux conflits non-internationaux entre des différentes factions armées libanaises au Liban. Car le conflit israélo-palestinien et le conflit israélo-arabe ont dégénéré en conflits non-internationaux entre des factions armées libanaises qui, malgré le fait qu'ils se sont produits par l'intermédiaire d'une série d'étapes de conflits non-internationaux opposant des factions armées libanaises et des factions armées palestiniennes sur le territoire libanais, ne sont cependant pas en relation avec le conflit israélo-palestinien ou celui israélo-arabe. Voici des exemples. (i) Le conflit opposant les Chevaliers arabes alawites libanais à la milice du Mouvement d'unification islamique, le Tawhid islami, à la fin de l'année 1983, à Tripoli. (ii) Le conflit entre le Hezbollah et la milice d'Amal, en avril 1988, dans le sud du Liban et dans les banlieues de Beirut. (iii) Les conflits opposant les Phalanges aux militants musulmans entre 6 décembre

> 1975 et juillet 1976, dans l'ouest de Beyrouth et à Damour. (iv) La 'Première guerre maronite' entre les forces armées du Parti des Phalanges et l'Armée de Libération Zghortiste, entre 1976 et 1979, dans le nord du Liban. (v) La 'Deuxième guerre maronite' entre les forces armées du Parti des Phalanges et les forces armées du Parti de libération nationale, en juillet 1980 (Opération 7/7/80), dans l'est, le nord-est et le nord de Beirut.

Ainsi, ce qui distingue essentiellement le Conflit non-international à caractère intra-national du Conflit non-international 'positif' et des expressions politiques sus-mentionnées, est qu'il est l'aboutissement naturel d'un conflit international ou d'un acte international par soi non-conflictuel. Les Parties au conflit ou à l'acte international qui a dégénéré en un conflit non-international peuvent savoir et sont tenues de savoir les conséquences naturelles nuisibles de leur conflit. Aucune Partie au conflit n'est censée les ignorer.

4. Responsabilité: Le Conflit non-international à caractère intra-national peut se présenter de trois façons. Tout d'abord, il peut être anticipé et délibéré par les Parties au conflit ou à l'acte international. C'est le cas des Parties qui agissent avec le savoir que le conflit international qu'elles engagent ou l'acte international qu'elles commencent dégénérera, tôt ou tard, le cas où le dommage causé ne serait pas réduit, en un conflit non-international. En ce cas, la grandeur du dommage, i.e., réfugiés, tension interne ou troubles intérieurs, contribue directement à aggraver la responsabilité des Parties, le dommage qu'elles causent étant par soi l'objet même du conflit ou de l'acte international.

Ensuite, le Conflit non-international à caractère intra-national peut être anticipé mais pas délibéré par les Parties au conflit ou à l'acte international; par exemple lorsque ces dernières commencent un acte international qui s'avère nuisible ou

commettent de graves méfaits sciemment pour aboutir leurs objectifs militaires, bien que sans dessein de causer un conflit non-international. En ce cas, la quantité du dommage contribue indirectement à aggraver les circonstances du conflit ou de l'acte international; car le fait de ne pas hésiter à commettre des méfaits que les Parties ne voudraient pas faire sans leur conflit international ou leur acte international, reflète une volonté inclinée à nuire.

Enfin, le Conflit non-international à caractère intra-national n'est ni anticipé ni délibéré par les Parties au conflit ou à l'acte international. En ce cas, le dommage causé n'aggrave pas les circonstances du conflit ou de l'acte initial international. Néanmoins, en raison de la négligence Parties à envisager les conséquences fâcheuses de leur conflit ou acte international, le dommage les rend responsables sans qu'elles l'aient fait à dessein, dès lors qu'elles engageaient un conflit international par lui-même défendu ou commençaient un acte international par soi non-défendu mais qui risque toutefois d'être nuisible. Cependant, les circonstances du conflit ou de l'acte international s'aggravent dans le cas du conflit non-international à caractère intra-national. Car si le dommage est par lui-même une suite naturelle du conflit ou de l'acte international, comme c'est le cas du Conflit non-international à caractère intra-national, bien qu'il ne soit ni anticipé ni délibéré, il aggrave directement les circonstances du conflit ou de l'acte international, par là aggravant la responsabilité des Parties au conflit ou à l'acte international, car ce qui est par soi-même une dégénération du conflit ou de l'acte international tombe, en quelque manière, dans le champs plutôt légal que non-légal de ce conflit ou de cet acte (concernant la distinction entre les concepts 'legal', 'illégal' et 'non-légal' v° A. Frangi, « The Intra-Nationalized International Conflict », *Free L.J.* 2005 1(2), note 5).

5. Conclusion: Le Conflit non-international à caractère intra-national doit être imputé aux Parties au conflit ou à l'acte international d'autant plus gravement que ces Parties ont plus de

puissance mondiale. Quand les Parties au conflit ou à l'acte international occupent une place primordiale mondiale, et quand un conflit non-international à caractère intra-national peut être présenté des trois façons sus-mentionnées, la délibération ou la négligence de ces Parties est un scandale dangereusement mondial, car l'injustice des grandes puissances fait que les gens s'en indignent davantage. Ainsi le conflit non-international généré par des Parties au conflit ou à l'acte international, qui sont en honneur mondial, leur est plus sérieusement imputé à mal, leur puissance mondiale étant une cause de responsabilité aggravante.

MULTIETHNICITY, IDENTITY AND STATE ADMINISTRATION-THE CASE STUDY OF VOJVODINA[1]

DRAGANA ĆORIĆ

Confronted with many challenges, but also with the "dawn of alternatives"[2], civil society in construction in Serbia was at a lot of crossroads in last few years. It was making some wrong decisions, but, again, it was somehow continuing to move forward on its hard way to its own democratization.

The content of this paper is somewhat unusual, because the recognition and protection of the rights of national minorities are observed in the same time from different points of view-philosophical, legal, political. A special part of this paper is dedicated to Vojvodina, which is still the constituent part of now independent Republic of Serbia, and which presents a rather intriguing but successful middle-European region. Intriguing, because during a lot of centuries of its existence, there were lots of

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[1] I wish to thank for help while working on this paper to Mr Pavel Domonji, head of the office of Helsinki comitee for Human rights in Serbia in Novi Sad, for the inspiration and support to research this rather complex issue.This goes way back to my participation on seminars conducted by Helsinki comitee during 2005, when I directly understood the relevance of Vojvodina as concept of succesfull living with the prefix " multi"- etnicity, linguality culturality, confessionality. Gratitude goes to Mr Domonji for the support that he was given me during my research, by instructing me which literature and sources are relevant, and because of answering on lots of my questions. Also, gratitude goes to Mr. Alpar Lošonc, PhD, professor of the University in Novi Sad and the head of the Centre for multiculurality in Novi Sad, whose suggestions changed a little but also improved original concept of my work. The paper was prepaired for the 1st ECPR Graduate Conference, that was held in Essex, 7-9 September 2006.

[2] Ljubiša Mitrović: Sudbina kulturnih i etničkih identiteta u procesima globalizacije i regionalizacije na Balkanu, u istoimenom zborniku radova,Jugoslovensko društvo za naučno istraživanje religije, IX/2002, str.15

them who tried to turn its multiethnic, multiconfessional and multilingual structure into a powerful weapon against itself. The same could never succeed, because of the existence of a specific, deep feeling that is spread among its inhabitants, the feeling that goes way beyond anybody's national or other feelings, which has its unique potential to unite in its diversity. Successful, because Vojvodina was always known as the Granary of Serbia, this kept alive the most of federations, in which it was by occasion.

That is why the speech of promotion and protection of rights of national minorities should focus on Vojvodina, proud of its multi-structure and the level of tolerance shown not only to itself but also to its enemies.

1.Identity-a way to Other(s) and back

A problem of identity is marked as one of the most significant issues to be researched in modern societies. All by itself, the identity isn't given only once and finally, although some of its elements are appearing with the very entering of a man into community(for example, the name, which almost automatically presumes national and confessional frame of an individual), and some of them are variable, changeable depending on situations(confessional frame is , for example changeable, as political identity, and so on).The only that remains unchangeable , as much as that picture doesn't suit to the individual for various reasons, is the national frame, which it belongs. This is the only constant which couldn't, and also shouldn't be changed during one's life, because the self-determination and self-respect of an individual are results of the level of its own acceptance of this very frame. Nationality of an individual is only one of its personal characteristics, but when a higher authority, for example, a state, places it as the only and sufficient characteristic for gaining some rights and freedoms, then in society start some processes, such as anti-Semitism, xenophobia, ethnic conflicts(or popularly called " incidents").

One of the worst consequences that could result by above mentioned, are ethnical segregation, ethnic mimicry, but also making of so called-hidden minorities. In those cases, it is rather evident the fear of expressing the own national identity, or else, which seems a little worst than others, indifference to express that segment of one's identity.

The concept of identity is an attribute of human existence, which functions escalate especially in periods of great social and economic crisis. Identities are being lost, or simply pressed back, before the charism of political leaders, or leaders of confessional or ethnical or other groups.

Making of an identity (whether it is done by an individual or the collective) is complex process, where we find two categories: individual identity is related to diversity, and collective to similarity. Collective identity and the acceptance of its internal characteristics and motives for its own existence are the variables that get, from time to time, integrative or destructive character. Among them, the national identity is the mostly (ab)used category of identity. Individuals find themselves inside that kind of identity, following the symbols which give them the sense of making community, which guarantee them safety and salvation from oblivion and sense of exposing to a danger from the members of other nation.[3] Promotion of earlier mentioned identity as value, acceptance of that kind of identity, whether it is marked as majority, or even better, as minority, also marked as value, is supposed as one of the highest moral imperatives in the

[3] Tomislav Žigmanov: Skica za fenomenologiju nacionalnog identiteta(filozofsko-sociološki pristup),lecture on seminar Living in multiethnic societies, Novi Sad, May ,2005. Similar in Laslo Vegel: Politika hiljadu sitnih prodevaka, lecture on the same seminar."Immortality " could be secured through faith in historical and fated community, by which the very colective being becomes even more realistic and possible. Vladimir N. Cvetković:Nacionalni identitet i (re)konstrukcija institucija u Srbiji (ideologije,obrazovanje i mediji), Filozofija i društvo, XIX/XX, 2003.p.51-76.

modern "open society".

Right to an identity is presented as significant human right, not as the mere proclamation, but as its expression and acceptance. This is very important especially when it is a question of a minority group, for example, the national minority. Only by preserving all aspects of the above presented identity (cultural-ethical, geographically-economical, psychosocial, historically-political aspects), could be possible to accept not one and only identity, but great number of (minority) identities as the source of "plentitude and prosperity"[4].

Individuality of a man is determined by a lot of factors, which has influence on human behavior, and also to a way of acceptance of some new experiences, on that how much energy is taken into changing of life patterns, on a ways of working and thinking. Experience, concepts built by us, about ourselves, and especially about Others, values, and attitudes, are some of the fundamental variables in that frame[5]. In this sense, this paper, presenting formally legal,(but in practice more pointed out as political aspect) frame of protection of national minorities, Others are just those who are different for Us, because they aren't the members of the same national, confessional, cultural or lingual circle as We

[4] Agneš Kartag Odri: Normativno pravna zaštita identiteta,in collection of papers: Kulturni i etnički identiteti u procesima globalizacije i regionalizacije na Balkanu, Jugoslovensko društvo za naučno istraživanje religije, IX/2002, p. 61-63.

[5]" People living in plural surroundings have a chance to meet with different histories, cultures, traditions, customs, systems of values, and by that to enrich their own social experiences, widen their cultural horizons and limits of their knowledge. By meeting Other, by identifing his/her characteristics, we become aware of not only the differences among us , but -also similarities. But , there is something else by- Other we can better comprehend ourselves". This is the core of concept of human rights, accepted as value. This could be applied also to the democracy, which accepts all those above mentioned values, as suitable mechanisms for identification of similarities and differences. Quote by lecture of Pavel Domonji, on seminar " School for democracy", September, 2005.

are. In such manner, a way to Other(s) should be understood as a way of recognition, acceptance and, in the end -respect and further affirmation of that diversity and ourselves.

1.1. Civilian vs. national identity in Serbia

" Human ability for multiple and complementary identity is one of the key factors which make democracy possible in multinational states".[6]"Confusion of identities"[7], or else, “hysteria of identities"[8], isn't just a product of fatally inevitable crisis of changes, in which people are trying "to find a somehow solid concept in their conscience. Freedom is very important attribute of identity, whether it is noticed as civilian or national. Then, you're right to insist on Habermas's notion on individual identity that could be achieved only "when the individual is able to notice a difference between traditional norms and those norms which are justified by principles".[9]

In context of conflict between civilian and national identities in Serbia, as the “point of clash" is identified the notion of concept of a citizen, which is understood as belonging to majority nation, not as a relation between citizens and the state. Concept of citizenship has a meaning that is rather wider from the concept of nationality, although in time of creating of concept of citizen, especially during creation of modern states in 19 century, the whole concept was interpreted only as from the aspect of belonging to a specific nation.
What inspires loyalty of men to their state-belonging to a political community or belonging to specific nation? Nationalism gives an answer, regarding existence of conscience about common

[6] Linc, Huan i Stepan, Alfred , 1998, Demokratska tranzicija i konsolidacija, Beograd, "Filip Višnjić",p.143
[7] Zagorka Golubović, Ja i drugi-- antropološka istraživanja individualnog i kolektivnog identiteta, Republika, 1999.
[8] Quote by: Jovan Komšić,Tranzicije, manjine i identitet, Helsinške sveske br. 12 p. 6-35.
[9] Zagorka Golubović, above mentioned paper.

national belonging. But, there is liberalism which asks: what conditions must a state fulfill, to preserve to every its citizen freedom of independent choice of way of living, and that should be equal regarding other members of same community? At the same time, answer inspired by nationalism presumes that certain state can be a state only if it is a state of certain nation, liberally inspired answer takes as valid a notion that a state must behave to its citizens as equal only if every citizen is directly under the validity of state's laws.[10]

Globalization has an influence on sovereignty of national states and changes the nature of violence[11], firstly by taking a part of national suzerainty for the sake of global suzerainty. Globalization means that all national states are occupied by considering their own identity, and "restructuring of their history and their nature"[12].

Civil (political) identity can be further defined as interference of civil ethos with certain psychic dispositions, and identifying the citizen with basic normative consensus.[13]Shaping of civil identity is especially relevant for transitional states, having in mind that the process of transformation from autoritary/totalitary system into democracy can not be achieved unless serious political reconstruction could be done, which could enable political socialization to create individuals as citizens. The problem is more complex because "new democracies" are about to find their democratic identity: It couldn't be achieved by pure implementation of already existing patterns. So, democratization is a process that should start not from the already formed society,

[10] Milan Podunavac, , Princip građanstva i poredak politike, »Princip« i FPN, Beograd, 1998

[11]Entoni Gidens:Nema šanse za nezavisno Kosovo, available on : www.nspm.org.yu

[12] Ibid.

[13] Schwan G., 1998, »Kako se konstituise demokratski politicki identitet«, *Filozofija i drustvo*, XIII, 1998.

burden with past authoritarian heritage, but from the individuals, who are ready to actively participate in that process of "resocialization"[14] .

Civil identity isn't still enough strongly created, at least not in Serbia. That proves the fact that the population is still determining between national identity and the civil identity in creation. That means that a part of population is subordinated to the authority of nation, keeping itself in the frame of authoritarian concept of identity, until the second goes out of that frame, without all enough constituted attributes of the citizenship. That is why a resistance against all new aspects in the very concept of citizenship is rather unequal, but also in sense of acceptance of some earlier promoted concepts.[15]

1.3. Vojvodinian identity- identity with "multi" in it

Inhabitants of Vojvodina aren't and shouldn't be separate nation[16], because, being the "inhabitant of Vojvodina means the state of spirit and mind"[17], which “accepts diversity as highest value of all ". It is wrong to identify above mentioned with political goal to gain some wider territorial autonomy. Being Vojvodinian, or how should we call this phenomena, isn't depicted here as political option, but as civil and multicultural category, which draws its power from centuries of tolerance and respecting the Others. It's not the kind of identity which mobilizes

[14] Zagorka Golubović ,above mentioned paper

[15] Zagorka Golubović: Autoritarno nasledje i prepreke za razvoj civilnog društva i demokratske političke kulture

[16] Although in all registers of inhabitants that were made so far, there was a category of inhabitants called- Vojvodinians.But, there also exist -Yugoslavs, although Yugoslavia, in sence of Socialist Federal Republic of Yugoslavia doesn't exist for almost two decades.

[17] Statement of Bojan Kostreš,the president of parliament of autonomous province of Vojvodina, on the round table "Vojvodinian identity today",,Novi Sad, 28.06.2006.

on the ground of ethnical, confessional ,political or any other belongings, but on the ground of spiritual component, on the ground of living together, and the sense of mutuality that's "reigns" the Vojvodina. That “integrative potential", which has ground in ideal of civil equality, is rather close to the very essence of democracy and tolerance.

Exactly that vojvodinian identity and depicted as such, can be the only one to build up a bridge to Europe and European Union, because of the same ground on which are build-democracy, rights and freedoms , respecting the others, riches of diversity, interaction and synergy of all regions in its composition[18].

This year is proclaimed to be the year of vojvodinian identity. Conscious of the riches of diversity, with which they are living every day, the inhabitants of Vojvodina will try to prove that already constituted theoretical differences between national minorities and the majority of people in practice doesn't really exist, but that the people are ones who are relevant as such, and that they are all united in this unique identity. The same identity survived, in spite of political attempts to be ethnocized[19] , and it is, at this time, the highest value which should mobilize not only the inhabitants of Vojvodina, but also other citizens of Republic of Serbia, because of its integrative essence.
Vojvodina knows what the forgiving and reconciliation are[20], because only by using these mechanisms it kept the riches of diversity, besides rather frequent attempts of central executive

[18] Statement of Bojan Pajtić, president of the vojvodinian government, on the international round table: " Vojvodina-european region and accession of Serbia and Serbia and Montenegro to the European Union",Belgrade, 28-29- March, 2006.
[19] Lecture of Pavel Domonji, the head of Novi Sad office of Helsinki comitee for human rights in Serbia, on the international round table: " Vojvodina-european region and accession of Serbia and Serbia and Montenegro to the European Union",Belgrade, 28-29- March, 2006.
[20] " Doris Park: Vojvodina zna šta je praštanje i pomirenje", Danas,31.01.2005.

bodies(from Budapest, Vienna, or Belgrade) to eliminate it.[21]

2.Terminology of confusion-ethnical, national or what kind of minorities or communities

The most known definition of national minorities is the one given by Kappatorti in his expose to the United nations: that they are groups who are by a number , smaller that the rest of the inhabitant in a country, whose members, being also subject to a rule of the state, have certain ethnical, confessional or lingual characteristics different from other inhabitants, and that they are showing implicitly sense of solidarity regarding preservation of their culture, tradition, religion and language. Similar definitions could be found in reports of sub commission for prevention of discrimination and protection of minorities, and in some documents of Venice commission.[22]

Under the provision of Art.47 of Charter for the protection of human and minority's rights and freedoms, beside the word " national minorities", are mentioned ,as equal, some other terms, mentioned in constitutions and laws of the member states, such as "nationality" (narodnost), nation (narod), ethnical minority, etc. That is why is in the provision of Art.2 section 2 of The Law on protection of national minorities said, that, in the sense of this law, by national minorities would be understood all groups of citizens who are called or are identified as nations, nationalities, national and ethnical groups, or national and ethnical

[21] From the exposition of project " Affirmation of multiculturalism and tolerance in Vojvodina", founded by vojvodinian administration.

[22] The same definition could be also found in Mitja Žagar: Noviji trendovi u zaštiti i specijalnim pravima etničkih manjina-evropski kontekst,lecture on the conference " Transition and the status of minorities" 8-9.09.2001, Helsinški odbor za ljudska prava,Helsinške sveske br 12- Manjine i tranzicija; Miroslav Samardžić: Položaj manjina u Vojvodini, Centar za antiratnu akciju, Beograd, 1998; and others.

communities, that fulfill the above mentioned conditions of recognition.

There are some authors who think that the term national minority is too narrow, even " politically explosive", because of which they are disposed to use the term of ethnic minorities, which is wider, and includes confessional, racial and lingual minorities, or simply-any minority.[23] There is no consent regarding this issue in international documents, even not in those regarding this very issue. On the other side, The Law on Protection Rights and Freedoms of National Minorities tried to limit the term of "national minorities" using two parameters[24]: representative numbers, which means belonging to some of the groups of inhabitants that are permanently attached to a territory of state in which they're living, and autochthonism, regarding the self-determination of the group(in which case all earlier mentioned terms could be equally used, such as nation, nationality, national minorities, national or ethnical groups, etc).

In any case, it is considered that in the case of such group there is an element of identity which is different from the majority of people (such as culture, language, confession), beside the strong resolution of the group members to keep the common cultural identity.

