FREE LAW JOURNAL

VOLUME 3, NUMBER 1 - JANUARY 18, 2007

In this issue :

ISSN 1712-9877

LE CONFLIT NON-INTERNATIONAL À CARACTÈRE INTRA-NATIONAL - DR ANWAR FRANGI (LEBANON) 9

ENFORCEMENT OF TRIBE'S LAW OR VIOLATION OF STATE'S LAW? ON KILLINGS BASED ON CUSTOM - DR. SAIM ÜYE (TURKEY) 21

BASES FOR THE EXCLUSION OF THE CRIMINAL ACT IN CRIMINAL LAW OF BOSNIA AND HERZGEGOVINA – BORISLAV PETROVIĆ (BOSNIA AND HERZEGOVINA) & DR. DRAGAN JOVAŠEVIĆ (SERBIA) 33

A PROPOSAL OF A UNIFORM CODE FOR POLITICAL CRIMES AND TERRORISM - DR ANWAR FRANGI (LEBANON) 61

THE SYSTEM OF CRIMINAL PENALTIES IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA - PROF. DRAGAN JOVAŠEVIĆ, LL.D. (SERBIA) 113

LA PROBLÉMATIQUE DE L'INTERRUPTION VOLONTAIRE DE LA GROSSESSE EN FRANCE - MĂDĂLIN-SAVU TICU (ROMANIA) 71

LEGAL REQUIREMENTS FOR ADOPTION UNDER TURKISH LAW - DR. ERKAN KÜÇÜKGÜNGÖR (TURKEY) 83

ABSENCE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AS A JUSTIFICATION FOR PUBLIC EMERGENCY – DR ANWAR FRANGI (LEBANON) 93

LEGAL AND JUDICIAL STRUGGLES WITH POLYGAMOUS MARRIAGES IN MORMON SOCIETY (1830-1887) – BY DIDEM ÖZALPAT 115

THE GUILT IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA – DR. DRAGAN JOVAŠEVIĆ 127

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

Academics, post-graduate students and practitioners of law are welcome to submit in the academic section their articles, notes, book reviews or comments on any legal subject, while undergraduate students are welcome to publish in our student section. The list of fields of law addressed in these pages is ever-expanding and non-restrictive, as needs and interests arise. If a field is not listed, the author simply needs to propose the article and the field believed of law applicable; we will insure to create and list it.

We accept articles in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Inuktitut, Italian, Latin, Polish, Portuguese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian, Spanish and Turkish.

Articles not in English are provided with a synopsis to explain their content. Articles of exceptional quality, or requested to be, can be translated into English and/or French. All of this is the measure of freedom we provide.

The material submitted for publication remains copyrighted to the author. If the author has interest in publishing elsewhere after having published in our pages, no permission to do so will be necessary. The author remains in full control of his or her writings. Articles of superior value will be considered for incorporation in collective works for publishing.

We always accept submissions. To submit, please read the submission guidelines or ask us any question at: FLJ@FWPublishing.net .

List of subject addressed
(as it currently stands - modified as need arise)

Administrative Law **Admiralty law** **Antitrust law** **Alternative dispute resolution** **Anti-Terrorism** **Bankruptcy** **Business Law** **Canon Law** **Civil Law** **Common Law** **Comparative Law** **Constitutional Law** **Contract Law** **(Consuetudinary law)** Obligations Quasi-contract **Corporations law** **Criminal Law** Organised Crime Criminal Procedure Cyber Crime Law Penal law **Cyber law** **Election law** **Environmental law** **European Law** **Evidence Law**	**Family law** **History of Law** **Human Rights Law** **Immigration Law** **Intellectual Property Law** International trade law Patent Trademark Law **International Humanitarian Rights Law** Laws of Armed Conflicts Laws of war War Crimes Law (Belgium) **International Law (Public)** Diplomatic Relations Jus Gentium Treaties Law **Labor law** Law and economics **Law and literature** **Medical Law** Public Health Law Public Law Malpractice Mental health law **Military law** **National Legal Systems -** (Laws of any national legal system that is not of a precise category) Nationality and naturalisation Laws **Natural law** **Philosophy of Law**	**Private International Law** **Private law** **Procedural law** **Property law (Public)** **International Law (See International Law (Public))** **Refugee Law** **Religious law** ***Islamic Law (Sharia)*** Qur'an Sharia ***Jewish law (Halakha)*** Hebrew law (Mishpat Ivri) Talmud Taqlid ***Christian (other than Canon Law)*** Twelve Tables **Roman Law** **Sacred text** **State of Emergencies Laws** **Space law** **Tax law** **Technology law** **Torts Law** Quasi-delict **Trusts and estates Law** Liens **Water law** **Zoning**

Free World Publishing is a partner of the Free European Collegium, provider of web-based, e-learning education in matters related to the European Union.