Some authors think about another term, a kind of compromise regarding earlier mentioned terms- "minority ethno-cultural communities", in which case the specifics of any of those communities are put under conditions of "territorial homogenization of ethnical groups, social persistency for ethno-cultural diversity, as well as for confessional and linguistic

[23] Ivana Simović-Hiber:Savet Evrope i kulturna prava, centar za antiratnu akciju, Beograd, 2002, p.15-16

[24] Ivana Simović-Hiber, pgs. 27-28.But, using only term " minority" involves fruther explanation, what kind of minority is it, is it minority because of its ethnical, political or any other ground.

characteristics of those group members"[25] . In that sense, recognition of ethno-cultural identity of all citizens could be directly understood as a part of the wider spread policy (of affirmation) of diversity in Serbia[26]. Terminological diversity only shows the complexity of this very issue, which in case of Vojvodina sometimes gets the most unusual epilogue(s).

3. Multiethnical, multiconfessional and multicultural capacities of Vojvodina

All speeches about minority rights always mean certain effort[27], taken for accomplishing equality of all individuals, no matter differences that really exist among them. A certain ethnical distance, in sense of ethnical separation, diversity between individuals or groups in frame of multiethnic community, is understood as almost necessary. In case of Vojvodina, the ethnical distance is more present as positive projection of the state of mind of people living here, and in a very small number of cases the same distance is negative or very negative, which should be understood more as product of deep-rooted stereotypes than as the product of common sense thinking[28] .

Of course, none of us can choose family nor nationality within we are born, but the only thing that is up to us, to choose, during our lives is tolerance with which we can stand against inequality and discrimination.[29]Maybe some of them will fall under temptation

[25]Goran Bašić: Evropske integracije i politika multikuturalnosti u Srbiji, Filozofija i društvo, 1/2006, p. 114.

[26] Vojvodinian administration is already conducting a project called "Affirmation of multiculuralism and tolerance".

[27] Aron Rouds,lecture on conference "Tranzicija i položaj manjina 8-9.09.2001, Helsinški odbor za ljudska prava,Helsinške sveske br 12- Manjine i tranzicija

[28] Žolt Lazar, Dragan Koković: Etnička distanca u Vojvodini, Sociološki pregled, br 3/2005,p 251-265.

[29] Dragan Žunić, Introductory note in : Prava manjina, Odbor za građansku inicijativu, Niš, 2005, p.4. See also : Pavel Domonji: Nacionalni identitet? Ne,

of newly founded trend of ethnic mimicry. Calculating with "profits" and “losses", that they could gain because of expressing of their belonging to original ethnical group or to any other group, they will choose the possibility which is less painful for them. That doesn't mean that they have changed their national frame within which they are born and existed, but that they are, because of the loss of courage to accept their own nationality and confront it with it within the Others, chose to accept their own assimilation as solution.

Someone's nationality isn't his/her only characteristic. This is something that shouldn't be intruded by anyone, but also not to held as secret. The fear that is present during the selection of identities became a tendency present for a last decade in Serbia, and which solution could be seen in some time soon.

Although formally equal before law and God (whatever His name is, or even if we don't recognize His existence), the positions from which we are entering our lives aren't equal. Even they determine the level of tolerance we're ready to accept, and whether we'll have it at all.

Serbia, defined as unfinished state, captured inside the transitional processes[30], burdened with close authoritarian past, criminalized society and governmental bodies, and also with

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hvala!, Teme,br 3/2002, Niš, p. 465-467. It is obvious tendency of strengthening of a need of people, living in multinational communities, to prove to other and to themselves that they belong within " right one nationality".Those who accept their own nationality as one but not the only one part of their identity, are removed from that part of society, see also : Ivan Cvitković: Odnos između nacionalnog i konfesionalnog identiteta, in :Kulturni i etnički identiteti u procesima globalizacije i regionalizacije na Balkanu, Jugoslovensko društvo za naučno istraživanje religije, IX/2002,p.176.

[30] Some authors see this situation as " late and slackened transition, which is constitutionally undetermined and still not teritorially depicted.See: Tomislav Žigmanov: Sudbina vezana uz državu i vlastitu zrelost, Zbirka tekstova Nacionalne manjine u Srbiji, Građanske inicijative, 2006. p.2

debts that it has to own citizens, but also to the citizens of other Balkan and European countries,- this country has always been closer to a kind of constitutional nationalism[31], to a kind of enlightened idea of authoritarianism, more than it was ready to confront to its own real life. That real life says that members of national minorities-so, those who aren't defined as constitutive nation, and they are *argumentum a contrario*, defined as minorities, regarding the last census from 2002, form 17% of inhabitants of Serbia, and 35%of inhabitants of Vojvodina. That kind of multiethnic capital is rare in Europe, but it has been for a long time pressed back and depicted as danger, as a mechanism which if ever be activated, will lead to ghetoisation of majority of nation, which is the absurd.

Even new projects of the constitution for the Republic of Serbia, which we re expecting for the sixth year, are promising reconciling start position, in sense of proclaiming one nation as constitutive, but also proclaiming the state as civil-the state of all its citizens, no matter what nationality they are, without emphasizing of one ethnic community, whether it is majority or minority. All proposals of new republican constitution, that are known to the public, have principle attitude about guaranteeing rights to national minorities, regarding the internationally accepted standards that are implemented into national legal system. There are also some mechanisms that should stimulate their equality to the majority of people. The special emphasis input on mechanisms of so called affirmative action for surpassing factual differences in conditions for realization of universal human rights.[32]

[31] Sonja Biserko, lecture on conference "Tranzicija i položaj manjina 8-9.09.2001, Helsinški odbor za ljudska prava,helsinške sveske br 12- Manjine i tranzicija

[32] Marijana Pajvančić: Opšti ustavni okvir ljudskih prava, u okviru zbornika radova Srbija između ustava i ustavnosti, helsinške sveske br 22, Beograd, 2005, p.156-173

Multiculturalism and peaceful life are dominant in Vojvodina[33], which should be specially emphasized in periods of underlining this diversity as “defect" of this region. General thesis of multiculturalism, such as tolerance, non-discrimination and ethno cultural justice are not only simply present here, but sometimes they succeed in bringing out the whole concept of multiculturalism from the frame of mere respecting of rights of members of "ethno-cultural minorities".[34]

Vojvodina has always been and still is considered as "small Europe", region with six official languages and a long tradition of openness, tolerance and respect for diversity. For example, classes in state primary schools in Vojvodina are held on all six languages[35], in high schools on five, in faculties for now only on two languages, beside the fact that examinations for the admission of students to a university could be held on any language of national minorities, if any candidate expresses his/her wish to do that (and that is for three year now). Public information in electronic media is done on eight languages. Official use of languages of national minorities is obligated in 39

[33] See: Vladimir Ilić: Attitudes of the ethnic elites members in Vojvodina to minority rights and to interethnic relations, Sociologija,Vol.XLIV, Nr 1/2002.Also: Hju Poulton: Etničke manjine u jugoistočnoj Evropi- primeri integracije i dezintegracije, Minority Rights Group International, 2000, p.21, and Radoje Radulović: Međunarodno pravo i nacionalne manjine, Pravni fakultet u Novom sadu, 1999, p. 71-74.

[34]Goran Bašić:Politika multikulturalnosti i otpor većine, Filozofija i društvo, XXIV, 2004.

[35] There are a lot of positive examples of raising children in the spirit of multicultural and tolerant tradition. This could be considered as the true capital of Vojvodina as region. For example, in a village near Zrenjanin, all pupills in the primary school are learning three languages-serbian, hungarian and slovakian languages.Most of them fluently speak all three languages, and there is also a section for keeping the bulgarian national customs.

municipalities from 45[36], how much there are municipalities in Vojvodina. There are professional theaters on Serbian, Hungarian, Slovakian and Romanian languages, which activities have been financed from the budget of province of Vojvodina.[37] Also, there have been constituted hundreds of associations and organizations for attending customs, folklore, development of national culture, language, education, etc.[38]

On the other side, Vojvodina is also confessional plural community, because here we can find about 30 confessional communities and organizations. Only in Novi Sad there are 27 religious objects, and most of them are concentrated in the so-called "old core" of the city. All earlier mentioned positive examples, even besides inherited ethnic conflicts from the 90-ies of XX century, couldn't interrupt the continuing of tradition of respecting diversity in Vojvodina(at least not significantly, if we can judge by the number of ethnically inspired "incidents" in this region).

4." New" and "old" majorities and minorities in context of events on Balkans during the period of 1991-2006.

[36]There are often in use , beside serbian language, at least two languages of natioanl minorities. For example, in the municipality Bela Crkva, official languages are serbian, hungarian, romanian and czech languages.

[37] Taken from the explanation of earlier mentioned project " Affirmation of multiculturalism...".Further data about realisation of right on education on languages of national minorities could be seen in text: Zoltan Bunjik: prosvjetni kadrovi-usko grlo obrazovnih prava, regionalne paralele, Nr.3/2004.

[38] For several years, in the beginning of summer, in Novi Sad is held Ethnofestival, regarding the promotion of national customs,handyworks and traditional meals. Some may , with sarcasm, notice, that, if we see this issue only from this aspect, it seems that "national minorities only dance, drink and eat".But, we must have in mind that those are just the segments of someone's identity, which shouldn't at any cost, neglected.Their conastant promotino is needed, even throughout dance, songs and-food.

"Cultural and political climate in Serbia is at the time burdened with traditionally-romantic possession with pure identities, so every attempt to implement liberally-democratic institutions causes the feeling of endanger of minority identities but also the identity of majority identity"

Jovan Komšić,lecture on conference "Tranzicija i položaj manjina 8-9.09.2001, Helsinški odbor za ljudska prava, helsinške sveske br 12- Manjine i tranzicija

Forming of "majorities" and “minorities" in modern civil societies depends much on lots of factors, firstly political, but even demographical nature[39].Furthermore, political moves that have been moved on the field, sometimes lead to change of demographic picture of a state. In those cases, a majority of people became “new" minority because of some reclassifing and the autochthones minority became the new majority. With so wide open definition of national minorities, the Serbian law on national minorities tried to erase the newly created difference between new and old minorities, the difference that was made by changing state borders and migrations. In that sense, we must differentiate real and political visibility of any ethic group and its recognition as national minority group.

The first could be related to the number of Russians (15.000) and Ukrainians (5.000) in Vojvodina. Their presence is on the limits of acceptability to be further defined as minorities from the legal side. On the other side, Roma, although are present in this region for very long time, they got their political visibility just by formal recognition of they're being national minority, by these very law. (Art 12 Law on national minorities).Those two examples are real examples of political decision-making regarding existence of some national minorities, although there were some sporadic

[39] Vojislav Stanovčić:Većina i manjina u demokratskoj teoriji i političkim institucijama, books of resumes from international round table: POložaj nacionalnih manjina u Srbiji, SANU, November, 2005

attempts of other state bodies to influence on that kind of negative discrimination of them.[40]

In states, such were SFRY, SSSR, even Czechoslovakia; the issue of minorities was very simply resolved with the legal document of the highest power-the constitution. The constitution was determining which nations in that state should be considered as constitutive[41] and be considered as founders of that state; all others nations, *argumentum a contrario*, should be considered as national minorities. But, clashes of those (communist's) powerful federations, created a lot of consequences: they've deepened political and ethnical conflicts, created some new conflicts and partitions, and also-created some "new" minorities. Members of different nations, who lived regarding the maxim " brotherhood-unity", have becoming almost over the night in their own state-national minorities, and their whole life was changing form the top.[42] Some of the problems of "new" minorities are

[40]The statement of federal minister of national and ethnical minorities on the Round table dedicated to the problem of identity of minorities in FRY, October, 2001.

[41] Goran Bašić: "Stare" i " nove" mnajine, Regionalne paralele, regionalni glasnik za promociju kulture manjinskih prava i međuetničku toleranciju, br 3/2004.Similar in: Tomislava Žigmanova: Hrvati u Vojvodini-primjer postajanja manjinom, knjiga rezimea sa međunarodnog naučnog skupa POložaj nacionalnih manjina u Srbiji, SANU, novembar 2005, and also earlier paper of the same author: Politika imenovanja nacionalnih manjina u Jugoslaviji/Srbiji-apstrakcija i svemožnost u službi razdora i asimilacije, u zborniku Kulturni i etnički identiteti u procesima globalizacije i regionalizacije na Balkanu, Jugoslovensko društvo za naučno istraživanje religije, IX/2002, str 127-154.

[42] The very new example just resulted from the decision of MOntenegro , made on referendum in May this year to separate from Republic of Serbia. There can be some problems regarding the right of national minorities to use their own language.Namely, The Charter on minorities' or regional languages is ratified in the Parliament of State unity of Serbia and Montenegro, but with different list of minority languages in both member states: this list in case of Serbia consists of 10 languages, and in Montenegro only 2. The problem may appear in case of creating new montenegrian constitution, when determining the constitutive

directly attached to interstates relations, because numerous minorities have their states of origin just in their neighborhood. Those relations are burdened with processes of confrontation with past, with victims, war crimes and with one specific general national, emotional and state's separation and decadence.[43]

Only Croatia, , as one of the former Yugoslav republics, have the Constitutional Law on Protection of Rights and Freedoms of National Minorities from 1991.That law was changed in 2002, with even more liberal law in regarding the same issue. The rest of the states in the region have only rather barren constitutional provisions, or, as in case of former state unity of Serbia and Montenegro- a few provisions in the Constitutional Charter (which is an act of less power than the constitution itself), then, so called small Charter (on protection of rights and freedoms of national minorities), a law on federal level and a regulation on election of national counsels for the protection of cultural rights of national minorities.

5.Legal framework for the protection of national minorities

The rights of minorities are regulated on two levels, when it's to international sources. On the first level, there are obligations and

nation in this state. If the status of constitutive nation would be recognized only to the MOntenegrians, then Serbs become-national minority and should have all minority rights that come from this Charter, especially regarding the language. But serbian language isn't mentioned in this sence in the instrment of ratification in part which adresses to Montenegro. This question was oficially raised by prof. Dragoljub Mićunović, on the round table " Serbia and Montenegro-how further", held on 30th May 2006. in Journalists's school in Novi Sad problem može nastati već prilikom donošenja novog ustava Crne Gore, prilikom određivanja konstitutivnih naroda u ovoj državi.

[43] Dušan Janjić: Nove manjine u traganju za identitetom i statusom, Regionalne paralele, br.7/2004, str.29-30.

rights that come from the international agreements that are signed and ratified from some states. By ratifying an international document, a state shows its agreement to implement its provisions into its own legislative. In that sense, that kind of document is considered as the source of law of the higher instance regarding even the constitution. The most important multilateral conventions in the area of protection of rights of minorities are the Frame Convention of the Council of Europe on Protection of National Minorities (1994)[44] and European Charter on Regional or Minority Languages, also, brought by The Council of Europe (1992). It is important to emphasize that those conventions are just placing the frame and a way on which states should treat national minorities and their rights, and they aren't the mechanisms of their immediate protection.

On the other side, that means that members of minority groups cannot accomplish any protection before national nor international bodies when it comes to infringement of their rights. The only mechanism possible is given to the state, to send a report of the level of implementation of above mentioned measures.[45]

The secondly mentioned Charter was the last international agreement, ratified in the parliament of the state unity of Serbia and Montenegro, in their plenary session from 21.december 2005. It is important to mention that the ratification is done from the second attempt, because the first time, in the session from the 5.December 2005, the Law on Ratification didn't pass. Although the Council of ministers proposed passing the same law under the

[44] MOre about this convention in paper of Goran Bašić:Zaštita prava nacionalnih manjina u SR Jugoslaviji prema standardima Okvirne konvencije za zaštitu prava nacionalnih manjina Saveta Evrope, Centar za antiratnu akciju, Beograd, 2002,

[45] Tamas Korhecz:Zaštita nacionalnih manjina u međunarodnom pravu, Zbirka tekstova Nacionalne manjine u Srbiji, Građanske inicijative, 2006.p .4-5.

urgent procedure, even besides the warning that the term of two years, in which we were obligated to implement that Charter, have already gone, the same didn't pass. The reasons were of political nature, but there was present a certain level of political animosity[46], that this act will create some new right and mechanism which we cannot conduct.

Animosity also came form the side of national majority, that with this act they will be ghettoized, because national minorities are gaining some new rights. Even the committee for the minorities and human rights as the body of the parliament, refused to put Vlach language on the list of minority languages, because it's not still "officially accepted and standardized". In the meantime, the state unity doesn't exist anymore, and the Charter went into effect on the 1st June 2006.

The list of minority languages[47] consists of ten languages: Albanian, Bulgarian, Bosnia, Hungarian, Roma, Romanian, Russian, Slovakian, Ukrainian and Croatian. The Charter made possible widening of this list.[48]That possibility has already been

[46] Biljana Petrović, Dragana Ćorić: Povelja o regionalnim i mnajinskim jezicima, paper present during the conference" II majski pravnički dana na Pravnom fakultetu u Kragujevcu", 5.May 2006.See also lecture of e Alpar Lošonc on the conference "Razvoj multikulturnog i multietničkog društva", Fond za otvoreno društvo, Beograd, 2001

[47] Under " regional or minority language", the charter understands thos elanguages which are traditionally in use on the part of the teritory, by the inhabitants of that state.That group of inhabitants is by number minor than the rest of the inhabitants, and the language itself is different from the official language in that state.(art.1 of the Charter). In this category can not be languages of migrants, or different dialects of the official language. On the other side, Charter says something about "unteritorial languages", which are those languages used by the citizens of the state but which are traditionally used on the teritory of the state, and they cannot be identified with its specific teritory. teritorijom

[48]As minority languages, in Montenegro, there are mentioned only albanian and roma languages.

used by the Vlach and Macedonian community, which initiated that widening[49] Right to use own mother tongue, and especially in context of minority language could be understood as one of the crucial human rights and freedoms, with which realization, individuals prove themselves, and prove their own cultural and historical integrity. That is why the very Charter emphasizes the significance of multiculturalism and multilingualism, having also in mind defining straight line between those languages and the official language in a state.

On the second level there are international documents of declarative content, such as Recommendations from Oslo about linguistic rights of national minorities, and Recommendations form Lund about efficient participation of minorities in political life of a state. Although accepted as standards for respect of the rights of national minorities, the mentioned documents are not that obligatory as the previous group of international documents. That means that a state can decide in every moment whether and how will realize those standards.

Sources of domestic legislation in this area were until some time: Constitutional Charter of the State Unity of Serbia and Montenegro, Charter on Human and Minority Rights and Civil Freedoms, constitutions of the member states, Law on Protection of Rights of National Minorities[50], Law on Determining specific jurisdiction in autonomous province, and the Statute of Vojvodina, as well as the Law on Local Self-government. The problems arise, after proclaiming the independence of Montenegro, with all laws that were adopted on the federal level. Rather pragmatic and the simplest solution was found after proclaiming the Republic of Serbia for the formally legal

[49] In the meantime, the national counsels of those national minorities have been formed, so it seems that they can actively enter the whole process.

[50] Couriosity that lead this law was that it was printed on serbian, englis, but also on 9 languages on national minorities: albanian,bulgarian, macedonian, hungarian, roma, romanian, russinian, slovakian and german languages.

successor of state unity of Serbia and Montenegro, and that all legislation, that was adopted on this level so far, becomes the part of Serbian legislation, until something else would be decided.

The problem is defined when it comes to Constitutional charter, which constituted the state unity. The state which was constituted by this act doesn't exist anymore; the legal ground for the very existence of this act is lost. Much important for this issue, the so called little Charter, or Charter on human and minority rights, resulted from the constitutional charter, and was adopted as its integral part. From this, it follows that with loosing the ground for existence of constitutional charter, it's been also lost the ground for the existence of the small Charter. Furthermore, it is questionable the existence of all other laws that were adopted on the ground of the constitutional charter. It seems that if the ground for their existence is gone, all those laws lost their ground for existence, so, we can ask a technical question, if and which laws has Republic of Serbia inherited at all, as the legal successor of state unity.[51]

We can say that this paradox doesn't addresses on the Law on protection of national minorities, which is adopted in 2002, while the existence of FRY. Because it has no direct ground for its existence in the Constitutional charter, which isn't a part of positive law anymore, we can presume that there is a solid ground for further enforcement of this law. It is also important to emphasize, that the fact that this act was adopted in FRY gives it the legitimacy to Republic of Serbia for further enforcement of this law, because, as a part of " inherit age", that act was inherited

[51] In that sence is an apel of Belgrade centre for human rights, adressed to allstate bodies to take urgently some steps that Republic of Serbia shouldn't stay without basic guarantees of human rights." If we allow to Charter on human and minority rights to dissapear after the dissapaerence of the state unity, Serbia will return to the constitution from 1990, and its citizens will be again the victims of anachrone understanding of human rights". Dnevnik, 20.05.2006.

by state unity, and further , by Republic of Serbia. So, there's no reason for fear, shown by some nongovernmental organizations and political parties of national minorities that they are absolutely without any protection.[52]

Making of new proposition on protection of minorities is in progress. So far, the proposition was made only by Center for research of ethnicity, nongovernmental organization from Belgrade, and presented it on round tables across Serbia. It is important to emphasize that this law should regulate, for the first time, undoubtedly even the way of forming the national councils for the protection of cultural rights of national minorities, which is significant change, because this issue is now regulated only by a regulations.

The very Law on minorities is rather important, because it must constitute the important mechanism of certain minority rights, in the first place those which guarantee free existence of identity of any minority: language, culture, education and public information(which all could be understood as cultural rights of minorities)[53].Provision from the Art.12 says that expression, keeping, development, transmission and public exposure of national, ethnical, cultural, confessional and linguistic specifics as parts of tradition of citizens, national minorities and their members, are considered as their inalienable individual and collective rights. This law also says that in aim of preservation and development of national and ethnical characteristics, members of the national minorities have a right to establish special cultural, artistic and scientific institutions, societies, and

[52] "SRbija: zastupljenost nacionalnih manjina pod lupom", Balkan Insight, 10.05.2006. The same attitude was expressed by some members of vojvodinian administration, although they are aware of maxime that a state -legal successor of other state, inheretes its legislation in a way in which their enforcement can not harm the the political system of the state that is new one, and all that until adopeting new legislation.

[53] Ivana Simović-Hiber,in earlier mentioned paper.

organizations in all areas of cultural and artistic life.

By adopting this law, the legal emptiness was filled, which existed regarding the realization of generally recognized minority rights. Especially is précised the right on national orientation, right on cooperation with fellow-countrymen in the state and abroad, and other rights which make possible equal inclusion in processes in a state and in life of the very community.

As especially significant is the status of acquired rights, which in this context means the guarantee that none of the acquired rights of national minorities cannot be limited or abolished, whether they're acquired inside one national minority or in cooperation with other national minorities. It is also important that the right in issue is acquired till the date of entering into force of this law. The very institution of acquired rights is taken in its original sense from the Charter on human and minority rights and civil freedoms, which in Art.57 says something about guaranteeing of acquired rights especially to national minorities.

All proposals of republic constitution have different solutions of this issue: in the proposal made by the Government of the Republic of Serbia there is no guarantee of the acquired rights, but general clauses of guaranteeing all acquired rights to all citizens, not all restrictively to the national minorities.[54]

Provision of Art 20 of the same law provided establishing of the special Federal Fund for stimulation of social, economic, cultural and general development of national minorities. The fund should be financing activities and projects from the budget of FRY, in areas of betterment development of cultural activities of national minorities. But, till today, the same fund wasn't established, nor is possible establishing of any similar fund, until the gap created by the secession of Montenegro, would be surmounted, and until

[54] Marijana Pajvančić: Prava pripadnika nacionalnih mnajina, u zborniku Srbija između ustava i ustavnosti, str.187-212.

the new law on national minorities would be adopted.

In above mentioned sense, it is important to mention even the erasing the census of 5% of votes from the voters that entered the vote process, regarding the participation of parties of minorities in division of mandates in parliaments. That was at first done by the Law on changes of law on election of deputies of the federal parliament, and repeated in Decision of election of deputies in parliament of autonomous province Vojvodina in 2004. In this decision, the census is reduced from 6000 votes to 3000 votes. Determining the so- called “natural threshold" for the parties of national minorities it is made possible for them, to enter the federal state bodies.[55]

6.National councils of the national minorities

According to the provisions of the Law on rights of national minorities, National councils were formed, with intense to help preserving diversity inside their own nations. Law's formulation undoubtedly determines the jurisdiction of those councils: realization of the rights of self-government in areas of use of language and letter, education, public information and culture". The council, according to the further formulation, presents the national minority, participates in process of decision-making, or decides by itself about issues from mentioned areas, and establishes institutions from those areas. Or, to be precise, the council must be asked for advise, suggestion, or remarks on choice and use of personal names, right of use of mother tongue and letter in private and in public, right of official use of own language and letter, right of preserving the culture and tradition, education on mother tongue, use of national symbols and

[55] Lecture of minister for the local self-government Zoran Lončar on the international round table: " Vojvodina-european region and accession of Serbia and Serbia and Montenegro to the European Union",Belgrade, 28-29- March, 2006.

information on languages of national minorities.[56]

There are opinions, that national minority have got their own parliament and government, which will directly, by the principles of self-government, take care of realization of rights important for preservation of their national identity.

But their legal ground is a little confused. They are formed on the basis of the federal law, but are assigned to the republic to take care of their work. But, Vojvodina has already twice financed activities of the councils that have seat in Vojvodina.

Until mow, there have been formed national councils of: Hungarian[57], Russian[58], Romanian[59], Croatian[60], Slovakian[61], Bunjevac[62], Bulgarian[63], Ukrainian[64], Roma[65], Bosniak[66], Greek[67],

[56] Ana Tomanova Makanova: Kompetencije nacionalnih saveta, lecture on the conference "Iniciative for institutionalization of Concels of national minorities by adopting and aplication of law on their jurisdiction",Informator centra za multikulturalnost, Novi Sad, 18-19. March 2005.

[57] Electors' assembly held on 21.09.2002. in Subotica, invited 604 electors, 587were present, elected the national counsel of 35 members, and established in the same day.

[58] Electors' assembly held on 02.11.2002. in Novi Sad, invited 104 electors, 102 were present, elected the national counsel of 18 members, which was establish on the 14.12.2002.

[59] Electors' assembly held on 07.12.2002. in Vršac, invited 169 electors, 143 were present(the session left 45 elector, but the electionm was continued with 85), elected the national counsel of 21 members.

[60] Electors' assembly held on 15.12.2002. in Subotica, invited 204 electors, 198 were present, elected the national counsel of 35 members, which was establish on the 25.01.2003.

[61] Electors' assembly held on 18.01.2003. , invited 127 electors, 111 were present, elected the national counsel of 29 members

[62] Electors' assembly held on 23.02.2003, invited 45 electors, all of them were present, elected the national counsel of 21 members.

[63] Electors' assembly held on 10.05.2003. in Niš, invited 132 electors, 118 were present, elected the national counsel of 21 members.

Macedonian[68] and Vlach[69] national minorities.

6.1. Election of the members of the national councils-controversis

Law on Protection of Rights and Freedoms of National Minorities and the Regulation on work of Electors' Assemblies for the Election of National Councils from 2002, established indirect election of the members of those councils. The electors are the most important in this matter, as they can be nominated from the minority institutions, or from the side of such organizations, and from the other side, those whose nomination is supported by 100 voters. Electors by the function could be federal, republic or provincial deputies, who are nominated to those functions as the representatives of the minorities or they're declaring themselves as the members of that minority and they're speaking their own language, or deputies -members of national minorities who are elected in any unit of self government in which the language of national minority is in official use.

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[64] Electors' assembly held on 17.05.2003. in Kula, invited 38 electors,all of them were present, elected the national counsel of 18 members.

[65] Electors' assembly held on 24.05.2003. in Belgrade, invited 417 electors, 348 were present, elected the national counsel of 35 members.provision of Art 4 of the Law on protection of minorties Roma are finally recognized as the national minority,and the state was obligated to keep the affirmative actions, by providing the measures for betterment of status of Roma in general.

[66] Electors' assembly held on 06.09.2003. in Novi Pazar, invited 217 electors, 214 were present, elected the national counsel of 35 members

[67] Electors' assembly held on 25.04.2004. in belgrade, invited 32 electors, 31 were present, elected the national counsel of 18 members.

[68] Electors' assembly held on 04.03.2006. in Negotin, invited 98 electors, all of them, were present, elected the national counsel of 18 members, which was establish on the 31.03.2006

[69] Electors' assembly held on 02.11.2002. in Novi Sad, invited 104 electors, 102 was present, elected the national counsel of 18 members, which was establish on the 14.12.2002

At least 20 members of the minority can call for an electors' assembly for electing the members of the national council, if the number of that national minority isn't registrated specially, or is to 20.000 people; 30- if the number of that national minority is between 20-50.000 people; 40- if the number of that national minority is between 50-150.000 people, and 50- if number of that national minority is more than 150.000 people(Art 2 of the mentioned Regulation).The election of the members of the national assembly is done proportionally, according to the number of votes that a list of candidates can get, with the limitation that one elector can vote for only one list of candidates.(Art 14, par.1,3,5 of Regulation).

But in practice, as especially problematic has shown the lack of the provision on obligated notarization of signatures of the electors, as it's done in any other case of election of candidates for any other state's body. The whole process of election inside the minorities' community has no sense, but at this time, all this has also shown "rather scorned attitude of the officials to election of minorities' representatives"[70]. As the main consequence of this kind of election, the system shows domination of one party or organization[71], which then represents the only partner of the state regarding the minority issues, especially on the field of issues

[70] Slaven Bačić: Sofisticirano simuliranje ili raskid, collection of papers :Nacionalne manjine u Srbiji, Građanske inicijative, 2006. p.9

[71] That's why the president of the National councel of Slovaks, Ana Tomanova Makanova, says that she is very satisfied with the work of this councel, because all members are elected for the right reasons, faith that they will propairly represent the interests of slovakian national minority, not for some wrong reasons, for example-lobbing of certain political options. This also comes from the fact that Slovaks don't have any special party or organization, when working inside this councel, aren't burdened with political reuniting inside the same councel." Manjine u procepu potrošenog bratstva i jedinstva", Dnevnik,31.07.2005.See also : Marton Attila: Na udaru kritike i u iščekivanju promena, collection of papers: Nacionalne manjine u Srbiji, Građanske inicijative, 2006. p.10. In that sence text: Nepromenjena matrica, knjiga izveštaja za 2005, p.465.

attached to the specific national minority.

Instead of integrative function, this law only made more active fights between elites inside the minorities themselves.[72] In the first place, it is because of the way of election of national councils, by way of electors' assemblies, which is the surpassed system because of the legitimacy (not) given to the persons elected in that way. It should be mentioned that this system is in use only in USA, when electing the president of the state, but the legitimacy to the same election gives the component which lacks in the case of election of national minorities-voluntarily and interested participation of voters in such a process. It seems that this solution, in case of the national councils, was established only to satisfy The Council of Europe, when it comes to the protection of national minorities.

Controversies are seen in case of the very election process for the members of national councils. During the process of adoption of law on minorities, some assertions that system with electors' assembly is the most democratic ever, in the circumstances in Serbia , because the right to propose candidates for electors has been given to certain groups, whose are concerned.[73]

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[72] Losoncz Alpar: Pitanje za samorazumevanje Srbije, collection of papers: Nacionalne manjine u Srbiji, Građanske inicijative, 2006. p.13-14.The same is certified in the research-project of the Fund for open society: " Local policies in multiethnic local communities-status and pespectives of govrening in the multiethnic comunities"., which was held during May and June 205 in municipalities Sombor, Senta and Zrenjanin,as well as in the lecture of Pavel Domonji on the round table: Inicijativa za institucionalizaciju Saveta nacionalnih manjina usvajanjem i aplikacijom zakona o njihovim nadležnostima", printed in Informator centra za multikulturalnost, Novi Sad, 18-19. March 2005. Also in paper of Julijan Tamaš:Rusinska i ukrajinska nacionalna manjina u Srbiji:sinhronija i teleologija,books of resumes from international round table: POložaj nacionalnih manjina u Srbiji, SANU, November 2005.

[73] " Elektori brišu razlike", Dnevnik, 20.mart 2002.

On the other side, assertions of the members of national minorities differ, regarding 2002 and now, as well as in cases where there are strong minority political parties. So called “big" minorities are now speaking in favor of direct election of the members of national councels. Just four years ago, they were kind of protectors of electoral system. On the other side, the so called “small" minorities are still for the electoral system, because of their numbers, they couldn't organize such elections in any municipality in Vojvodina.[74]

Furthermore, according to proposals of new Law on minorities (the only proposition known to the public is the one made by Center for research of ethnicity[75] and some unofficial versions, of unknown authors); there is a possibility that besides electoral system would be established direct election. The announcement of that elections is conditioned with establishing a special list of voters, on which should be registered at least 60% of members of a national minority. The elections are also announced at the same time as the elections for deputies of the municipalities' parliaments, and are announced by the president of the National assembly of the Republic of Serbia. In this case , the jurisdiction of national councils of national minorities consist of gathering of demands of members of national minorities, that are signed and ratified by a court , to be registered in that list of voters, and acting as the state's body in the first level whether the member will be registered in that list or not, and forwards that demand to a higher body- here it is a body of local self-government, which is the second level body, and which decides in final level of formal registration.

[74] The best example is ukrainian national minority, with 5000 members, who are "distributed" across whole Serbia. Although 85% of them are living in Vojvodina, there is no municipality with more than 500 members of this minority. Radio slobodna Evropa, 02.08.2005.

[75] The same preposition was presented in School of journalism in Novi Sad, in March 2006, GRađanski list, 11-12.03.2006.

Councils should be, according to this proposal, formed on the level of municipalities. After that will be formed, on the electoral assembly the national councils of certain minority.

Registration of persons in that list and their erasure from it should be done on the basis of free will of those persons, not to be bureaucratized and put in minority[76].Besides that, there is a certain fear of members of national minorities, that are not concentrated in certain municipalities, that their votes, or any other data about them as voters from that list, probably would be misused, or that their names would never appear on that lists.

Furthermore, according to this proposal, every three months those lists should be verified from the body of local self-government as well as the lists that are done by national councils' that, the double registration is done and lost much more energy.

Activities of national councils were financed from the budget of republic of Serbia. During the 2004, those resources were determined as-fixed-purpose, but for natural disaster!? But, in 2005, those resources were determined as ones that go for financing the citizens' organizations. In above mentioned sense, that means degradation of significance of national councils. From

[76] Pavel Domonji:Režim izbora nacionalnih saveta, , lecture on the round table Inicijativa za institucionalizaciju Saveta nacionalnih manjina usvajanjem i aplikacijom zakona o njihovim nadležnostima, printed in Informator Centra za multikulturalnost, Novi Sad, 18-19. March 2005.A kind of degradation of national identity of members of national minorities is also done in Art 4 of the Regulation on Election of National councels, where was put as, one of the conditions for elector or persons electing the electors to present a written consent about their own nationality.Also, it is said that it would be enough for someone to know the language of any national minority, to be elected for elector, or to be one of the persons that are electing electors. Having in mind the multiethnical structure of Vojvodina, those provisions are without any practical sence, because a lot of members of minorities speak laguages of other minorities. Knowledge of language of any other minority doesn't legitimize them in above mentioned sence.

the consultative bodies and partners of the state regarding the protection of diversity in Serbia, the national councils became societies to which state doesn't have any obligations, even not of consultative nature.[77]

It's evident that Law on protection of rights and freedoms of national minorities is a result of time in which it was adopted. Of course, its adoption is a step forward in general democratization of Serbian society, which started after the changes in 2000. But, as many other events, as many other laws adopted and processes that started in this period, this law have that component of hurry and compromises, which haven't seen anywhere else but in Serbia, but they were parts of everything that followed changes from 2000.

The process of democratization by itself is very long, and it couldn't be inculcated to all individuals inside a rather hermetic society as Serbian society is, immediately and now, without giving any space for perception and acceptation of that concept from a side of those who are concerned.

6.2 Activities of national councils so far

Beside rather "bombastic" promotion of nation councils and their significance, all that in practice is rather marginalized. For example, while there were elected members of the Republic Radio and Television Agency (who is determining frequencies for emitting radio and television stations), there weren't elected none of 11 candidates that were all together proposed by all national

[77] Esad Džudžević: Mogućnost uspostavljanja partnerskog odnosa između države i njenih organa i predstavnika nacionalnih vijeća manjinskih naroda, lecture on the round table: Inicijativa za institucionalizaciju Saveta nacionalnih manjina usvajanjem i aplikacijom zakona o njihovim nadležnostima, published in Informator Centra za multikulturalnost, Novi Sad, 18-19. March 2005.

councils. Of course, none of the laws regulating rights and freedoms of national minorities , even no The Law on Republic Radio and television Agency, doesn't have an provision obligating any body, even though for the members of the Republic Radio and Television Agency to elect the members of national minorities. But, not accepting the demands of national councils, which are promoted as the state's partners, significantly weakened the influence of national bodies, just in areas for which they are established. With this action, the objectivity of public information regarding national minorities and their activities has come into question. Also, we can identify the breach of principle of protection of rights of national minorities in general.[78]

Furthermore, the representatives of most of national councils aren't satisfied with the content and quality of programs on languages of national minorities, which have been emitted on programs of public service of Radio Television of Serbia. But, all demands of these bodies stay without answers, or they are answered in a manner that doesn't say anything directly to their problems.[79]

During 2004 there was adopted a law which abolished the possibility for a state to be an exclusively owner of all media houses, so even those on languages of national minorities. Right after that, the Vojvodinian assembly has turned to national councils its right to administrate and care about policies in those cases. The Hungarian national council, which represents the most numerous minority in Vojvodina, administrates with most important media groups in Vojvodina: Magyar szo", magazine for young people "Kepesz Ifyuszag" and weekley magazine "7 Nap". Then, the ownership over magazine " Libertatea" is taken to the Romanian National council, which resulted, as in previous cases, with protests and internal conflicts, change of managers, and a lot

[78] Statement of Tamaš Korhec, secretary for administration, informations and national minorities of the autono,ous provence of Vojvodina.
[79] "Brinemo o manjinama više nego drugi", Dnevnik, 13.03. 2006.

of criticism on political basis.

Similar problems were when magazine "Ruske slovo" was turned to Russian national council. On the other side, some serious misunderstandings weren't present in case of “Hrvatska riječ”, weekly magazine of Croatian national minority in Vojvodina, and Croatian national council, because there's no political party strong enough to take over the whole council[80].

The same decision of vojvodinian parliament made a lot of controversies, and it was a cause of appeal to Constitutional court of Serbia, regarding the constitutionality of itself. The appeal was made by magazines " Libertatea","Ruske slovo", and "Hlas ludu" (magazine of Slovakian national minority).Although the appeal was supported by the previous vice-president of vojvodinian parliament, even from the parliamentary committee on information, the appeal wasn't adopted, from procedural reasons. Constitutional court, because of the lack of interpretation of vojvodinian parliament, examined the appeal by itself and said that there is no such illegal decision.

From the very beginning of this process, the fear was present because of the possibility of arranging the activities of that magazine not on the basis of quality, but on the basis of political compatibility. There were a lot of mechanisms that supported the continuity of those magazines[81], but possibility that a political

[80] "Političari se mešaju u rad medija nacionalnih manjina", available on www.iwpr.net. Also in paper of Dubravka Valić Nedeljković: Privatizacija i transformacija medija na jezicima nacionalnih manjina,books of resumes from tghe international conference: POložaj nacionalnih manjina u Srbiji, SANU,November 2005.

[81] National councels are ought to not to sell out the property of those magazines, and that they're accepting an obligation to continue printing and publishing of mentioned paprers.On the other side, Vojvodinian parliament guaranteed financing of those magazine in amounts at least on the level on which they were financed when they were taken over.It is also limited that national councels cannot lead the editors' policies in these newspapers, but it

party can hold a magazine for its own interests, not for the interests of national minority itself, was really terrifying for minorities.

There were some opinions in public that this should wait till the adoption of new constitution for the Republic of Serbia, as well as till the adoption of new constitutive act for province of Vojvodina. Furthermore, there were proposals that ownership-rights should be transferred to one or more municipalities in which the certain national minority is numerous, or that they should be privatized by transferring some 30%of actions to the employees, and to sell out the rest on the auction.[82]

Certainly, there are some great examples of cooperation of national councils with other governmental bodies in Vojvodina. For example, Secretary for the administration, legislation and national minorities of province of Vojvodina together with the National council of Hungarian national minority held special educational program for administrative staff in governmental bodies, courts and public prosecutors' offices regarding the realization of right on official use of Hungarian language and letter. The whole program is also supported by the Ministry of justice of Republic of Serbia.[83]

National council of Bunjevac national minority has in cooperation with National council for minorities of Serbian government started its own information centre. They're also preparing the books regarding Bunjevac language and grammar. Important activities have been done by their Committee on culture, by giving grants to students which professions are needed in work of this

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just happened in several cases, that are waiting for thier courts epilogue..Dnevnik, 27.05.2004

[82] All proposals made on the round table, organized by the Helsinki comitee for human rights in Serbia, Danas, 17.09.2003

[83] Statement of the Center for development of civil society, regarding the seminar on official use of hungarian language, available on www.crnps.org.yu

council. During the last school year, there have been given three grants, and the competition for the next year is still open.[84]

Protest of national councils of Slovaks and Russians, supported by the secretary of administration, legislation and national minorities for province Vojvodina, because of revoking Slovakian and Russian languages as well as Latin letter as official in municipality of Šid, has resulted with withdrawal of that controversial decision of municipality's assembly.[85]

6.3. Responsibility for the work of national councils

As one of the crucial problems, there is identified a problem of responsibility of national councils. According to known mechanism from the theory of the state, every state's body is responsible for its work to the body that it elected it. In case of direct election, the body is responsible directly to the people. This is a little bit confused mechanism, having in mind that in practice the unsatisfaction of people with the elected body usually ends with its violent withdrawal from its function- with revolution, as radical was of changing society.

On the other side, it is easier to determine responsibility in cases of indirect elections, because, for example, the government is responsible for its work to the parliamentary majority, from which it was formed. But in case of national councils, the whole mechanism is much more confused.