All material published are available for free at http://www.FWPublishing.net and can be used freely for research purposes, as long as the authors' sources are acknowledged in keeping with national standards and laws regarding copyrights.

All mail correspondence can be made with the editorial board at 82-146 Stewart Street, Ottawa, Ontario, K1N 6J7 Canada, while electronic correspondence can be made through FLJ@FWPublishing.net .

The views and opinions expressed in these pages are solely those of the authors and not necessarily those of the editors, Free World Publishing Inc. or that of the Free European Collegium Inc.

Cited as (2007) 3(1) Free L. J.

ISSN 1712-9877

FREE LAW JOURNAL SUBMISSION GUIDELINES

Important. The following is not meant to discourage from submitting; only to ensure quality. If your article conforms to your own national standard of writings, we accept all and any format as long as arguments are justified by footnotes or endnotes. Never hesitate to submit an article : if there is a need for improvement, we will inform you and we will always remain open for re-submissions.

1. Academics, Post-Graduate Students and Practitioners of law are all welcomed to publish their book reviews, comments, notes and articles.

2. All legal subjects are considered for publication, regardless of the legal tradition, national or international field of expertise. The only limit to the extend of our publishing would be content that is illegal in national legislation (i.e. enticement to hatred) or against international norms (i.e. promoting genocide).

3. Articles are welcomed in English, French, Bosnian, Bulgarian, Croatian, Czech, Finnish, German, Greek, Hungarian, Icelandic, Innuktikut, Italian, Latin, Polish, Portuguese (both Brazilian and European), Romanian, Russian, Serb (both Latin and Cyrillic), Slovenian, Spanish and Turkish. Note that our staff is limited and therefore we use "Word Recognition Processors" to communicate in some languages. Nonetheless, this does not prevent understanding articles submitted in these language and we are not interested in measuring every word of your article: simply in publishing your writings. Therefore, we will review the general content, but leave with you the precise sense and meaning that you want to convey in your own language. If translation is desired by the author, we then submit it for translation to a translator.

4. Their is no defined system of reference (footnotes or endnotes) demanded. As long as you justify your argument through references (author and work), we accept all writings respecting your own national standards. Exceptions: For Canadians, the Canadian Legal Guide to Citation is recommended but not mandatory. For Americans, referencing is expected to be in accordance with Harvard University's The Bluebook, A Uniform System of Citation. Any breach of copyrights is the sole responsibility of the author.

5. The author retains the copyrights to his or her writings. As articles are unpaid for, ownership remains within your hands. We act as publishers and caretaker. Nothing prevents you from publishing elsewhere. You may even decide to have the article taken off this site if another publisher desires to buy the rights to your article.

6. We reserve ourselves the right to edit the content or length of the article, if at all necessary.

7. We do not discriminate in any way. Our aim is to bring under one roof perspectives from everywhere and everyone. Never hesitate to submit.

8. If you desire information or desire to submit, do not hesitate to contact us at : FLJ@FWPublishing.net.

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

[1] *LL.M.* 1995, Faculté de Droit de l'Université Harvard (Massachusetts, USA); *LL.M.* 1992, Faculté de Droit de l'Université Américaine (Washington, D.C.); *Doctorat en droit* 1986, Faculté de Droit de l'Université de Poitiers (France); *D.E.A.* 1983, Faculté de Droit de l'Université de Poitiers (France); *Licence de droit* 1982, Faculté de Droit de l'Université libanaise (Liban). Dr Frangi est professeur assistant et chercheur à l'Université Saint-Esprit de Kaslik (Liban), et professeur de droit international et de philosophie du droit à la Faculté de droit de l'Université La Sagesse (Liban).

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…» (v° *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.

ENFORCEMENT OF TRIBE'S LAW OR VIOLATION OF STATE'S LAW? ON KILLINGS BASED ON CUSTOM

By **Dr. Saim ÜYE***

INTRODUCTION

Being structured around a variety of social control mechanisms, the social life comprises lots of socio-cultural norms that force human beings to be in line with the justified ways of behaving. Living steadily as a member of a society or a social group is possible only by conforming the pre-established rules of conduct. Non-conformity results in facing sanctions and these sometimes cause to end one's life. The society reaffirms the values attributed to the norms by way of getting rid of the very existence of the disobedient. The "killings based on custom" observed in some – especially middle eastern– cultures represent the situation of this kind.

Strict customary practices, which justify killings decisively as a sanction for the deviants of the customary code, are held generally in relation with the concept of "honour". In literature there seems to be a general usage of the term "honour killings" to desribe the wide range of such commitments. It must be stated here that there are differences between so called "honour killing" and "killing based on custom". Though both are related with the concept of honour, the former has excessively individual, not collective aspects. What makes the latter different is that it includes decisions of family (or tribal) counsels; that is family (or tribal) counsels

* **PhD, Ankara University, Faculty of Law, Turkey.**

gather and decide whether the customary rules are violated by the act or not and what the sanction thereof shall be.