Some treat them as state's bodies, which, if we look from the financial side, is true, because their activities are financed from the budgets of province of Vojvodina and Republic of Serbia. But, according to the rest of parameters: their jurisdiction, way of electing, consultative and partner's role to a state, which have

[84] Subotičke novine, 17.03.2006
[85] Available in book : Sigurnost građana u nedovršenoj državi, str.461-462

been given to them, - they aren't formally the state's bodies. Furthermore, they should be responsible for their work to the body that elected them- that means, to the electors' assemblies, but those were only temporary bodies, designed in order to elect the national councils. Their existence was finished with accomplishing that assignment. Are they responsible to the motional minority which interests are they representing? This is even more problematic, because members of some minorities, especially in Vojvodina are diffusing disposed. Most of them weren't interested to enter the whole process with electing the national councils

Then, it is also not so clear whether there are some laws that are also applicable to members of national councils, such as Law on preventing conflict of interest, Law on access to information of the public significance etc.

7.National council for minorities of the Government of Republic of Serbia

At the very government of Republic of Serbia, it is formed a special body to take care of respect of rights of national minorities. It consists of members, who entered this council because of the nature of their position: ministries of culture, religion, education, internal affairs, justice, local self-government and the prime minister himself, and representatives-presidents of national councils of national minorities, who are 14 at the moment. The council itself was formed to prevent any incident on the basis of nationality, especially, against any member of national minority, and to make better their position in transitional Serbia. It should be formed on the level of state unity, because the legal ground for its forming was in federal law. But, in practice, it seemed more practical to form it on the lower level, level of republic, where live majority of national minorities (and then, the majority of that live in Vojvodina). Also, it seemed rather enough to form a ministry on the level of state unity, which

should deal with issues of protection of human and minority rights. This made the whole legal confusion in this area even more interminable.

But some say that forming of this body was provoked by the election that were held in 2004, and because the question of interethnic conflicts in Vojvodina has come to a level, at least in international level, that was examined even before the Council of Europe.[86]

It should be also emphasized that this body has no jurisdiction at the territory of Kosovo and Metochia, although it is still considered as the integral part of Serbian territory. Albanian national minority (if seen from the aspect of republic of Serbia as whole, they are national minority, but if seen from the side of Kosovo and Metochia, they are majority people) hasn't still formed its national council. The reason for this might be not only the conflicts inside that ethnic community, but also expectations from very soon solution of the status of Kosovo, in sense of decentralization, or even more.

In the last session of this body, according to demands of national councils of Hungarian, Croatian, Bunjevac and Bosniaks, it was adopted a decision regarding symbols and national holidays of those minorities.[87]That means that in days of national holidays of these minorities, certain symbols will be shown on state buildings and other object used by members of these minorities, especially in municipalities where these members are majority. On that occasion, it is clearly stated that only forming of these national councils improved realization and betterment of rights of national minorities in Serbia. Also, there was accepted a suggestion of alliance of Jewish municipalities that in this body also enter representatives of this alliance, although they aren't accepted as

[86] Florian Bieber, Jenni Winterhagen: Ethnic Conflicts in Vojvodina: Glitch or harbinger or Conflicts to Come, ECMI Working Paper Nr.27, April 2006
[87] Danas, 09.01.2006.

any kind of minority and they haven't got their own national council.

8. Councels for interethnic relations

Law on Local Self-government made possible forming the special councils for interethnic relations, which would be responsible for examining the issues of realization, protection and betterment of national equality in multiethnic municipalities. Their function is more consultative, because they're obligated to inform the National assembly for any suggestion that was made in their territory. On the other side, the local (municipalities') assembly is obligated to look for an opinion from these councils regarding any issue of rights of national or ethnical minorities.

Every council consists of members of national minorities that participate with more than 1% of number of inhabitants in that municipality. The members are furthermore assigned by their own national councils, which propose one candidate. In case that any national minority hasn't formed the national council yet, their member in this council would be assigned by the municipalities' committee for administrative and working place relations.[88]

Furthermore, The Council for interethnic relations has a right to appeal before the Constitutional court for examination of constitutionality and legality of any decision or other act of municipality's assembly, if it thinks that certain rights of national minorities (that are members of this council) are infringed. Under the same conditions, the Council may appeal before the main Administrative court, for accordance of any decision of municipality's assembly with the Statute of municipality or any other act.
Above mentioned is very important because the most of the municipalities in Vojvodina have formed such councils so far. So,

[88] Statute of the municipality of Zrenjanin, Art.14.

councils for interethnic relations are formed in Kanjiža (Jun 2005), Zrenjanin (February 2005), Stara Pazova, Subotica, Novi Sad. For example, members of that Council in Zrenjanin are representatives of the most numerous minorities- there are representatives (one of the each mentioned) of Serbs, Hungarians, Romanians, Slovaks and Roma. The members of the council are appointed for the period of 5 years. When this council was formed, it was still undefined the status of Yugoslavs, community which counts, under the data of last inhabitants census in Zrenjanin, 1,94% of inhabitants. Additionally, it's been decided that Yugoslavs can participate in this council.

On the others side, In Novi Sad appeared as problem the participation of representatives of Roma national minority. According to the last inhabitants' registration, from 2002, there are less than 1% of them in entire population of Novi Sad. In the end, because of rather strict interpretation of Statute of Novi Sad rules, they didn't get their representative at all. The same problem appeared also in Subotica, but it was solved with much more diplomacy: Roma got their representative in this council, but without right to vote for any decision.[89]

9.Ministry for human and minority rights of the state unity of Serbia and Montenegro

The Constitutional Charter from 2003 formed on the level of the state unity of Serbia and Montenegro special Ministry for the human and minority rights. The mentioned ministry, by accident or by purpose, when ceding the authority of state unity to Republic of Serbia, become a kind of collateral damage-it's been revoked. The Serbian government has formed special Service for human and minority rights, as a part of the very government, which means that the mentioned Service has more administrative significance, as the organizational part of very large Serbian

[89]According to: Sigurnost građana u nedovršenoj državi, p.461-462

administration, and that all its employees are directly responsible for their work to the Serbian government.

Former secretary of the National council for national minority, body which is formed in 2004 under the very Serbian government, was on the session of Government held in Kragujevac on the 22nd June, appointed for director of this Service. Having in mind that the same person was representing the National council for the national minorities, and also forming of this kind of Service at the same level, a question is raised; does it mean that this body would be revoked soon? Is it a way of showing government's attitude to issues of human and minorities' rights (which is rather ignoring for some time), or is it only a rather neglectful decision, made because of surprisingly fast acquired new independence of Republic of Serbia?

There are also some other practical problems. The government was only principally formed this body, but it is not proper legal ground for its existence. Mentioned Service should be understood as act of good will of Serbian government, which will get its very epilogue-with its beginning-with legal act which will identify its forming. As far as jurisdiction of the former Ministry is concerned, which were delegated to this Service, they should be now understood as measures of technical support to republic parliament, republic council for national minorities in issues regarding protection of rights and freedoms of national minorities.

The service will be acting in issues of protection and betterment of human and minorities' rights, participate in preparing the laws in same areas, follow accordance of domestic legislative to international conventions and other international documents, and will also initiate changes in domestic legislation. The Service will represent republic of Serbia before the European court for human rights, report of taking care of certain international conventions, get answers to certain international bodies which jurisdiction was accepted in certain matters by our country, and

will especially take care of realization of rights of national memories in Serbia. Authority of federal ministry for human and minorities rights are ceded partially to Ministry of justice , Ministry of internal affairs, Ministry of local self-government and to newly formed Service for human and minorities rights.[90]

10.Perspectives

There are rather justified the concerns of national councils of national minorities, which are elected on the basis of a law form 2002. In situation as mentioned, general legal, technical and political decadence, and especially having in mind fact that most of the councils ends their mandates of 4 years in September this year, intervention of legislator in sense of adopting a specialized law on rights of national minorities is much needed. As far as Vojvodina is concerned, in which seat have 7 national councils, 3 of them are in Subotica, concern has wider proportions even because of the increase of ethnically based "incidents", during 2004 and 2005.[91]

Nonetheless, political moves that have been made so far, especially some questions that have been raised before non-competent bodies here and abroad[92], even more emphasize need for solid constitution of national councils of national minorities, not only as the represent and consultants for area of ethno-

[90] Danas 09.06.2006

[91] The increase of such incidents initiated changes of domestic criminal legislationand adoption of new criminal offence of "spreading of racial, confessional and other hatred", also known as"hate speech".In the beginning of July 2006 the first verdict regarding "hate speech" against a memebr of slovakian national minority was adopted, in the Court of First instance for the municipality of Novi Sad. In above mentioned sence, it si also important The Resolution of European parliament on protection of multiethnicity in Vojvodina, which represents a strong framework for establishing better status of national minorities especially in Vojvodina.

[92] Dnevnik, 24.11.2005

cultural rights of minorities, but also as totally equal political factors of Republic of Serbia.[93]

Of course, it is up to newly independent Republic of Serbia to better establish the whole system of protection of rights of national minorities, and also- national councils, and to finally end with political myths that the protection of minorities is " a way beyond than the international standards say" by establishing solid and wider authority, and by proper financial support, this state should show its own tolerance to Others, different from majority, Serbian inhabitants.

[93] According to obligations adopted on the basis of ratified recomendations form Lund regarding the efficient participation of national minorities in political life of a state.

COMPLICITY IN THE CRIMINAL LAW OF BOSNIA AND HERZEGOVINA

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NOTION AND TYPES OF COMPLICITY

Complicity exists if several persons jointly perpetrate a criminal offense. Persons who perpetrate a criminal offense are called accomplices. Thus, the complicity implies participation of several persons in perpetration of one criminal offense and the accomplice is every person who participated in perpetration of that criminal offense[1]. Complicity[2] is not only a special type of criminal offense perpetration but also a special type of

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[1] Many foreign criminal codes define on similar way a notion and characteristics of complicity. In such a way the Criminal code of Ukraine, in the article 19, defines the complicity as intentional joint participation of two or several persons in perpetration of a criminal offense. (M.I. Koržanskij, Popularnij komentar kriminolnogo kodeksu, Naukova dumka, Kiev, 1997); The Criminal code of Slovenia in the article 25 considers that the complicity exists if two or several persons jointly commit a criminal offense so that they participate in perpetration or by some other activities they decisively contribute to its perpetration. (Kazenski zakonik z uvodnimi pojasnili B. Penka in K. Stroliga, Uradni list, Ljubljana, 1999); the Criminal code of Spain, in the article 29, defines a notion of accomplice. So that persons are being considered as accomplices if participate in perpetration of a criminal offense, and also persons who undertake activities that precede to perpetration of a criminal offense, and in that way participate in perpetration of the criminal offense. (N.F. Kuznjecova, F.M. Rešetnikov, Ugolovnij kodeks Ispanii, Zercalo, Norma, Moscow, 1998)

[2] I. Simović Hiber, Thesis on complicity, Archive for law and social science, Belgrade, No. 1-3/1996, pgs. 573-581

criminality, i.e. collective criminality, which is more dangerous for a society than a solitary crime. The collective criminality represents accumulation of criminal energy (criminal volition) due to joint volition of numerous persons in perpetration of one or several forbidden acts.

This joint volition of numerous persons in joint perpetration of a criminal offense gives this offense a special aspect of social jeopardy. Due to its special meaning, the complicity represents an institute that is regulated by definitions of general offense according to the Criminal code of Bosnia and Herzegovina (articles 29-32, Criminal code of Bosnia and Herzegovina-CCB&H[3], articles 31-34, Criminal code of the Federation of Bosnia and Herzegovina-CCFB&H [4], articles 31-34, Criminal code of Brčko District B&H – CCBDB&H [5] and articles 23-27, Criminal code of the Republic of Srpska[6] - CCRS)[7] .

For existence of the complicity, beside participation of several persons in perpetration of a criminal offense, it is necessary to be fulfilled another two conditions: objective and subjective relation. The objective relation means that every accomplice initiates some activity that contributes to perpetration of a criminal offense. All these activities that are initiated by accomplices, no matter to the fact whether they are perpetrated contemporaneously or not, and on the same place or not, must be related so that it leads to the same result – to cause a consequence. The consequence of a criminal offense must be a result of a joint activity of all accomplices. It means that a causal relation must exist between a consequence of criminal offense and every undertaken activity of

[3] Official gazette of Bosnia and Herzegovina No. 3/2003
[4] Official gazette of the Federation of Bosnia and Herzegovina No. 36/2003
[5] Official gazette of the Brcko District of Bosnia and Herzegovina No. 10/2003 and 1/2004
[6] Official gazette of the Republic of Srpska No. 49/2003
[7] D. Atanacković, Complicity in a criminal offense, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, pgs.5-69

several persons[8]. The subjective relation means that all accomplices possess knowledge about a joint activity that is directed towards perpetration of a certain criminal offense. It means further that accomplices know about each other and they know about perpetrators of that criminal offense. But they do not necessarily need to know each other personally. Personal acquaintance may, or may not exist, but it is not relevant for existence of complicity. The most important is that every accomplice knows that beside him/her there are other certain persons participating in perpetration of a criminal offense and a perpetrator of the criminal offense is from that circle of persons.

Participation of several persons in perpetration of a criminal offense may be realized by different activities and on several ways[9]. In such a way, accomplices are all persons who equally participate in perpetration of a criminal offense in a way that they jointly carry out an activity of perpetration of criminal offense or undertake some other activity that decisively contributes to perpetration of that criminal offense. In this case there is complicity. Several persons may participate in perpetration of a criminal offense in a way that some of them guide a perpetrator to undertake an activity of perpetration of a criminal offense while the others help him/her to undertake the activity and cause a consequence of the criminal offense. In the first case, there is incitement, and in the other case there is accessory. Unlike some other foreign criminal codes,[10] which define organizing in criminal

[8] J. Tahović, Criminal law, General part, Beograd, 1961. page 287

[9] M. Tomić, Types of participation in perpetration of a criminal offense, Collection of papers at Law Faculty in Mostar, Mostar 2002, pgs. 85-98

[10] Organizing in criminal organization is known by articles 20-21 of the Bulgarian criminal code or the article 26 of the General criminal code (former Criminal code of SFR Yugoslavia). The French Criminal code in the article 450-1 defines a malicious criminal organization as organized group inclined to perpetrate criminal offenses for which was threaten a punishment in prison and forced labor of 10 years (F. S. Pierra, La Guide de la defense penale, Dalloz, Paris, 2003). On the contrary, organizing a criminal organization as a type of complicity is not known to criminal codes of Macedonia, Croatia, Slovenia or Germany.

organization as a type of complicity, this type of complicity does not exists in the legislation of Bosnia and Herzegovina.

All these types of accomplices may but also may not be represented in perpetration of one criminal offense taking into consideration the fact that complicity is optional in a process of perpetration of a criminal offense. From everything that was earlier mentioned one can conclude that there are three types of complicity: co-perpetration, incitement and accessory[11].

A law theory distinguishes complicity in narrower and broader sense. The complicity in narrower sense is incitement and accessory, while the complicity in broader sense, beside the earlier mentioned forms, is a co-perpetration.

The criminal legislation of Bosnia and Herzegovina defines in a specific way the complicity of legal entities in perpetration of a criminal offense in the article 129, CCB&H, article 133, CCFB&H, article 133, CCBDB&H and article 132, CCRS. For existence of the complicity of legal entities it is necessary that two or more legal entities collaborate in perpetration of a criminal offense. In that case each of the entities is responsible for a criminal offense that a

[11] Different types of complicity are known to a series of modern criminal codes. So that the French criminal code in the article 121-4-7 defines the following forms of complicity: 1) incitement, 2) managing a perpetration of a criminal offense, 3) production, acquiring and delivery of means for perpetration of a criminal offense, 4) providing accessory while perpetrating a criminal offense and 5) mutual cooperation towards perpetration of a criminal offense in a way of cooperation in activities that precede to action of perpetration and collaboration in that action; The Bulgarian criminal code in the articles 20-21defines: incitement, accessory, organizing in criminal organizations and co perpetration; The Spanish criminal code anticipates in the article 17 a specific way of complicity under the name of "agreement or proposal for perpetration of a criminal offense". This type of complicity is punishable only when it is explicitly anticipated by the criminal code. The agreement exists when two or several persons agree or plan to perpetrate a certain criminal offense, and the proposal exists when a person who made a decision on perpetration of a criminal offense propose to another person or group of persons to perpetrate that criminal offense.

perpetrator perpetrated on behalf, for or in favor of a legal entity. Then namely, each of the legal entities is responsible for the perpetrated criminal offense and is punishable with a sentence according to the law as it was the only entity responsible for that offense.

CRIMINAL RESPONSIBILITY OF ACCOMPLICES

A criminal responsibility of accomplices is based on accountability and guilt and is the same as that of perpetrator of a criminal offense. There are no special rules for accountability, which would be valid only for accomplices. But as for the guilt, there are certain differences that do not refer on content of guilt elements but on forms of its demonstration. Namely, a perpetrator of a criminal offense, no matter is it one or more of them, i.e. accomplices, is always responsible for a criminal offense that was perpetrated with premeditation and as for carelessness only when it is defined by the law. However, an inciter and helper as well as accomplices, in narrower sense, are responsible only when a criminal offense was perpetrated with premeditation, what means that the premeditation is the only form of guilt for the accomplices in narrower sense.

The criminal responsibility of accomplices is a personal matter. Namely, every accomplice is independently and personally responsible. It means that criminal responsibility of one accomplice does not depend either on responsibility of offense perpetrator or responsibility of other accomplices. Thus, the criminal responsibility of accomplices is related to undertaking of an act of perpetration by the perpetrator but it is not related to his responsibility as well as responsibility of other accomplices[12]. The responsibility of accomplices, especially of inciters and helpers, is based on two principals: 1) everybody is responsible within the limits of own premeditation and it can not go above that, and 2) everybody is

[12] B. Čejović, Some questions that concern limits of responsibility and punishability of accomplices, Serbia and European law, Book 3, Kragujevac, 1998, pgs. 17-29.

responsible up to the limit achieved by the perpetrator but also not below that. These limits of responsibility of accomplices come from the article 32 of CCB&H, article 34 of CCFB&H, article 34 of CCBDB&H and articles 26 and 27 of CCRS.

Responsibility of accomplices within limits of own premeditation. The accomplices are criminally responsible only for premeditated participation in perpetration of a criminal offense. Their responsibility exists only within boundaries of their premeditation. It means that the accomplice will be criminally responsible for a consequence that was caused by a perpetrator only if it is comprehended by his own premeditation and in such way that he had anticipated. If the perpetrator commit a heavier criminal offense of the same type than the one that was comprehended by premeditation of accomplices, then the accomplice will not be responsible for that heavier criminal offense, but for the easier one that was supposed to be perpetrated by his premeditation. However, the accomplice will be responsible for a heavier consequence that comes from the basic offense (offense qualified with a heavier consequence), if that heavier consequence can be imputed to his negligence. The accomplice will be responsible also for a qualified offense with special circumstances if those circumstances were known to him while participating in a basic offense, i.e. when he was undertaking his own activities in perpetration of a joint offense.

Responsibility of accomplices within limits of what was perpetrated. A perpetrator can do more than an accomplice wanted to do, but also he can do less than that. If the perpetrator do less than it was comprehended by premeditation of the accomplice, then the accomplice will be also responsible for the offense that was perpetrated or tried to be perpetrated by the perpetrator, and will not be responsible for the offense that had been comprehended by his premeditation. The accessory nature of complicity is fully expressed here, whereby the accessoriness is related to the perpetrated criminal

offense[13]. If a criminal offense remained as an attempt, responsibility of accomplices will be also limited to the attempt. Therefore, less is done by the perpetrator, better will be for the accomplice. An exception to this rule exists if incitement is failed, but responsibility of inciter here is not based on accessory but on principal conception. In case that the perpetrator perpetrate completely another criminal offense, i.e. a criminal offense that is not homogenous with the one that was comprehended by premeditation of the accomplice, then the perpetrator will be the only one responsible for a such criminal offense.

Influence of personal features and circumstances. A personal reference, features and circumstances because of which the law excludes a criminal responsibility or permits a possibility for acquitting from a sentence or mitigating the one, can be taken into consideration only to a such perpetrator, accomplice, inciter or helper whom is found with such reference, features, and circumstances (article 32, CCB&H, article 34, CCFB&H, article 34, CCBDB&H and article 26, CCRS). However, there are exceptions where personal features or references that exist with a perpetrator can be a reason for establishing a criminal responsibility of accomplices. These are the cases when a personal feature is en element of nature of a criminal offense. Thus, in such cases, the personal features, references or circumstances that exist with a perpetrator can have an influence at the criminal responsibility of participants.

COMPLICITY

The heaviest form of complicity is a co-perpetration[14]. It exists in a way, according to the article 29, CCB&H, article 31, CCFB&H, article 31, CCBDB&H and article 23, CCRS, when several persons

[13] A.Schonke, H. Schroder, Strafgesetzbuch, Kommentar, 22.Auflage, Munchen, 1995, page 364; E.Foregger, E.Serini, Strafgesetzbuch StGB,9.Auflage, Wien, 1989, page.56 and further on.

[14] More: B. Petrović, D. Jovašević, Criminal law of Bosnia and Herzegovina, General part, Sarajevo, 2005, pgs. 253-259

participate in perpetration of a criminal offense or in some other decisive way jointly commit a criminal offense[15]. It is consciously and willingly a joint participation in perpetration of activities that commit a criminal offense. The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense[16]. For existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act[17].

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a

[15] D. Jovašević, Institute of complicity in the criminal law, Law, theory and practice, Novi Sad, No. 11/2001, pgs. 14-26

[16] Some other understandings about complicity can be found in the theory. In such way, S.Frank is of the opinion that complicity exists always when some person perpetrates some action that would have been done by the perpetrator if he would commit the offense alone. S. Frank, Criminal law theory, General part, Zagreb, 1955, page 180; According to D. Atanacković, accomplice is a person that perpetrates an action without which there would be no perpetration of a criminal offense and which the perpetrator was not able to perform alone. D. Atanacković, Complicity in a criminal offense, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, page 30. Again, LJ. Lazarević is of the opinion that complicity is a conscious and willing joint accomplishment of a criminal offense by several persons. Group of authors, Comment on the Criminal code of SRJ, Belgrade, 1995, page 138

[17] M. Đorđević, Complicity, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1/1988, pgs. 29-36

conscience about joint activity. It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements.

The subjective relation consists of in existence of conscious of all perpetrators to jointly perpetrate an act of perpetration. If there is no conscious then there is no so-perpetration, but every person is occurred as an individual perpetrator of a criminal offense. The subjective relation between accomplices must be distinguished from guilt. The subjective relation between accomplices is a conscious on collaboration in a joint act, while the guilt is a psychical relation of each of them towards the act on which perpetration they worked. These relations must exist in the moment of perpetration of that act.

According to the article 29, CCB&H, article 31, CCFB&H, article 31, CCBDB&H and article 23, CCRS the complicity exists when several persons jointly perpetrate a criminal offense, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution can be made to its perpetration. It means that the Criminal code of Bosnia and Herzegovina accepts the objective-subjective theory. Therefore, two categories of persons can be considered as accomplices: 1) persons that participated in the act of perpetration no matter if they wanted to commit that offense as their own or as somebody else's achievement, and 2) persons that have not participated in the act of perpetration but they participated in some other action by which a decisive contribution was made to the perpetration of that act and who consider the act as their own and as a mutual achievement[18].

[18] D. Jovašević, Institute of complicity in the criminal law, Law, theory and practice, Novi Sad, No. 11/2002, pgs. 14-26

Important element of complicity is in the fact that several persons jointly perpetrate a criminal offense. That joint perpetration is being made in a way that some of the participants perpetrate an action of perpetration described as a criminal offense, while the others participate "in some other decisive way". That way of participation "in some other decisive way" by which is being contributed to perpetration of a criminal offense means that persons who perform such activities that belong to a field of accessory, but which are narrowly related to the act of perpetration so that together they make a whole, will be considered as accomplices. The complicity as a conscious and willing joint participation of several persons in perpetration of a criminal offense may exists in almost all criminal offenses. However, there are such criminal offenses in which the complicity is not possible. They are: delicta propria and personal criminal offenses.

As for the delicta propria or criminal offenses with a special subject, the complicity can exist only when several persons, who have special features that are required by the law for a perpetrator of such offense, participate in its perpetration. It is the case of real official and military criminal offenses, especially where is required a feature of plenipotentiary or commanding officer. The complicity is not also possible with personal criminal offenses, i.e. those offenses that can be perpetrated just by a certain person and only personally. So that, the complicity is not possible with a criminal offense of making a false statement because of that agreed false testimony is not considered as complicity due to the fact that everybody make a statement individually. It is a similar case with infanticide that can be perpetrated only by mother of the child.

A law theory distinguishes several forms of complicity: illusory, successive and unavoidable complicity. 1) Illusory, unreal or parallel complicity exists when several persons participate in perpetration of a criminal offense but without decision on joint perpetration of the activity, so that every person is shown individually as an independent perpetrator 2) Successive or subsequent complicity exists when several persons who participate in perpetration of a criminal offense replace each other in perpetration of the criminal offense, i.e. when the offense is being

perpetrated in phases or shifts or if one person who started perpetration of a criminal offense is joined by another person before the criminal offense is completed, then there is a successive complicity. 3) Unavoidable complicity, the complicity is an institute of optional nature in the most of criminal offenses, it means that it may exist or not. But there are some criminal offenses that can not be perpetrated by one person and it is necessary for two or several persons to participate in its perpetration. Then, there is an existence of unavoidable complicity. With some criminal offenses of unavoidable complicity, actions that are perpetrated by necessary accomplices are being carried out opposite to each other, i.e. it encounters each other. Those are criminal offenses of encountering or divergent criminal offenses (bigamy, incest). Second group criminal offenses of unavoidable complicity make offenses where actions of complicity are being carried out in the same direction and blend together. Those are so called criminal offenses of attainment or convergent criminal offenses (mutiny in arms, mutiny of persons deprived of freedom).

An accomplice is criminally responsible within the limits of premeditation or negligence. Even if the complicity is by rule a willing, i.e. agreed joint perpetration of a criminal offense, in other words premeditated, but it does not mean that a negligible complicity is not possible to occur. The negligible complicity is possible to happen not only compared to a heavier consequence as qualified circumstance, but also compared to basic consequence. Responsibility is within boundaries of premeditation, i.e. negligence, it means that one accomplice either is not responsible for an excess of another accomplice or for actions that the one has perpetrated outside of an agreement. A negligible responsibility may exist only when the law anticipates it to exist for the offense in question.

Criminal responsibility of an accomplice is independent. Responsibility of one accomplice is not dependable on responsibility of other accomplices. All perpetrators do not have to have the same type of guilt, therefore some of the perpetrators act with premeditation and other with negligence while perpetrating the

same criminal offense. The guilt must be independently established for every accomplice. It means that form and level of responsibility must be established for every accomplice. Personal relations, features, and circumstances may benefit or jeopardize only to such perpetrator who possesses all of that but not to the other accomplices. So that, an accomplice who voluntary prevent perpetration of a criminal offense may be relived from a sentence issued by the law.

INCITEMENT

The incitement is premeditated inciting of another person to commit a certain criminal offense. An action of inciter must be directed to provoke or determine a decision at another person to undertake an action by which will be caused a consequence of a criminal offense. Therefore, there is no incitement if the perpetrator already had a firm decision for perpetration of a criminal offense. However, if there was a decision that was not firm enough, i.e. hesitation, and such decision had to be firmed up, then there is an incitement. From the point of view of causality, the incitement occurs as causing of decision of perpetrator to undertake an action of perpetration and accomplish a consequence of a criminal offense. But, if incitement is a reason for decision, it is not a cause for consequence itself. The cause of consequence is an action of perpetration so that the incitement is shown compared to a consequence as its condition.

An action of incitement is consisted of undertaking of activities by which is being influenced on will of other person with an aim to make him perpetrate a criminal offense[19]. Activities by which the incitement is being carried out can be different. So that, the incitement can be made by persuading, showing an interest, giving gifts and promises, abuse of position or special relation

[19] The incitement is, according to the article18, of the Spanish criminal code, direct motivation of a person to perpetrate a criminal offense by public publications, radio and other means for mass communication or popularization of a criminal offense in front of gathered citizens on a public place.

towards a person that is being incited, misleading a person or keeping a person mislead, threat, pointing out a situation that might be unfavorable for a person that is being incited if such person does not perpetrate a criminal offense, etc. Sometimes, the incitement can be made by illusory dissuading from undertaking an action of perpetration but in such way by which it foments to its perpetration.[20].

An incitement is an active activity so that it can be made only by doing it. It can be done by words (in written form or orally), gestures, signs, mimics and concludent actions. In order to have an incitement there must be a certain relationship between inciter and person that is being incited as well as between inciter and criminal offense that is being incited[21].

Inciting on perpetration of a criminal offense must be directed towards one certain person or certain group of people taking into consideration that incitement cause or make firmer a decision of another person so that an inciter must have a possibility to influence on such decision. Such possibility may be if an inciter comes in contact with one certain person or with a certain group of people. Thus, it is not necessary that the inciter has to know exactly the person who is about to perpetrate a criminal offense that is incited by him, but it is sufficient to know that one of the persons from the group, anyone, will perpetrate the criminal offense. On contrary, there is no incitement if an invitation was directed to uncertain group of people, e.g. by advertisement. This type of incitement can have a character of independent criminal offense or propaganda but in that case it is not considered as incitement.

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[20] D. Jovašević, Incitement as form of complicity in criminal law, Law collection, Podgorica, No. 1-2/1999-2000, pgs. 118-134

[21] For existence of incitement it is necessary that the incited person did not have a firm decision on perpetration of a criminal offense at the time of perpetration and that decision was formed just under influence of the inciter while the incited person does not have to be aware of the fact that the decision was made under influence of the inciter (sentence of the Supreme Court of Serbia, Kž. 875/86 dated October 14, 1986)

The incitement must be directed towards perpetration of a certain criminal offense. There is no incitement if the incitement refers to perpetration of uncertain criminal offense. Then, there must be a criminal offense of propaganda but not incitement as a form of complicity[22]. Finally, for existence of incitement it is necessary that incitement of some person on perpetration of a certain criminal offense is done with premeditation. It means that negligible incitement that may exist in practice does not come under criminal responsibility.

The incitement can be direct and indirect. The direct incitement exists when an inciter alone incites another person (incited one) on perpetration of a criminal offense, and the indirect incitement exists when an inciter uses other persons for inciting of the incited person on perpetration of a criminal offense. With the indirect incitement, one person (inciter) incites another person to incite the third person (incited one) to commit a certain criminal offense. The direct incitement can be made not only by one but several persons. In the case that several persons consciously make a joint incitement of one person to perpetrate a certain criminal offense then a co-incitement exists. For the existence of the co-incitement two elements are necessary: joint participation in incitement of another person to perpetrate a certain criminal offense and conscious about that joint action. The indirect incitement occurs always as a co-incitement, especially as successive co-incitement.

There may be also a co-incitement on accessory. Considering the fact that the law considers as an inciter a person who incites on perpetrator to perpetrate a criminal offense, in such way this case is considered as accessory.

[22] Incitement can be made by leading only on perpetration of a certain criminal offense. Therefore, in the situation when the inciter and perpetrator of a criminal offense are on the opposite sides in conflict and have different interests, the inciter could not influence on decision of the perpetrator to perpetrate the criminal offense. (Sentence of the Supreme Court of Kosovo, Kž. 174/78 dated September 6, 1979)

Te inciter is criminally responsible only for premeditated incitement, inciting of another person on perpetration of a criminal offense. Premeditation of the inciter must have a conscious about the incitement of another person to make a decision to perpetrate a certain criminal offense and a wish to make such decision and then to perpetrate an action that commits a criminal offense. Besides the conscious on incitement, inciting of another person to perpetrate a criminal offense, the premeditation of inciter must consist a conscious of all actual circumstances (attributes) of a criminal offense on which the incitement is referred to. However, compared to a conscious of perpetrator that comprehends concrete forms of some characteristics in its realization, the conscious of inciter must comprehend only basic contours of some characteristics and even the whole criminal offense itself. In other words, the conscious of inciter must refer to perpetration of a certain criminal offense by comprehending the action, causative relation and causing of a consequence in its general form and not in its concrete accomplishment with all the details.

An element of will at premeditation of the inciter is represented in a wish of the inciter to provoke, by his actions, a decision of the incited person to perpetrate a criminal offense, i.e. in acceptation that under his influence such decision is being made by the incited person and then in his wish to undertake such action and cause a consequence of a certain criminal offense. For existence of premeditation of the inciter is not important whether an immediate perpetrator, while committing a perpetration, was acting with premeditation or with negligence. It is possible that the inciter with premeditation incites the perpetrator to perpetrate a criminal offense but the perpetration was made with negligence. In the case when the law seeks an intention or motive as en element of a criminal offense, then such intention or motive does not have to exist at the perpetrator but it is sufficient to exist at the incited perpetrator while the inciter is aware of its existence only. If such intention does not exist at the perpetrator but exists at the inciter, then the inciter is considered as indirect perpetrator of a criminal offense.

The inciter, according to the article 30, CCB&H, article 32, CCFB&H, article 32, CCBDB&H and article 24, CCRS, will be punished for a criminal offense on which the perpetrator was incited as if the inciter

had perpetrated such offense. In other words, the inciter is being punished for a criminal offense by punishment that was anticipated for a perpetrator. This equalization in punishment of inciter with perpetrator comes from the fact that the inciter is intellectual author of a criminal offense while the perpetrator is only physical, factual implementer. Punishing of inciter depends on perpetrated criminal offense in boundaries of its premeditation. So that, if a criminal offense was perpetrated on which the perpetrator was incited then the inciter will be punished by a sentence that was anticipated for perpetration of such offense. If the offense remained as an attempt then the inciter will be punished for an attempt if an attempt of such offense is punishable. In such case the inciter and perpetrator may be punished less severe then it would be in the case of perpetration. The inciter may be relieved from a sentence in the case if he voluntary prevents perpetration of a criminal offense.

NEGLIGIBLE INCITEMENT THAT IS PRACTICALLY POSSIBLE IS NOT PUNISHABLE.

An unsuccessful incitement exists in the following three cases: 1) when the inciter with his incitement fails to create, i.e. to make firmer a decision of the incited person, 2) when the inciter succeed to create or make firmer a decision of the incited person, but the person never perpetrated a criminal offense for any reason, and 3) when the inciter creates or make firmer a decision of the incited person but the person perpetrate completely some other criminal offense independently from the action of incitement. According to the article 30, paragraph 2, CCB&H, article 32, paragraph 2, CCFB&H and article 32, paragraph 2, CCBDB&H, the unsuccessful incitement is punishable if for a criminal offense, which was incited to be perpetrated, can be imposed a punishment of imprisonment for a term of three years or even more severe punishment. According to the article 24, paragraph 2, CCRS, the unsuccessful incitement is punishable only if the action of inciter was directed towards perpetration of a criminal offense for which can be imposed a punishment of imprisonment for a term of five years or even more severe punishment, and the criminal offence has never even been

attempted.Then, the unsuccessful inciter is being punished as if he had attempted to perpetrate a criminal offense.

In some cases the criminal codes anticipates that leading to perpetration of a criminal offense is the same as an action of perpetration of independent criminal offense. In such cases the incitement is not considered as a form of complicity, but as a form of independent criminal offense.

Such criminal offenses are the following: organizing of a group and incitement on perpetration of criminal offenses of genocide, crimes against humanity and war crimes, incitement on suicide and accessory in a suicide, calling for a violent change of constitutional structure. If the incitement is considered as a criminal offense by the law then the action of incitement itself represents an independent criminal offense that can be achieved as an accomplished offense or it can remain as an attempt. The criminal offense is accomplished if the action of incitement is completed and that is in the case when the incitement was made on a incited person while at this matter it is not significant if that incitement was successful or not. Thus, successful and unsuccessful incitement is considered as an accomplished criminal offense of incitement. An attempt of incitement exists in the case when the action of incitement is undertaken, but for any reason it has not made an influence on a will of a person who was incited (e.g. when a written letter was addressed and sent but it never reached hands of addressee).

ACCESSORY

The accessory is a premeditated undertaking of action by which is contributed to a perpetrator to perpetrate a certain criminal offense (article 31, CCB&H, article 33, CCFB&H, article 33, CCBDB&H and article 25, CCRS). The action of helping is consisted of undertaking such activities by which the action of perpetration is not accomplished, but it is contributed to its accomplishment. Compared to perpetration, helping does not cause a reason but a condition of a consequence. Activities that make accessory are outside of action of perpetration. Thus, helper does

not participate in perpetration of a criminal offense but it contributes to a successful accomplishment of the perpetrator. That contribution consists of making favorable conditions and assumptions for undertaking the action of perpetration and causing a consequence of a criminal offense[23].

The accessory can exist only when a perpetrator already had a decision to perpetrate a criminal offense. From there, if there is no such decision then there is any accessory. In such case there could be an incitement but not the accessory. From there, the basic difference between incitement and accessory comes from, because of the fact that the incitement can exist until a decision for perpetration of a criminal offense is not made and the accessory can exist only after such decision was made by the perpetrator of a criminal offense. From the other side, the accessory may exist before and during perpetration of a criminal offense but not later. Exceptionally, the accessory can exist even after the action of perpetration is undertaken, but before occurrence of a consequence of a criminal offense. It is so called inter-accessory. Helping that is provided after perpetration of a criminal offense has a character of independent criminal offense. But in this case it can be accessory if that accessory was promised in advance before perpetration of a criminal offense.

Even for the accessory it is necessary that a certain relationship exists between helper and perpetrator of a criminal offense as well as between helper and the criminal offense, which is being assisted. The helper must know that there is a person who will perpetrate a criminal offense and who is a person to be provided with accessory by undertaking activities that will enable or make easier to a perpetrator to perpetrate a criminal offense. While at that matter it is not necessary that he knows personally a perpetrator, it is sufficient to know that it would be a person from a certain circle[24].

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[23] See: D. Petrović, Accessory as a form of complicity, Belgrade, 1994; D. Jovašević, Institute of accessory in perpetration of a criminal offense – theoretical and practical aspect, Journal of AK Vojvodina, Novi Sad, No. 7-8/1999, pgs. 223-241.

[24] For the accessory in perpetration of criminal offense it is not necessary that helper personally knows a perpetrator of a criminal offense but it is sufficient to know that there is a conscious of helping other persons in perpetration of a

From the other side, the accessory must be directed towards perpetration of one certain criminal offense. A helper should know that he contributes to perpetration of a certain criminal offense. Finally, for existence of accessory it is necessary an existence of premeditation of helper.

Considering the fact that accessory can be undertaken by different activities, the criminal code defined in the paragraph 2 that the following, in particular, shall be considered as helping in the perpetration of a criminal offence: 1) giving advice or instructions as to how to perpetrate a criminal offence, 2) supplying the perpetrator with tools for perpetrating a criminal offence, 3) removing obstacles to the perpetration of criminal offence and 4) prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or items acquired by perpetration of the criminal offence. In the matter of undertaking the activity by which is contributed to perpetration of a criminal offense, helping is accomplished and several persons may participate in perpetration of a criminal offense so that there is so called co-accessory[25] .

There are several types of helping considering the following: character of activity, way of extending a help, time of help and way of perpetration of the helping activity.

Considering the character of activity, helping can be physical and psychical. The physical helping exists when activates of physical, material character are undertaken by which is contributed to perpetration of a criminal offense (acquiring means for perpetration of a criminal offense, removing obstacles, surveillance of facilities where will be perpetrated a criminal

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criminal offense, i.e. it is not significant if the previous agreement between perpetrator and helper existed or not as well as whether they had a mutual relation or not (sentence of the Supreme Court of Serbia, Kž. 232/86 and sentence of the Supreme Court of Monte Negro, Kž. 240/80)

[25] M. Tomić, Accessory in perpetration of a criminal offense, Advocacy, Belgrade, No. 12/1986, pgs.27-33

offense, accommodation of a perpetrator before perpetration of a criminal offense). The psychical accessory exists when the activities of psychical nature are undertaken (giving advices and instructions for perpetration of a criminal offense, encouraging a perpetrator to persist in perpetration of criminal offense, giving promises in regard with concealing the traces of the criminal offense or items acquired by perpetration of the criminal offence).

According to the way of extended help, the accessory can be direct and indirect. The direct accessory exists when a helper alone undertakes activities by which he enables, make easier or contribute to a perpetrator to perpetrate a criminal offense. The indirect accessory, however, exists when a helper provides accessory through somebody else, i.e. indirect helper. The indirect accessory exists even when one person provides help to indirect helper or indirect inciter. So that, the indirect helper will be a person who gives advices and instructions to an indirect helper how to assist a perpetrator in perpetration of a criminal offense. The incitement on helping is also an indirect helping as well as helping in the incitement.

Considering the time of helping, one can distinguish a previous, simultaneous and subsequent accessory. The previous accessory exists when a helper undertake activities on providing a help to a perpetrator of a criminal offense before the perpetrator undertook an action of perpetration. The simultaneous accessory exists when a helper provides a help to a perpetrator during perpetration of a criminal offense. The subsequent accessory exists when a helper, after a perpetrator perpetrated a criminal offense, provides a shelter, hide things, remove traces, etc. This subsequent accessory is considered a complicity only if it was promised in advance.

There is one more special case of extending a help to a perpetrator after perpetration of a criminal offense, which is called a contact with a criminal offense, concealing (or supporting). A contact can be made in several ways: hiding a perpetrator of a criminal offense, traces of criminal offense, tools used for perpetrating a criminal offence, items acquired by perpetration of a criminal offence but also concealing a criminal

offense itself. Concealing was considered in the earlier legal theory as accessory in the real sense of that word. But lately, this understanding was abandoned because it is practically impossible to participate in a criminal offense that was already perpetrated, where there was already a forbidden consequence. In such case any conditionality of occurred consequence is excluded.

Concealing can be: actual (where traces or items of a criminal offense are hidden) and personal (helping a perpetrator of a criminal offense not to be discovered and arrested, i.e. convicted). Therefore, the concealing itself does not represent accessory in a criminal-law sense, but a promised concealing if it was done before perpetration of a criminal offense represents accessory as a form of complicity. If the concealing was not promised priory, to a perpetrator, it is punishable only if the law anticipates it as an independent criminal offense.

Finally, compared to a way of perpetration of activity, it can be positive and negative. The positive accessory is achieved by doing it (active action), and the negative accessory is helping by doing nothing. Helping by doing nothing can be achieved only in a case when there is an obligation of helper to do it.