The issue may be examined as a problem of the criminal law, because the activities of these counsels are considered as criminal in formal legal texts. But this is not the main point here. It must be seen that these unofficial counsels act effectively like a court even though they are disapproved and criminilized by the state's legal system. These court-like bodies constituted in the social reality make the situation to be worthy of being examined from the point of view of sociological and anthropological studies. The aim of this article is to discuss briefly the theoretical place of such kind of events with regard to the conceptual framework improved by sociology and anthropology of law. This is obviously a descriptive but not a problem-solving perspective.

KILLINGS BASED ON CUSTOM AS A PART OF SOCIAL REALITY

Common Points

A review of exemplary events from three countries –Turkey, Pakistan and India–may help to illustrate the issue in question.

> "Her name is Hacer; she is 16. She asked for a love song to be played on the radio on March 2, 1984. The same night she ran away from home, but she was quickly found by the police who returned her to her father just like a parcel. She was brought home where her father and uncles were gathered, and she was locked in a small room while the male members of her family decided on her fate. Despite her father's objections, the decision was made that she must be killed; otherwise, the rest of the family would not be able to look others in the community in the eye. The

lethal task was awarded to a 13-year-old boy, the youngest male member of the family. He shot his sister in cold blood.[1]"

"According to the information received, on May 4, 2004, Ms Tahmeena (17) and Ms Aabida (18), who are cousins, were shot to death after having been accused of having "loose morals" for having visited their grandparents without permission. The decision to kill the girls was taken in a tribal jirga, convened amongst the perpetrators and led by Mr Abdul Rasheed, the tribal chief and a powerful landlord in the village.
...
The information also indicates that cases of crimes committed in the name of honour are generally ruled by the landlords (Jirga-tribal court) in the Sindh Province rather than by the courts of law.[2]"

"Fifteen inhabitants of a village in Haryana (Northern India) were charged with murder. They had stoned and stabbed to death two young lovers who refused to end their relationship. The young man was called before a village counsel where he was beaten to death with the approval of his family. After the execution, the two bodies were brought to a cremation area outside the village. When the police arrived, they only found the burned remains of the two victims[3]".

Lots of similar stories may be heard from different countries.

[1] Canan Arin, "Femicide In The Name of Honour in Turkey", Violence Against Women, Vol.7 No.7, July 2001, p. 821.

[2] http://www.peacewomen.org/news/Pakistan/May04/twogirls.html

[3] From a Belgian newspaper *De Standaard*, cited in Jeroen Van Broeck, "Cultural Defence and Culturally Motivated Crimes (Cultural Offences)", European Journal of Crime, Criminal Law and Criminal Justice, Vol. 9/1, 2001, p. 1.

However, for the purpose of this article, the common elements of all these may be figured out as follows:

a) Existence of a rule of conduct
b) Commitment of an act not conforming with the rule of conduct
c) Gathering of a counsel
d) Trial
e) Decision for punishment
f) Execution

It is not hard to see the strong resemblance between this practice and the official enforcement of the state's legal norms. The counsels seem to take the place of the state's courts and the same steps seem to be taken actually to produce the same results, even though one is officially justified while the other is not.

Comparison with the State

The elements of the two practices may be examined as compared with each other :

	CUSTOMARY PRACTICE	***STATE'S PRACTICE***
Norm	Customary Honour Code	Penal Code
Violation of the Norm	Dishonourable Conduct	Crime
Authority	Family (or Tribal) Counsel	Court
Trial	Unofficial Trial	Official Trial
Decision	Punishment	Punishment
Command of Execution	To a member/members of the family (or the tribe)	To the official organs
Execution	Unofficial Execution	Official Execution

Table: The parallel patterns

There are norms –written or unwritten, but well-known– on both side, in case of violation of which an authority is expected to have

a trial and reach a decision that is to be carried out by force. As far as effectivity is concerned, customary practices are not weaker, if not stronger, than the other, as a consequence of being naturally closer to the face to face interactions of the people in daily life.

In legal doctrine, the widespread opinion has long been that one of these parallel patterns running side by side effectively, that of the state's, is qualified to be called as "law" and the other not. This stems from the conventionally accepted thought that identifies "law" with "state".

Social scientific approaches, however, point another direction.

SOCIAL SCIENTIFIC CONCEPTUALIZATION OF LAW

Owing to the sociological and anthropological studies, it is claimed that involvement of the state in the production and enforcement of norms shall not be seen as a prerequisite condition for being called as "law". Accordingly, social reality itself is considered to be capable of producing law independently from the state. The views of some of the distinguished scholars may be shortly remembered in this context.