A criminal responsibility of helper according to the article 31, paragraph 1, CCB&H, article 33, paragraph 1, CCFB&H, article 33, paragraph 1, CCBDB&H and article 25, paragraph 1 CCRS, exists only if a perpetrator acts with premeditation. A negligible accessory does not represent accessory in a criminal sense. Helping can be done with direct or possible premeditation. The direct premeditation exists only in a case when a helper knew that by his actions contributes to a perpetration of a criminal offense and he wanted to achieve his contribution by doing so. The possible premeditation exists in a case when a helper was aware that his actions can contribute to perpetration of a criminal offense so he agrees to achieve that contribution by doing so.

Premeditation of a helper must contain a conscious about all characteristics of a criminal offense. In other words, the helper must be aware of all those

actual circumstances of the offense, of which the perpetrator of the criminal offense is aware of as well. A conscious about illegality of helping in a criminal offense of the perpetrator, about his personal features and circumstances, is demanded only when illegality, personal features or circumstances are shown as an element of a certain criminal offense. Criminal offenses for which is required an intention or motive, for responsibility of a helper it is sufficient that the intention or motive existed with a perpetrator and that it was known to him. If in this case the intention or motive exists with a helper and not with a perpetrator, then the helper will not be hold responsible for a such offense but for the offense that will hold a perpetrator responsible. The helper can not be indirect perpetrator of a criminal offense except in special cases anticipated by the law.

A helper has to know that his actions assist a perpetrator to achieve a criminal offense and it means that he had to know for perpetrator's presence, but he does not have to know him necessarily. But for establishing an existence of criminal responsibility of helper, it is not decisive that a perpetrator acted with premeditation while perpetrating a criminal offense. He can be criminally responsible even when a perpetrator perpetrated a criminal offense with negligence. If a perpetrator perpetrated a criminal offense then a helper will be punished that offense as if he perpetrated it alone, but he may be also punished less severe. A possibility for less severe punishment of helper comes from the fact that he is not intellectual or factual author of a criminal offense, but a person who contributed to perpetration of a criminal offense. Less severe punishment of helper is optional. It means that its application depends on judgment of the court in each concrete case. If a criminal offense remained as an attempt, the helper will be punished for an attempt, under the condition that an attempt of that offense is punishable by the law.

Finally, the helper can be relieved from a sentence if he voluntary prevents perpetration of a criminal offense (article 32, paragraph 2, CCB&H, article 34, paragraph 2, CCFB&H, article 34, paragraph 2, CCBDB&H and article 26, paragraph 2, CCRS).

Unsuccessful accessory exists when a helper achieves an action of helping and the assisted perpetrator does not undertake an action of perpetration or perpetrate a criminal offense independently from the helping action. Unsuccessful accessory is not punishable.

In some cases anticipated by the law, helping is incriminated as independent criminal offense. It means that by taking an action of helping there is a criminal offense for which the law imposes a certain type and size of punishment. Such is the case of e.g. criminal offenses: leading into suicide and helping in suicide, allowing conclusion of prohibited marriage, allowing enjoyment of narcotics, financing terroristic activities, accessory to a perpetrator after perpetration of a criminal offense.

Helping may be incriminated as a criminal offense even in the case when a perpetrator is not being punished. Such is the case in helping in suicide that remained as an attempt, although a person who attempted a suicide is not being punished. Or in the case of illegal termination of pregnancy, it is incriminating to help a pregnant woman to make an abortion, although the pregnant woman is not being punished for making an abortion over herself. These two cases are exception from the rule that a helper can not be an indirect perpetrator.

The accessory as a type of complicity and accessory as a criminal offense are excluding each other and there can not be a concurrence. If the accessory was promised in advance, and even extended after perpetrated offense, then the accessory will exist as complicity, and if the accessory was not promised in advance then the accessory will exist as independent criminal offense, i.e. as accessory to perpetrator after perpetration of a criminal offense.

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THE ESSENTIAL LEGAL EFFECTS OF ADOPTION ON THE RELATIONSHIP BETWEEN PARENTS AND CHILDREN IN ROMAN LAW

Dr. Erkan KÜÇÜKGÜNGÖR

I. GENERAL CHARACTER OF ROMAN FAMILY

A. The Nature and Content of Paternal Power *(Patria Potestas)*

Unlike the classical law on marriage rooted from the Roman *humanitas* and having common characteristics with our modern law, the classical law on the relationship between parents and children was based on strict rules of old law and therefore was primarily far from having humanistic values[1]. The *familia*, in Roman law, in its technical and strict sense, consists of a community of subordinated people gathered under the authority of *pater familias,* such as all sons and daughters (*filii,filiae familias*) including the adopted ones and their descendants, the wife as long as the marriage is based on *manus,* free persons in the position of slaves (persons in *mancipii causa*) and slaves. As a specific characteristic of rules of Roman law regarding parents and children, *patria potestas* formed the central institution granting the absolute powers to *pater familias*. The absolute powers of *pater familias* had been gradually limited by the sacral rules and customs, and finally by rules on private law in the Principate period. Under the aforementioned system, unlike the Greek and German systems, the age was not the identifying indicator for being *pater familias,* all male *civis*, whatever their

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[1] Schulz, F.: Classical Roman Law, Oxford 1969, p. 142; Muirhead, J.S.: An Outline of Roman Law, Glasgow 1947, p. 68; Talamanca, M.: Istituzioni di diritto romano, Milano 1990, p. 119.

age, were subject to the authority of their *pater* until his death, accordingly, they were given that title only after their fathers' death[2]. In that sense, in the Roman family only the *pater familias* retained the title *sui iuris* dominating the other members of the family, the *alieni iuris*[3].

Introduction of the *maternal potestas* by law in province and custom, on the other hand, was not accepted by classical and later Roman law[4].

As a matter of fact, the concept of *patria potestas* was the predominant factor that was regulating the relationship between parents and children. The lawyers in charge of application of the classical rules were opposed to radical changes as the were suggesting that the fundamental component of Roman law was *patria potestas* due to its unique character and therefore were not keen on applying rules that would moderate the severe effects of the *patria potestas*. As a result somehow rigid rules that were effective on parent and children relations have been kept even in the classical period until they were finally modified by the amendments of the Christian rules[5].

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[2] Kaser, M. (Translated by Dannenbring, R.): Roman Private Law, Durban 1965, p. 256; Buckland, p. 107; Leage, p. 90; Muirhead, p. 68; Nicholas, p. 66; Watson, p. 33; Lindsay, H.: Adoption and Succession in Roman Law, Newcastle Law Review, 3, 1998-1999, p.58; Schwarz, A.B. (Translated by Rado, T.): Roma Hukuku Dersleri *(Courses on Roman Law)*, İstanbul 1965, p. 217; Umur, Z.: Roma Hukuku *(Roman Law)*, İstanbul 1982, p. 383.

[3] Watson, A.: Roman Law and Comparative Law, Georgia 1991, p. 33; Buckland, W.W.: A Text-Book of Roman Law from Augustus to Justinian, Cambridge 1950, p. 101; Leage, R.W.: Roman Private Law, Founded on the Institutes of Gaius and Justinian; London 1942, p. 79; Nicholas, B.: An Introduction to Roman law, Oxford 1962, pp. 65-66; Karadeniz-Çelebican, Ö.: Roma Hukuku *(Roman Law)*, Ankara 2004, p. 155; Erdoğmuş, B.: Roma Hukuku *(Roman Law)*, Istanbul 1992, p. 121.

[4] Schulz, pp. 142, 144; Leage, p. 79.

[5] Schulz, p. 142; Muirhead, p. 68; Koschaker, P./ Ayiter, K.: Modern Özel Hukuka Giriş Olarak Roma Özel Hukukunun Anahatları *(The Main Institutions*

B. Specific Powers of *Pater Familias*

Pater familias had the authority to decide on the life and death of the persons under his control *(ius vitae necisque)* as well as to apply slight punitive measures. However, this power had been eliminated first by being limited to the exceptional cases in Principate period, and finally ceased to exist for killing of children in *familia* which was categorised as murder *(parricidium)* and subject to sanction of death in Constantine period *(CTh. 4.8.6 pr.; C. 8.46.10)*[6]. With respect to the slight punitive measures the power of the father was limited to application of rational punishment[7]. Classical law did not have preventive rules for abandoning of new-born children; however, the rights of the people who saved the abandoned children (*expositus)* were later regulated[8].

The child under power could be alienated by *pater familias* across the *Tiber* (*trans Tiberim)* by the application *of mancipatio.* In this case the child's legal status converts into a *quasi*-slavery (*in mancipio esse*). This meant that the child was regarded as a free man but his rights remained in suspense until he was manumitted by his acquirer[9]. There is not enough evidence proving that in early periods a sale of children for economical reasons had been possible. However, it has been suggested that the sale of a child, commonly for being used a worker, could be possible for a reasonable price depending on a fiduciary agreement that provided the redemption of the child by his father[10]. Moreover, in case of child's being sold three times by

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of Roman Private Law as an Introduction to the Modern Private Law), Ankara 1983, p. 325.

[6] Honig, R. (Translated by Talip, Ş.): Roma Hukuku *(Roman Law)*, İstanbul 1938, p. 182; Kaser, p. 257; Leage, p. 90; Nicholas, p. 67; Talamanca, p. 121; Erdoğmuş, p. 122.

[7] Talamanca, pp. 120-121; Buckland, p. 103.

[8] Buckland, p. 103; Nicholas, p. 67.

[9] Kaser, p. 257; Nicholas, p. 67; Honig, p. 182.

[10] Kaser, p. 257; Leage, p. 90; Erdoğmuş, p. 122; Koschaker/ Ayiter, p. 326.

his *pater familias*, the absolute rights of the father on the children were ceased. Accordingly, there was no possibility of restoring those rights even under the situation of the child's later emancipation[11]. Although the original aim of the aforementioned rule is not clearly identified, the later application areas of the rule in practice were *adoptio*, *emancipatio* and *noxae deditio*[12].

In the fourth century when there was a strong economic distress, Constantine allowed the selling of a new born child for protective reasons, such as to prevent the children from being abandoned. Compatible to main aim of that rule, the father kept the right to retrieve the child in return of either a reasonable amount of money or a slave (*Const. vat. 34; CTh. 5.10.1)*[13]. Later, under the influence of the church regarding restriction of this rule, in Justinian time those sales were only limited to the specific conditions, basically occurred from the serious indigence. The child could be given the freedom by any person in exchange for a specific amount of money or a slave *(C. 4.43.2; CTh. 5.10.1)*[14].

In the earliest times of Roman law, the *pater familias* in the need of protecting his *patria potestas* had the right to use a *vindicatio*, just like *rei vindicatio* in the Roman law of property, against everybody retaining his children in an illegal manner. In classical time, however, this remedy was replaced by a *praeiudicium* given by the *praetor* which was a special proceeding in order to find out the person who had the power over the child *(Ulp.D. 43.30.1 pr.: 3 pr.)*[15]. Other than these remedies the *pater familias* did have some interdicts provided by the *praetor*, such as *interdictum de liberis exhibendis* which was applied for

[11] Kaser, p. 258; Schulz, p. 146; Honig, p 182; Koschaker/ Ayiter, p. 326. The XII Tables (4.2) provided: *"Si pater filium ter venum duuit, filius a patre liber esto"*.
[12] Kaser, p. 258; Leage, p. 90; Nicholas, p. 67. Though children were sold into slavery by their parents, such transactions of sale and pledge were not recognised by *Paulus (5.1.1)* and prohibited by the emperors: Buckland, p. 103.
[13] Kaser, p. 258; Buckland, p. 103; Leage, p. 90; Nicholas, p. 67; Honig, p. 182.
[14] Kaser, p. 258; Buckland, p. 103; Leage, p. 90; Honig, p. 182.
[15] Kaser, p. 258; Buckland, p. 103; Honig, p. 182; Koschaker/ Ayiter, p. 327.

identifying the child in court and *interdictum de liberis ducendis* which was used for taking back of the child[16].

C. Beginning of *Patria Potestas*

1. *Patria Potestas* created by birth

Birth was the fact that had given rise to the *potestas* for a legitimate child as long as such paternal power arose in a lawful marriage *(matrimonium iustum, iustae nuptiae)*[17] and both child and his father were subject to *ius civile*[18].

A child was regarded as legitimate under the condition that he/she was born in a lawful marriage (*matrimonium iustum).* If he/she was born before the marriage he was not regarded as legitimate[19]. More clearly, in order to be accepted as legitimate, the child had to be born at earliest on the seventh month after the marriage and if the marriage was ended at the time of birth, the birth could not have been later than the tenth month after the ending of marriage[20]. The recognition of the child born during the aforementioned time limits was under the discretion of the husband. Once the recognition occurred, its effect was unquestionable[21]. In case of refusal of child by the husband the praetor had given an action against refusal and this action was

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[16] *"Moreover, the seizure and taking away of the person in power by formal manus iniectio was possibly equally as in early law: this manus iniectio could only be countered by vindication":* Kaser, p. 258. See also, Buckland, p. 103; Honig, p. 182; Koschaker/ Ayiter, p. 327.

[17] Di Marzo, S. (Translated by Umur, Z.). Roma Hukuku *(Roman Law)*, İstanbul 1954, p. 137; Talamanca, p. 124; Kaser, p. 261; Leage, p. 80; Karadeniz-Çelebican, p. 157.

[18] Kaser, p. 261; Leage, p. 68.

[19] Schulz, p. 142-143; Buckland, p. 104-105; Muirhead, p. 68.

[20] Talamanca, p. 124; Kaser, p. 261; Burdick, p. 245; Erdoğmuş, p. 124.

[21] *Paulus, D. 2.4.5: "pater is est, quem nuptiae demonstrant"*

later improved by *Senatus Consultum Plancianum*[22]. However, Schulz is of the opinion that in classical law no presumptions existed with respect to proof of legitimacy. He suggests that the only maxim that exists in *Paulus, D. 2.4.5*, "*pater is est quem nuptiae demonstrant*", is not enough to support the existence of that presumption. Likewise, according to him, there were no presumptions regarding the time of conception in classical law, because the rule that assumes the conception to be between the 182nd and the 300th day before birth that exits in the continental common law cannot be regarded as classical[23].

On the other hand, there was an additional condition to be a legitimate child (that falls under Roman *patria potestas*) suggesting that both husband and wife should be Roman citizens, or the father, being a *civis Romanus*, had to have the capacity of Roman marriage *(conubium)* with the mother. In all cases, however, the marriage should have been the one valid at *ius civile (G. 1.55 et seq.)*. If those conditions were not fulfilled the child could not be legitimate under *ius civile*, but *ius gentium* (peregrine law)[24].

2. *Patria Potestas* Created by Legal Acts

There was only one basic legal act which was known as *adoptio* (*optio*=choice, option) in classical Roman law in order to establish *patria potestas*. That act had two forms that differed in many ways from each other: *adoptio* of a *homo sui iuris*, in its technical sense named as *adrogatio* and *adoptio* of a *homo alieni iuris*, namely *adoptio* in the narrower sense[25]. There was no other way to legitimate the illegitimate child apart from adoption in classical law. As *legitimatio per subsequens matrimonium* was

[22] Kaser, p. 261. See also, *Ulp., D.25.3.1 pr. et seq.*
[23] Schulz, p. 143.
[24] Kaser, p. 261; Buckland, p. 104; Koschaker/ Ayiter, p. 329; Muirhead, p. 68.
[25] Talamanca, p. 125; Schulz, p. 143; Buckland, p. 121.

alien to the classical Roman law, marriage of parents after birth did not spontaneously lead to the legitimation of the child[26]. Likewise there was no application of *legitimatio per rescriptum principis in classical law*[27]. As for Roman soldiers did not have a right to marry until *Septimius Severus,* cohabitation without legal marriage (concubinage) was the only possible way for them. For this reason, their children were not regarded as legitimate and were not subject to a *patria potestas* but these children, because of *missio honesta* of Roman soldiers, were granted Roman citizenship[28].

The generally accepted reason for adoption was the religious purpose, that is, the motive of keeping the continuity of the *sacra familia* (family cult) for the unproductive persons. Although the religious purpose had lost its influence in time, the common motive to survive as a family remained in existence especially by way of adoptions in Roman families for many centuries. These reasons, in early times the continuance of the family cult and later the perpetuation of the family, had much more importance in Roman society compared to the modern communities[29].

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[26] Burdick, W.L.: The Principles of Roman Law and their Relation to Modern Law, New York 1938, p. 244; Schulz, p. 143; Leage, p. 81. It is commonly accepted that Constantine, the first Christian Emperor, recognised the legitimation by subsequent marriage of the parents: Leage, p. 81; Burdick, p. 244.

[27] In Justinian time, in cases where *legitimation per subsequens matrimonium* was impossible, if for example the mother was not alive or married to another, a rescript could be obtained upon the request of the father to grant the natural children the legal position of a legitimate born child. This could be possible under the condition that there were no legitimate children. : Leage, p. 82.

[28] Schulz, p. 143. For the full text and its English translation, see: Gordon, W.M./ Robinson, O.F.: The Institutes of Gaius, Edinburgh 1988, pp. 86, 189.

[29] Di Marzo, p. 138; Lindsay, Roman Adoption, p. 61; Nicholas, p. 77; Kaser, p. 261; Leage, p. 87; Muirhead, pp. 68-69; Erdoğmuş, p. 124. For Greek law see, Lindsay, H.: Adoption in Greek Law: Some Comparisons with the Roman World, Newcastle Law Review, 3, 1998- 1999, p. 107. According to Schulz, *"the only purpose of adoptio is to bring patria potestas into existence and it can not be applied to other purposes. A mere relationship of parent and child without patria potestas can not be created by adoptio. It is for this reason that women*

II. TYPES OF ADOPTION AND THEIR CONDITIONS

There are two kinds of adoption which has different characteristics and legal effects; namely, *adrogatio* and *adoptio*[30].

A. *Adrogatio* as a Legislative Act

The kind of adoption by which a *sui iuris* adopted another *sui iuris* was known as *adrogatio*. The basic effect of this way of adopting was that it resulted in the ending of a family as the adopted *sui iuris* could no longer keep its title[31]. *Adrogatio* has gone through some changes in time, however, the basic form retained as the same due to its important features. The initial investigation was being conducted by the pontiffs on the basis of admissibility. The basic test was whether the case before them fulfilled all the legal conditions or not. If the actual case passed the first investigation, then the *comitia curiata* was convoked and directed by the *Pontifex Maximus* at specific times of the year to examine the case[32]. During the proceedings the approval of all the parties; namely, the adrogator *(adrogans)*, the *adrogatus* and the members of the *comitia curiata*, were required. Once the approval was maintained by them, the adrogated person became

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were inevitably debarred from adopting, since a woman can not have patria potestas and materna potestas did not exist. An adoptio in fratrem known to peregrine law was expressly rejected by Roman law.": Schulz, p. 144.

[30] In order to *e*xpress the institution of adoption the terms *adrogatio* and *adoptio* were exchangeably used by both *Gaius* and Justinian. For adoption, their common reference was *adoptio imperio magistratus* and for *adrogatio*, *Gaius* used the term *adoptio populi auctoritate* while Justinian preferred *principali rescripto*: Leage, p. 87, fn. 1.

[31] Buckland, p. 124; Leage, pp. 85-86; Muirhead, p. 69; Watson, p. 34; Lindsay, Greek Adoption, p. 97.

[32] Talamanca, p. 125; Buckland, p. 124; Leage, p. 86; Nicholas, p. 77; Kaser, p. 261; Nicholas, p. 77; Watson, p. 34. The act of *adoptio* had to be made in Rome as the *comitia* could only gather there. If it was done by imperial rescript, however, any location could be preferred: Nicholas, p. 77; Buckland, p. 125; Leage, p. 87.

a *filius familias* of the adrogating one. The legal effect of this was that the original *sacra* of the adrogated person were no longer able to exist[33]. Both the legislative background and the detailed case procedures regarding the *adrogatio* was actually the result of this destructive effects on the families[34]. In the following periods, the *comitia curiata* began to consist of thirty lictors as representatives of the citizens. However, the proceeding regarding the *adrogatio* remained unchanged; the judicial inquiry and consents of the parties etc. were still necessary. It was the Diocletian time when this old system has gone through a material change. *Diocletianus* has declared that the rescript of the emperor would be enough instead of the vote of the *comitia* and this new form of *adrogatio* has been followed by Justinian as well[35].

The adoption in *comitia* as a legislative act included the performing of *rogatio*. In that sense the explanation of *Gaius* on that subject *(1.99-107: "dicitur 'adrogatio', quia et is qui adoptat, rogatur ... et is qui adoptatur ...")* is spurious. In fact the consents of the *adoptans* and the *adoptandus* were necessarily required before the *pontifex* in the aforementioned procedure. Likewise, it could also be the case that they attended the *comitia* and gave their consents[36]; however, Schulz was opposed to the idea that the presence and consents of the parties in the comitia were legally

[33] Nicholas, p. 77; Buckland, p. 124-125; Kaser, p. 261; Leage, p. 86; Muirhead, p. 69.
[34] Nicholas, p. 77; Watson, p. 34.
[35] Talamanca, p. 126; Di Marzo, p. 139; Buckland, p. 124-125; Kaser, p. 261; Leage, pp. 86-87.; Umur, Roma, p. 392. The *formula* was as follows: *Gellius 5.19.9: "Velitis iubeatis, utiL. Valerius L. Titio tam iure legeque filius siet, quam ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita, uti dixi, ita vos Quirites rogo"*
[36] Buckland, p. 127; Leage, pp. 86-87; Di Marzo, p. 139. The consent of the *adrogatus* was necessarily required as he was one of the parties to the act. Accordingly, if it was not possible for him to give his consent due to insanity, deafness of dumbness, he could then not be adrogated: Buckland, p. 127.

necessary[37]. According to him the only obligatory components in that procedure required by the legislative act were the existence of the *pontifex* and the vote of the *comitia*[38]. In that respect, as the attendance of the *adroganda* was not required, the legal disqualification of women regarding the attendance to the *comitia* could not be a reason underlying the rule that the women could not be adrogated[39]. In fact the republican pontiffs had reached to the decision that the woman could not be adrogated with the idea that the continuity of the family could not be maintained through women[40].

The situation where a person appointed another as his son and heir after his death was called *testamentum calatis comitiis*, adrogation in contemplation of death. This was the example of a concept derived from the adrogation in which the effects were delayed until the testator's death on the condition that the heir would be alive at that time[41]. If the appointment of someone as heir was realised under the condition of the heir's taking the *nomen gentile* of his testator, then it would be necessary for the appointed to accomplish the condition determined by the testator, accept the inheritance and make an application to the pontiffs for realisation of adrogatio[42]. It is difficult to comment on whether in early law this kind of adrogatio consisted of a condition applied only to the *sui iuris* as adopted son, because such action disappeared at the pre-classical time[43]. The formula that was applied by the *pontifex maximus* while applying the

[37] Schulz, p. 144. Though the consent of the *adoptandus* was necessarily required in early law, it is not clear whether it was required in the classical law as well: Buckland, p. 124.
[38] Schulz, p. 144.
[39] Schulz, p. 144. For a different view, see: Leage, p. 87.
[40] Schulz, p. 144. Also see, Buckland, p. 125, fn. 11.
[41] Kaser, p. 262. According to Schulz, "*since the presence of the adoptans was not required, a posthumous adrogatio (viz. after the death of the adoptans) was possible (Adrogatio per testamentum)*": See, Schulz, p. 145.
[42] Schulz, p.145.
[43] Kaser, p. 262.

general rule to the specific case was: "*Velitis iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset ante testamentum a L. Titio factum*"[44]. The information regarding the adoptions by will *(adoptio per testamentum)* rooted from the Greek law is maintained basically from the literature sources rather than lawyers. One form of its application in Rome that puts an obligation on the heir to take the name of the testator was based on a moral duty. One of the most well known examples of such a transaction was the adoption of *Octavius* (later the Emperor *Augustus*) by *Julius Caesar*. This adoption was, however, confirmed by the *comitia curiata* so that it could be categorised as adrogation[45]. However, as the pontiffs were reluctant to execute this type of *adrogatio*, they have applied it only in exceptional cases. Accordingly, reference to that transaction can neither be found in the Digest itself nor in the elementary treatise of *Gaius*[46].

During the application of the *adrogatio* execution of the pontiff's duty was not dependant on the approval of the *collegium pontificum*. Similarly, investigation of the case by the *comitia centuriata* did not require the approval of the Senate. This was because the *adrogatio* was a legislative act. Generally it was accepted that the pontiffs were applying *de decreto collegii*, however, Cicero was opposed to the legitimacy of *adrogatio* by suggesting that in the adrogation of *Clodius*, in which he went round the existing rule that prevented him to enter the tribune of *plebs* as a patrician by being adopted by a plebeian, *de decreto collegii* was not applied[47].

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[44] Schulz, p. 145. Just like the other rules applied by pontificial jurisprudence, the aforementioned act was unnatural as well: Schulz, p. 145.
[45] Umur, Z.: Roma Hukuku Lügati *(Dictionary of Roman Law)*, İstanbul 1983, p. 19; Kaser, p. 262; Buckland, p. 127.
[46] Schulz, p. 145.
[47] Schulz, p. 145; Watson, p. 35.

The only known example of the substitution of the comitial approval was the *testamentum in procinctu* in which the approval was given by the army prepared for the battle instead of the *comitia*. This form of *testamentum* did no longer exist after the first century B.C.[48].

As continuance of an agnatic family depended on the existence of a *sui iuris*, the *adoptandus* had to be *sui iuris*, even if there were no persons in his *patria potestas*[49]. In early times it was possible for *homo alieni iuris* to be adrogated, however, after the specific way of adoption had been introduced for them *adrogatio* became limited to only *homines sui iuris*[50].

As already mentioned, it was not possible for women to be adopted during the classical period[51]. As a result of this rule illegitimate daughters could neither be adrogated nor adopted and they were regarded as *sui iuris*[52].

On the other hand another group that could not be adrogated had been *impuberes* during both republican and early classical times with the view of protecting them from potential damages[53]. However, under very strict conditions an exception to this rule could be applied through a letter written by *Antonius Pius* as *pontifex maximus* to the pontiffs (*cum quibusdam condicionibus*

[48] Kaser, p. 262.
[49] Kaser, p. 261.
[50] Schulz, p. 146.
[51] Schulz, p. 147; Leage, p.87. "*There was no difficulty when it was done by rescript, but there was small advantage, for though she continued the family for a generation, it must then fail, as she, the sole successor, could have no sui heredes.*": Buckland, p. 125.
[52] Schulz, p. 147.
[53] Schulz, p. 147; Leage, p. 87. One of the probable damages that could occur was that, after a person's adrogating a child, and thereby acquiring the entire property of the child due to adrogation, if the father emancipated the *adrogatus*, he continued to possess all the property of the child acquired by the act of adrogation: Leage, p. 87.

adrogatio fit)[54]. First of all there had to be an investigation on the ground that whether it would be advantageous for the child. In addition the approval of the tutor (*auctoritas*) to *adrogatio* was necessary. Besides, it was merely necessary for the adrogator to give a security that in case of the death of the *adrogatus* before he reached to the puberty, the adrogator's property would be returned to the original heirs that would have received the property if the adrogation had not taken place. In case of the *adrogatus* reached to the puberty, however, he would receive the title ordinary *adrogatus* without being limited by and security or liability. Additionally if the *adrogatus* was taken away the inheritance or emancipated without any appropriate reason accepted by the court, he could demand his whole property and a quarter of the adrogator's property (*quarta Antonina*) in case of the death of the adrogator[55].

Although it was necessary for the *adrogans* to be pubes, a specific age difference was not required between *adrogans* and *adrogatus*. As an example *Clodius*, when being adopted, was much older than his *pater adrogans*; the former had indeed been at the age to be the latter's father. In that sense the maxim of Cicero *(De domo sua 14.36)*: *"ut adoptio fili quam maxime veritatem illam suscipiendorum liberorum imitate esse videatur"* was not a strict rule. Depending on this example Cicero suggested invalidity of *adrogatio*. Nevertheless, although the example was an exceptional case it was not invalid[56].

Adrogatio was not prohibited for the ones who had legitimate children. However, with the purpose of protecting those legitimate children, the pontiffs were unwilling to accept such requests. As a matter of fact, *adrogatio* was rejected for the

[54] Schulz, p. 147. One under 25 could not be adrogated by one who had been his tutor or curator: Buckland, p. 127; Leage, p. 87.
[55] Buckland, p. 126; Leage, p. 88; Muirhead, p. 69.
[56] Schulz, p. 147. This type of adoption was questioned by *Gaius* on the basis of legality: Leage, p. 89.

adrogans who were at an age that could still be father. In classical times the age limit of 60 accepted by modern law was not known[57]. It was not necessary for an adrogator to be married[58]. Additionally, if required, the *adrogans* was under the obligation to make a statement under oath that he had good ground for that transaction *(iusiurandum calumniae)*[59].

The city of Rome was the only place where *adrogatio* could be performed because the *comitia* could only be gathered in Rome[60]. The people living in Roman provinces, however, could apply make their application by a letter or through their representatives and the *adrogatio* could be affective by that way as well[61].

The *adrogatus* had to declare before the witnesses that he had relinquished his domestic cult (*sacra familiari),* namely, *detestatio sacrorum*[62]. Actually such transaction was not effective on the validity of the *adrogatio*[63].

A *libertinus* could not be adrogated by anyone apart from his master. However, the performing of the adrogatio by *per obreptionem* would still be valid (*non debet fieri sed factum valet*). In that case the rights of the master would be reserved[64].

As recorded by Justinian, *Cato* suggested that adoption of a slave by his master was possible in ancient times. The definite proceeding regarding this case, however, is not known: this could either be by *adoptio* or *adrogatio*. According to the former argument, the slave was sold by his master collusively to another and then the sold slave was demanded back as a son by the ex-

[57] Schulz, p. 147; Buckland, p. 126.
[58] Buckland, p. 127.
[59] Schulz, p. 147.
[60] Schulz, p. 146; Buckland, p. 125; Leage, p. 87.
[61] Schulz, p. 146.
[62] Schulz, p. 145; Kaser, p. 261.
[63] Schulz, pp. 145-146.
[64] Buckland, p. 127.

master before the *praetor*. The latter view, however, suggests that the transaction was merely *adrogatio* in which the master manumitted the slave. In Justinian time, the registering of a slave to the record (*acta*) of the court would be sufficient for adoption of the slave[65].

It was suggested by *Aulus Gellius* that in ancient times giving a slave to another by his master in adoption would be legally valid. This type of adoption was performed through *in iure cessio apud praetorem*. In the following period this proceeding disappeared and instead, the slave began to be first manumitted by his master and then adrogated by the *adrogans* so that he could be given in adoption[66]. If the father (adrogator) of the slave was a *libertinus*, adoption was actually permitted without any legal obstacle. Additionally, if the father was an *ingenuus*, the son would naturally be *libertinus* and the adoption would be valid as well[67].

Though the adoption was a transaction that was done to achieve the same results that would be reached through birth, there were still some limits set at the times of later Rebuplic[68]. In the post-classical period, however, strict rules of the old law had gone through a serious change. It was newly shaped through an imperial rescript *(per scriptum principiis)* by *Diocletianus* to take the place of *per populum (C. 8.47.2.1)*[69]. In other words *rescriptum principis* started being used during the performance of *adrogatio*[70]. At the time of the Principate it became lawful for women to be adrogated[71]. With regard to adoption by women the classical law was preventive for they were not able to have paternal power. Later, however, by being accepted as a quasi-

[65] Buckland, p. 127; Leage, p. 88.
[66] Buckland, p. 128; Leage, p. 89.
[67] Buckland, p 128.
[68] Kaser, p. 262.
[69] Kaser, p. 261; Burdick, p. 248; Talamanca, p. 126.
[70] Schulz, p. 148; Burdick, p. 248.
[71] Schulz, p. 148; Kaser, p. 262; Burdick, p. 248.

adopt this was permitted by *Diocletianus* in A.D. 291 for women who had lost their children and became a generally accepted provision which needed the consent of the Emperor at Justinian time *(Inst., 1.11.10; C. 8.47.5)*. As a result of this type of adoption the right of succession was achieved, but not the *potestas*[72]. Under the rule of *adoptio naturam imitatur* that was created in later times there had to be at least eighteen year age difference between the *adrogans* and the *adrogatus*[73]. In later law, it was not permitted to adrogate for the ones who were incapable of getting married *(Inst. 1.11.9; D. 1.7.16; G. 1.103)*[74]. Generally, in a situation where the *adrogans* was under the age of 60 *adrogatio* by imperial rescript was not accepted[75]. Apart from adoption two new forms of legitimation (*per subsequence matrimonium* and *per rescriptum principis)* became valid for illegitimate children born to concubine of the father[76].

B. Act of *Adoptio*

Adoptio meant the adoption of *homo alieni iuris* in narrow sense and was an offspring of the jurisprudence in the early republic[77]. *Adoptio* consisted of a two stepped procedure. In the first step the relation with the original family came to an end and in the second step a relation with the new family was formed[78]. For the *adoptio* to be effective an act rooted by the rule of XII Tables was formed (*XII Tables, 4.2.: "Si pater filium ter venum duuit, filius a patre liber esto"*). According to this rule, a son who was sold three times

[72] Talamanca, p. 128; Di Marzo, p. 140; Buckland, p. 123; Kaser, p. 262; Schulz, p. 148; Leage, pp. 87, 89. This type of adoption is called as "*adoptio in solacium amissorum libertorum*": See, Umur, Lügat, p. 18.
[73] Schulz, p. 148; Buckland, p. 123; Leage, p. 89; Di Marzo, p. 141.
[74] Buckland, pp. 123, 127; Leage, p. 89.
[75] Nicholas, p. 77; Schulz, p. 148.
[76] Burdick, p. 242; Schulz, p. 148; Muirhead, pp. 69-70; Watson, p. 35; Di Marzo, p. 138; Erdoğmuş, p. 125.
[77] Schulz, p. 146; Leage, p. 83; Lindsay, Roman Adoption, p. 63.
[78] Leage, p. 83; Nicholas, p. 77; Talamanca, p. 127.

by his father became free from the power of his father[79]. In other words, the father sold his son three times and transferred him by *mancipatio fiduciae causa* to the person who wanted to adopt the son. After the first and second *mancipatio* the adoptive father gave freedom to the child by *manumissio vindicta* by which the son was returning to the *patria potestas* of his real father. Finally, the last *mancipatio* was the transaction by which the *patria potestas* ceased to exist[80]. In other words once the power of *patria potestas* was terminated after the son's being sold three times the *patria potestas* could not be restored even with manumission[81]. The reason behind that rule which resulted in the release of the child from the *patria potestas* of his father is actually not clear. It could be a penalty for the father who sold his son three times or simply a way of releasing the child from the *patria potestas*. However, later, the rule was applied with the aim of forming of the transactions of *adoptio*, *emancipatio* and *noxae deditio*[82]. With respect to a daughter and a grandchild, depending on the word *filius* that existed in rule of the XII Tables, it was accepted that only one *mancipatio* was enough[83]. After the termination of the *patria potestas* by the *third mancipatio*, for the child to fall under the *patria potestas* of the new adoptive father, the application of the *in iure cessio* was necessary in order to accomplish the act of adoption. *In iure cessio* required a procedure that consisted of the claim by the adoptive father (*adoptans)* regarding his paternal power before the *praetor* and the approval by the natural father regarding the claim and finally the decision taken by the magistrate to give the child into the *patria potestas* of the adoptive father through an *addictio (Gaius, 1.134; 101 et seq.)*[84]. The lawyers in early times of Roman law did

[79] Nicholas, pp. 77-78; Schulz, p. 146; Kaser, p. 262; Leage, p. 83.
[80] Kaser, p. 262; Buckland, p. 121-122; Leage, p. 83; Muirhead, p. 69.
[81] Watson, p. 34; Kaser, p. 258; Nicholas, p. 78.
[82] Kaser, p. 258; Leage, p. 83.
[83] Nicholas, p. 78; Schulz, p. 146; Kaser, p. 262-263; Buckland, p. 122; Erdoğmuş, p. 125.
[84] Nicholas, p 78; Schulz, p. 146; Kaser, p. 263; Buckland, p. 122; Leage, p. 84; Muirhead, p. 69; Watson, p. 34.

not come to a conclusion to terminate the *patria potestas* by *in iure cessio* because there was no specific supportive rule regarding the termination of sacred Roman *patria potestas* in the Twelve Tables[85]. As the *adoptio* was in the form of a *legis actio*, it would have been void if the act consisted of *condicio* or *dies*[86].

There is a considerable similarity between the role of *pontifex* in legislative act of *adrogatio* and that of the *praetor* in the act of *adoptio* which consisted of his declaration of *addictio* in the transaction of *in iure cessio*. But, as the *praetor* was unwilling to intervene the *patria potestas*, *in iure cessio* was based exclusively on the intents of the parties and the *addictio* given by the *praetor* was only a procedural act[87]. As a result it was possible for also women and *impuberes* to be adopted like men and *puberes*[88]. While in republican times it was possible for the slaves to be adopted, in Principate period the *addictio* was being refused by the *praetor*[89]. As a result, in Justinian time, it was required that there had to be at least eighteen years of age difference between *adoptans* and *adoptandus* based on the main principle of *adoptio naturam imitatur*[90].

In Justinian time, the old form was replaced by a procedure based on an agreement (*adoptans*, *adoptandus*, and the father of the latter) made before the court consisting of the registration of the declaration of the adoptive father together with the old father to

[85] Schulz, p. 146.
[86] Buckland, p. 124.
[87] Schulz, p. 148.
[88] Schulz, p. 148. Until the Diocletian time it was not possible for women to be adrogated, though they were capable of being adopted. The same applied to the *impubes* until the time of *Antoninus Pius*: Leage, p. 90.
[89] Schulz, p. 148; Leage, p. 89; Kaser, p. 263.
[90] Buckland, p. 123; Leage, p. 89; Erdoğmuş, p. 125. However, Schulz, depending on the idea that the *imitatio naturae* was an artificial concept, did not accept the requirement that *adoptans* to be older than the *adoptandus*: See, Schulz, p. 148.

the records (*acta*) of the court in the presence of the child to be adopted *(C. 8.47.10; Inst. 1.11.2)*[91].

C. Effects of *Adrogatio* and *Adoptio*

As a matter of fact the essential result achieved by the act of adoption was the falling of the *adoptandus* into the *patria potestas* of the *adoptans*[92]. In other words the *adoptandus* was then under authority of his adopter together with all his property and the persons under his power. This act also resulted in the ending of his debts by *capitis deminutio.* Regarding the latter consequence, the *praetor* could provide his creditors *in integrum restitutio* similar to the act of *conventio in manum* of a woman *sui iuris (Gaius 1.107; 3.83 et seq.; 4.38)*[93]. If the person to be adopted had a wife *in manu,* it was necessary for the *manus* to be transferred to the *adoptans (pater adoptivus)* as well[94]. As a rule there was an improvement in the legal and social status of the adopted person as a result of adoption, however, there were two exceptions of that rule: An adrogated *libertinus* could not achieve the status of *ingenuus*, and, the status of an adrogated *patricius* turned into a *pleb*[95]. In Justinian time the general rule was that the *adrogatus* could hold the ownership right over his own property while the *adrogans* could only have *ususfructus* on it *(Inst. 3.10.2)*[96].

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[91] Nicholas, p. 78; Kaser, p. 263; Leage, p. 85; Burdick, p. 249; Erdoğmuş, p. 125.
[92] Nicholas, p. 78; Schulz, p. 148; Leage, p. 86; Lindsay, Roman Adoption, p. 64.
[93] Kaser, p. 262; Buckland, p. 125. According to Leage, *"with regard to obligations owed by the person adrogated there was a distinction; if due from him as heir of some third person deceased, they passed to and bound the person making the adrogation; if merely personal, they became extinguished altogether at strict law"*: Leage, p. 86.
[94] Schulz, p. 148.
[95] Buckland, p. 125.
[96] Di Marzo, p. 140; Kaser, p. 262; Leage, p. 87.; Umur, Roma, p. 394.

In classical law the act of *adoptio* resulted in the passing of the *adoptandus* from one family (agnatic group) to another. In such a case the *adoptandus* was regarded as a natural son as long as he stayed under the *potestas* of his new father, thus, if his new father emancipated him he would then become *emancipatus* against both his old and new fathers. Accordingly, by adoption, the *adoptandus* was loosing his agnatic family tie with the old family and all his rights depended on *patria potestas*. In return he was granted new rights, especially the right of succession, which were equivalent to those of a natural son[97]. However, the new legal status that arose after the act of adoption was only referring to the adopted person himself, thus, his existing children, including the ones that were expected but not born yet, at the time of adoption act stayed in the *potestas* of the old *pater familias*. Only the children conceived after the act of adoption belonged to the new family. In such a case, however, the father *adoptandus* could not acquire the equivalent benefits of the natural son[98].

After giving the child in adoption the old father could readopt his own child and he could do so if the adopted child was later emancipated by the adoptive father as well. In case of readoption, however, the readopted child could not be tied back to his old family, thus, for example, he could neither be the father of his own children again nor be *suus heres*[99].

An *adoptans* could adopt a person as a grandson as well as a son. In this case the adopted person was the *suus heres* of the son of the *adoptans*, not of the *adoptans* himself. However, this result could only be achieved by the consent of the son of the *adoptans*[100].

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[97] Nicholas, p. 78; Buckland, p. 122; Leage, pp. 84-85.
[98] Buckland, p. 122.
[99] Buckland, pp. 122-123; Leage, p. 84.
[100] Buckland, p. 123; Leage, p. 84.

During both the early and the classical periods after the act of *adoptio* the adopted person, leaving his agnatic family tie, was falling into the new *patria potestas* of his adoptive father *(Inst., 1.11.5)*[101]. This act, however, could have potential tragic consequences. If, for example, the *adoptandus* was later emancipated by the adoptive father, he would then loose all his rights of succession related to both the adoptive family, as all agnatic ties were terminated by the act of emancipation, and the natural family, as by the act of adoption he had already left his old family[102]. In Justinian time a fundamental change occurred in the law of adoption which included the differentiation between *adoptio plena* and *adoptio minus plena*. The adoption of a person by a close agnatic relative (ascendant), e.g., mother, grandmother, grandfather, was called *adoptio plena* and this type of *adoptio* had all the same legal effects mentioned above which were accepted in early and classical period, i.e., the adopted person left his old agnatic family completely and fell into the new *patria potestas* of his adoptive father[103]. The cases where the adoption of a person by the ones apart from his close agnatic relatives were called *adoptio minus plena*. In this type of adoption the child adopted continued to be bounded to his old agnatic family, though he was now falling into the authority of his adoptive father. The actual rights of a child in such a case were under discussion among the classical lawyers, however, it was commonly accepted that the succession rights of the adopted child in the old family would continue while he was barely acquiring the right of succession on intestacy in his new family[104]. Justinian, taking into consideration that the adopted grandchild would not be a *suus heres* when he was given in adoption though his father was alive, granted the adopted child all the rights

[101] Nicholas, p. 79; Kaser, p. 263; Leage, p. 84.
[102] Nicholas, p. 79.
[103] Buckland, p. 123; Kaser, p. 263; Leage, p. 85; Nicholas, p. 79; Burdick, p. 250; Karadeniz-Çelebican, p. 159.
[104] Buckland, p. 123; Kaser, p. 263; Leage, p. 85; Nicholas, p. 79; Karadeniz-Çelebican, p. 159.

related to succession in his new family, though this did not mean the passing of *potestas*. However, if the adopted child achieved rights in relation with the old family, then, the adoption would be considered as *adoptio minus plena*[105].

[105] Buckland, p. 123.

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THE SYSTEM OF CRIMINAL PENALTIES IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA

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ABSTRACT : The new Criminal code of the Republic of Serbia entered into force at the beginning of 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. Thus, after a period of 145 years, Serbia has obtained its crimnal 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 penal system in the Republic of Serbia as the most significant type of criminal sanctions which are enforced by the state for the purpose of protecting the society from crime and applied as coercive measures reflecting the social reaction against the perpetrator of the criminal offence. 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. 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 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

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different kinds of criminal sanctions : penalties, warning measures, security measures and corrective measures.

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 general objective of criminal sanctions is : 1) to prevent the offender from committing criminal offences and to deter the offender from commiting 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.

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 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. For that purpose, the Code envisages the following types of punishment : 1) imprisonment (restraining the offender's freedom), 2) a fine (monetary penalty which exists in two forms : a) determined daily amounts and b) fixed amount, 3) community service and 4) withdrawal of the driving licence. In a special part of the Criminal Code on prescribed criminal sanctions, the legislator prescribes specific : 1) rules for determining penalty ; mitigating and aggravating circumstances, 2) the rules for reducing the sentence or releasing the offender from penalty, 3) the rules for sentencing recidivist or concurrent criminal offences or 4) the rules for determining sentences for the already convicted offenders.

In this paper the author analyses characteristics of the system of criminal penalties in the new Criminal Code of the Republic of Serbia from 2005.

KEY WORDS : criminal code, criminal offence, offender, court, responsibility, criminal sanctions, penalties

CRIMINAL SANCTION

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 coercive 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: 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 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 a collection 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. Criminal statute law of the Republic of Serbia in Article 4 foresees quite a number of kinds of criminal sanctions: penalties, warning measures, safety measures and educative measures. Other contemporary criminal rights also know a number of kinds out of which these are best known: penalties, safety measures, educative measures, suspended conviction, court warning a well as various parapenal sanctions.

CRIMINAL 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 penaltiesare given when the court pronounces all given penalties according to the doer of the criminal deed.

The criminal code of the Republic of Serbia in Article 3 foresees the following kinds of penalties: 1) prison penalty, 2) monetary penalty, 3) work in public interest and 4) motoring disqualification. 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 penalty system in our country determined in this way points to the following characteristics: 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.

PRISON PENALTY

Penalty of depriving of freedom (prison) consists of dispossessing of freedom of moving to the offender of a criminal deed in the court conviction for a definite time.

In all contemporary punishment systems the penalty of depriving of freedom takes a central place. The majority of criminal deeds has been threatened by this punishment because it offers the largest amount of opportunities to realize the purpose of punishing which consists of reeducating and resocializing of the condemned and his repeated inclusion into normal social life.

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 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 2 years of life (younger adults).

Suspended discharge consists of discharging the convicted person from having prison punishment before he has fully had it and his letting be free under the condition that he does not perform a new criminal deed by the end of the time for which the penalty is passed. If such a person does not perform a criminal deed during the time of his punishment, the punishment is considered to have been fully executed. On the contrary, the given suspended discharge can or must be revoked.

Suspended discharge represents a measure by which individualization is done for the punishment and resocialization of the convicted is realized with his personal and active participation. It can be given to every person that has endured half of the passed prison punishment provided that it has, during enduring the punishment, so much recovered that it can reasonably expected that he will behave well free outside and especially that, up to the lapse of time for which the punishment is passed, he will not perform a new criminal deed. At the evaluation whether the condemned person shall have suspended discharge in freedom the following circumstances shall be taken into account: 1) behaviour of the condemned during enduring the penalty, 2) performance of work obligations considering his work ability and 3) other circumstances that show that the purpose of punishment has been reached.

According to Article 522 of the Code on criminal procedure from 2001. in the Republic of Serbia, it is the court which brought decision in the first degree that decides on suspended discharge. Suspended discharge lasts as much time as left to the condemned until his full endurance of passed punishment. During the stay in freedom, it is subjected to temptation thus not daring to perform a new criminal deed which means having to fulfil other set obligations. During the period of suspended discharge he is considered that he still endures the punishment because the term of passed punishment is running.

If one with suspended discharge does not justify the showed trust, there comes revoking of suspended discharge and his returning into the institute establishment. There is definitely a facultative revoking of suspended discharge as well. The court also decides on that revocation. It comes to the compulsory revoking when the suspendedly discharged, during the time he is at the suspended discharge, performs a criminal deed (one or more) for which he was given prison punishment over one year while facultative revocation comes in the case of passing the prison punishment up to one year and for newly done criminal deed during the time of lasting of suspended discharge. In this latter case, the court will, when deciding on revocation, take into consideration the similarity of performed criminal deed , motives out of which these are performed and other circumstances that point to justification of revoking suspended discharge.

When the court makes a decision to revoke a suspended discharge, then, as per the rules for passing penalty for deeds in acquisition, it gives a unique punishment out of which it subtracts previously endured part of punishment as per former conviction. In the same way, the court will proceed and when it is determined that the suspended discharge before entering the institute establishment has performed a criminal deed for which he was not sued and which was announced only within the time of duration of suspended discharge. In case the court does not revoke the suspended discharge then the discharge thus given will

be prolonged for the period that the condemned spent at enduring the penalty for newly performed or newly opened criminal deed. Suspended discharge can be revoked at the latest within the term of two years starting with day when the suspended discharge has expired.

MONETARY PENALTY (FINE)

Monetary penalty is the only propriety penalty in our punishment system. It consists of the obligation of the convicted person to, within a definite term, pay a monetary amount, determined by conviction, in favour of the state. By pronouncing monetary punishment between the doer of the deed and the state, there is obligation relation created in which the state appears as a creditor and the doer of the deed as a debtor. Monetary penalty in the sense of Article 48 of the Criminal code of the Republic of Serbia can be pronounced as a main and 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.

In order to prevent arbitrarity of courts in pronouncing monetary penalties in this way, the law itself has set certain limitations so that monetary penalty is:

1) up to 60 daily amounts it can be asked for criminal deeds for which prison penalty up to three months is defined,
2) 20 from 30 to 120 daily amounts for criminal deed for which prison penalty up to six months is defined,
3) from 60 to 180 daily amounts for criminal deeds for which prison penalty of one year is defined,
4) from 120 to 240 daily amounts for criminal deed for which reason penalty up to two years is defined,
5) at least 180 daily amounts for criminal deeds for which prison penalty up to three years is defined.

The other form of weighing monetary penalty which is foreseen by the Criminal code of the Republic of Serbia in Article 50 is a monetary penalty in a certain amount. The penalty is pronounced in case it is not possible to determine the height of daily amount of monetary penalty not even on the basis of free estimation of the court or getting such data would considerably prolong duration of criminal procedure. Upon pronouncing monetary punishment in this case the court may move in the span from 10,000 to 1,000,000 dinars and, if criminal deed has been performed out of self-interest, then the penalty may be pronounced amounting to 10,000,000 dinars.

Even here the law has imposed to the court restrictions regarding weighing monetary penalty in certain mount as main punishment therefore this penalty amounting to:

1) up to 100,000 dinars can be pronounced for criminal deed for which prison penalty up to three months is defined,
2) from 20,000 to 200,000 dinars can be pronounced for criminal deed for which prison penalty up to six months is defined,
3) from 30,000 to 300,000 dinars may be pronounced for criminal deed for which prison penalty up to one year is defined,
4) from 50,000 to 500,000 dinars may be pronounced for criminal deed for which prison penalty up to two years is defined,
5) at least 100,000 dinars may be pronounced for criminal deed for which reason penalty up to three years is defined.

While weighing monetary penalty, the court is obliged to take into consideration all circumstances which are connected with the criminal deed and the personality of the doer of criminal deed but also circumstances connected to his propriety state. During pronouncing monetary penalty the court is obliged in the conviction to determine also time term of its payment which cannot be shorter than 15 days or longer than three months. The term is counted from the day of legal binding of the conviction. In justified cases the court can approve of payment off of the monetary penalty in partial payments (instalments) but it is then obliged to determine the amount of the instalments, their amount and term for paying it off which cnnnot be longer than one year.

If the convicted person does not pay monetary penalty within a certain term, the court shall substitute it by prison penalty (suppletary prison) so that it shall for each commenced 1,000 dinars of monetary penalty determine one day of prison provided the prison penalty such pronounced cannot be longer than six months. In case that the nonpaid monetary penalty amounts to bigger amount than 700,000 dinars, then suppletory prison cannot last longer that one year. In case the convicted person

pays off the monetary penalty, prior penalty is abolished. If the convicted pays only part of monetary punishment, the remainder shall be substituted by prison penalty in accordance to the stated proportion. By the death of the convicted person who had monetary penalty pronounced, the very penalty is also extinguished so that to maintain the personal character of the punishment.

COMMUNITY SERVICE (WORK IN PUBLIC INTEREST)

In Article 52 the Criminal code of the Republic of Serbia there is introducing a new kind of punishment – community service (or work in public interest) – criminal sanction which is otherwise known also by many other contemporary criminal 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.

While pronouncing this punishment, the court shall, having in mind the punishment purpose, separately take into consideration the following cicumstances: 1) the weight of the deed performed, 2) personality of deed offender and 3) also his readiness to perform work in public interest since this kind of punishment cannot be pronounced without the deed offender. In case the convicted person does not perform work in public interest, as defined in the decision of the competent court this punishment can be replaced by prison punishment so that every eight hours of work commenced in public interest will be replaced by prison punishment of one day. However in case a convicted person like this fulfils all set obligations connected to work in public interest,

the court is authorized to reduce the pronounced punishment by one fourth. This is a special kind of alleviating the pronounced punishment.

MOTORING DISQUALIFICATION (WITHDRAWAL OF THE DRIVING LICENCE)

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: Withdrawal of the driving licence (or 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.

This punishment may be also pronounced as both main and accessory doers of a peculiar kind of criminal deeds or those doings in whose performance the offender set a particular kind of means – motor vehicle, therefore each traffic means on motor drive in land, waterways or air traffic. As the main one, this punishment may be pronounced to the criminal deed doer for which prison penalty up to two year is pronounced and as an accessory penalty, prison penalty or monetary punishment is pronounced. This punishment may not be pronounced cumulatively with the measure of safety of the ban to drive motor vehicle. In case the convicted to whom this punishment to drive motor vehicle is pronounced, for the time period of lasting the pronounced punishment, the court is obliged to substitute thus pronounced punishment from Article 53 of the Criminal code of the Republic of Serbia by prison punishment so that it will replace one year of motoring disqualification with one month of prison.

BASES OF EXTINGUISHING CRIMINAL SANCTIONS

Every criminal sanction does not get extinguished by pronouncement over the offender by state authorities competent for its execution. However what can happen that after executing the criminal deed there come on some circumstances which extinguish the right of the state to pronounce and execute criminal sanctions – ius puniendi. These circumstances annul the right for pronouncing and executing or only for executing the criminal sanction, not affecting thereby the existence of the criminal deed. Those are in publiclegal institutes determined in a general interest and the court must look after its existence as per its official duty no matter if the deed performer to who they concern has called them or not. The extinguishing criminal sanction happens when: there comes death of the criminal deed of the offender, its obsolete nature, amnesty and pardoning.

Being obsolete is a legal fact which leads to extinguishing criminal sanction due to the flow of time law determined. Since being obsolete is defined by the state via legal stipulations, it appears as full denying the state from the right to punish due to the time flow. The code makes a difference between two kinds of being obsolete: 1) being obsolete by the criminal prosecution and obsolete in executing criminal sanction and 2) relatively and absolutely being obsolete. Being obsolete by the criminal prosecution (abolition) exists when after lapse of a defined time and execution of criminal deed, there cannot be undertaken criminal prosecution of its doer. The time which has to pass in order to be obsolete is called the term for being obsolete. The term of being obsolete is different for certain criminal deeds and depends on the kind and height of due punishment.

In Article 103 of Criminal code of the Republic of Serbia there is foreseen that criminal prosecution cannot be undertaken when there pass:

1) twenty-five years from executed criminal deed for which, as per the law, there may be pronounced prison penalty from thirty to forty years,
2) twenty years from execution of criminal deed for which, as per the law, there can be pronounced prison penalty over fifteen years,
3) fifteen years from execution of criminal deed for which, as per the law, there can be pronounced prison penalty over ten years,
4) ten years from execution of criminal deed for which, as per the law, there can be pronounced prison penalty over five years,
5) five years from execution of criminal deed for which, as per the law there can be pronounced prison penalty over three years,
6) three years from execution of criminal deed for which, as per the law, there can be pronounced prison penalty over one year,
7) two years from execution of criminal deed for which, as per the law, there can be pronounced prison penalty up to one year or monetary punishment.

If, for the criminal deed, there is stipulated a number of punishments, the term for being obsolete is defined as per the heavier stipulated punishment. The term for being obsolete starts running from the day when the criminal deed is done and that is the day when the doer undertook the action of doing or when he missed to undertake doing on which he was obliged. With prolonged and collective criminal deed, the term of being obsolete starts running from the day when the last action is performed which enters into the composition of prolonged and collective criminal deed respectively. With the permanent criminal deed, being obsolete starts running from the moment when antilegal state stopped. For an attempted criminal deed this term is determined according to the term of being obsolete for finished criminal deed. The term for being obsolete for coparticipants is the same as for the doer of the deed.

Obsoleteness is stopped due to existence of circumstances law - foreseen so that by stopping those circumstances it is not continued but starts to run anew. There are two reasons foreseen

in Article 104 of Criminal code of the Republic of Serbia which bring to stopping obsoleteness: 1) undertaking the processing action in order to reveal criminal deed or revealing and prosecution of its doer and 2) when the doer performs a new, identically heavy or heavier criminal deed.

Absolute obsoleteness means disability of criminal prosecution when certain time passes after performing criminal deed not taking into account interruptions of obsoleteness. According to Article 104 Item 6 of Criminal code of the Republic of Serbia the absolute obsoleteness starts when there pass twice as much time as it is requested for occurring obsoleteness.

Obsoleteness of executing punishment means that after certain time has passed the pronounced punishment cannot be performed. For occurring this obsoleteness it is necessary for the court to have pronounced the penalty but, due to existence of certain circumstances there has not appeared execution or execution has stopped due to those circumstances. The term for obsoleteness of execution of punishment is counted according to the kind and height of the punishment prounced by legally bindig conviction. These terms according to Article 105 of Criminal code of the Republic of Serbia amount to:

1) twenty-five years out of conviction for prison from thirty to forty years,
2) twenty years out of the conviction to prison over fifteen years,
3) fifteen years out of the conviction to prison over ten years,
4) ten years out of conviction to prison over five years,
5) five years out of the conviction to prison over three years,
6) three years out of the conviction to prison over one year,
7) two years out of the conviction to prison up to one year, monetary punishment, punishment of working in public interest or punishment of motoring disqualification.

Execution of monetary punishment and motoring disqualification (as accessory punishment) becomes obsolete when two years have

passed since legal binding of the conviction. Criminal code of the Republic of Serbia in Article 106 speaks of obsoleteness to execute pronounced safety measures. At the measures: compulsory psychiatric treatment and confinement in a health institution, compulsory psychiatric treatment outside, compulsory treatment of drug addicts, compulsory treatment of alcoholic addicts and dispossessing of items – obsoleteness occurs after five years have passed since legal binding of the decision pronounced by the decision. Obsoleteness of measures: ban of making calls, activities or duties, ban to drive a motor vehicle and deportation of an alien from the country disappear with due time for which they have been pronounced.

Obsoleteness of criminal prosecution and of execution of punishment and other criminal sanctions are general institutes of criminal law so they apply in relation to every executed criminal deed, to each doer and in relation to any pronounced sanction. Out of this rule there exists an exception foreseen in Article 108 of Criminal code of the Republic of Serbia according to which criminal prosecution and execution of punishment do not become obsolete for criminal deeds: genocide, crime against humanity, war crime against civil people, war crime against the wounded and the sick, war crime against prisoners- of -law and orgaization of group ad helping execution of genocide and war crime ad for criminal deeds for which obsoleteness cannot occur as per ratified international contracts. Such a solution is based on International convention on application of law obsoleteness for war crime and crimes against humanity that the OUN brought in the year 1968 (and our country signed and ratified in 1970).

Amnesty and pardoning consist of pardoning the punishment to the criminal deed doer which is given via acts of highest government authorities. With them there can be given pardoning from a punishment which has been legally binding pronounced (amnesty and pardoning in a narrow sense) or freeing from prosecution and punishment (amnesty and pardoning in a wider sense or abolition). As acts of mercy, sovereign amnesty and

pardoning represent a general basis for extinguishing criminal sanctions because they may refer to all criminal deeds and all offenders. That extinguishing punishment can be fully or partially dependent on whether the punishment has been pardoned fully or partially.

It is actually submitting to forgetfulness (amnestia is in Greek forgetting) of the guilt of a person or pardoning from the punishment drawn by the guilt. Their application represents exception from the rules that every doer of a criminal deed gets deserved punishment. In that way these acts become stronger from the very law (which pronounces punishment for performed criminal deed) and from the very court decision (by which this punishment is pronounced) By giving amnesty and pardoning there is no interfering in the right of third persons which are based on the conviction. Persons who are damaged by the criminal deed have rights to request the additionally pronounced damage to be indemnified.

Amnesty is an act in the form of a law by which there is given to an indefinite number of persons: getting rid of prosecution, fully or partially getting rid of executing punishment, substitution of pronounced punishment by a milder punishment, rehabilitation is given, there are abolished some or all legal consequences of the conviction, stopping the following safety measures respectively: ban to make calls, activities or duties, ban to drive motor vehicle and deportation of an alien from the country (Art 109 of Criminal code of the Republic of Serbia).

Pardoning (Article 110 of Criminal code of the Republic of Serbia) is an act in the form of solution brought about by the president of the republic by which a certain person by name is given freedom from criminal prosecution, fully or partially freedom of executing the punishment, substitution of the pronounced punishment by a milder punishment or suspended conviction, rehabilitation is given, there are defined shorter duration of a definite legal consequence of the conviction or there are abolished some or all

legal consequences of the conviction and abolish or define, respectively, shorter duration of the following safety measures: a ban to make calls, activities or duties, ban to drive motor vehicle and deportation of an alien from the country. The action of pardoning is stronger also than the very court decision (conviction by which criminal sanction is pronounced) and even than the very law since it annuls and derogates its stipulations on punishing the criminal deed doer. By applying this institute the court decision is changed however its legal power is not touched, legal might, its legitimity confirmation that a certain person executed a criminal deed. Since it concerns certain person, it is a single, personal, individual act and not a normative act which creates situations for an indefinite number of persons in advance.

DATA FROM PENALTY FILES

In Article 102 of Criminal code of the Republic of Serbia there is determination for the penalty files to contain: 1) personal data about the offender of the criminal deed, 2) data about pronounced punishment, suspended conviction, court warning, freeing from punishment and pardoned punishment and 3) data about legal consequences of the conviction. Into these files, there are entered also all subsequent amendments of previously entered data as well as data on enduring punishment as well as annulling files about the wrong conviction.

Aiming to protect the condemned persons and prevent possible abuses, the law foresees that data from penalty files may be given only to the court, state prosecutor and authorities of interior affairs and that in connection with criminal procedure which is led against person who had not been convicted earlier; then, to competent authorities for performing criminal sanctions and competent authorities who participate in the procedure of giving amnesty, pardoning, rehabilitation or deciding on stopping legal consequences of the convictions as well as custody authorities

when that is needed in order to pursue work from their competence.

Upon argumentative request, these data may be given to the state authorities, enterprises, establishments, other organizations or undertaker if there are still lasting definite leagl consequences of the conviction or safety measures but if there is for it a justifiable interest based on the law. Therefore the data from penalty files can be given also to citizens i.e. persons who are interested as proofs on their convicting and nonconvicting respectively however only if they need them in order to realize their rights.

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Free Law Journal
ISSN 1712-9877

Free European Collegium