Weber : "Extra-State Law"

Max Weber denies to identify the law with the state. He calls an order as law, "if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose[4]".

[4] Max Weber, *Law in Economy and Society*, tr: Edward Shills and Max Rheinstein, Harvard University Press, Cambridge – Massachussets, 1954, p. 5.

Neither the staff emphasized in the definition ought to be the official organs of the state, nor the coercive power the monopoly of these organs. The sociological definition also covers other social groups and associations having coercive means for the enforcement of their norms. Accordingly, Weber indicates that if the means of coercion are at the disposal of some authority other than the state then we shall speak of "extra-state law"[5].

"Extra-state law" may be in contradiction with the "state law" and where it is not, it does not need the guaranty of the state. This paves the way for an order of a social group to be qualified as a "legal order" and to be acknowledged without necessarily referring to any activity of the state[6].

Ehrlich : "Living Law"

Eugen Ehrlich agrees with the opinion that, being created by the state or being the basis for the decisions of the state's courts is not a necessity for an order to be recognized as law[7]. Ehrlich sees "the basic form of law" as "the inner order of the associations of human beings"[8]. "A social association is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them.[9]"

The legal system of the state is composed of legal propositions. "The legal proposition is the precise, universally binding formulation of the legal precept in a book of statutes or in a law

[5] Ibid, p. 16, 17.
[6] Ibid, p. 17.
[7] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr: Walter L. Moll, Russel & Russell Inc., New York, 1962, p. 24.
[8] Ibid, p. 37.
[9] Ibid, p. 39.

book.[10]" But legal propositions do not have the same meaning as legal norms. The criteria for being considered as a legal norm is that of "actual effectiveness". That is, the legal propositions which are not only stipulated in law books but also really effective on human life shall be considered as legal norms. On the other hand, there are many effective rules in the associations of human beings which actually regulate the conduct of their members but do not take any place in law books. These are the rules arising from the very core of the social life itself. That is why "in every society there is a much greater number of legal norms than of legal propositions.[11]"

To what attention must be paid is the "living law" rather than what is written in official texts. "The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only of those that the law has recognized but also of those that it has overlooked and passed by, indeed even of those that it has disapproved"[12].

Gurvitch : "Spontaneous Law"

Georges Gurvitch considers the opinion that regards the state as the institution having both political and jural sovereignity as an "optical illusion"[13]. According to Gurvitch, normative facts, i.e. social facts having the capacity to produce law, are the most

[10] Ibid, p. 38.
[11] Ibid, p. 38.
[12] Ibid, p. 493.
[13] Georges Gurvitch, *Sociology of Law*, Transaction Publishers, New Brunswick and London, 2001, p. 253.

immediate data of jural experience[14] and social groups are specific normative facts in this manner. After pointing that "There is no observable society which does not include a multiplicity of particular groups"[15], Gurvitch claims," Every group in which active sociality predominates and which realizes a positive value … affirms itself as a 'normative fact' engendering its own jural regulation"[16].

"Active sociality" refers to a thought of having something to be done, a duty to be performed together and "positive value" means a socially recognized "good" that is supposed to be realized in the life of the particular group[17]. Different types of the social groups, in accordance with their special qualities, are capable to produce their own "frameworks of law"[18].

Closely related with these assessments, Gurvitch contends that there is a "spontaneous" level in the life of law as opposed to the "organized"[19]. When speaking of the law which arises from the former level, Gurvitch uses the term "spontaneous law", which may be recognized and described just in the same way as the "organized law" of the state[20].

Pospisil : "The Legal Systems of Subgroups"

Basing his views on anthropological studies, Leopold Pospisil argues that any human society "… does not possess a single consistent legal system, but as many such systems as there are

[14] Ibid, p. 53.
[15] Ibid, p. 232.
[16] Ibid, pp. 241, 242.
[17] Ibid, p. 201.
[18] Ibid, pp. 242-250.
[19] Ibid, pp. 222, 223.
[20] Ibid, pp. 226-229.

functioning subgroups. Conversely, every functioning subgroup of a society regulates the relations of its members by its own legal system, which is of necessity different, at least in some respects, from those of the other subgroups.[21]"

According to Pospisil, there are certain attributes which must coexist in order to provide the essence of law. He lists the four essential "attributes of law" as authority, intention of universal application, obligatio and sanction[22]. "Authority" is an individual or a group of individuals, who have the power to make a decision and to have it obeyed even in cases where it faces resistance of those to whom the decision is related[23]. "The intention of universal application" points that the decision is taken with the intention that it shall be applied in all cases of similar kind which may take place in the future[24]. "Obligatio", differing from 'obligation', means that the decision states or implies that a party is under a duty as a result of his/her act; while "sanction", included in the decision, shows what is to be done in order to have the situation corrected[25]. Consequently Pospisil calls law "... as principles of institutionalized social control, abstracted from decisions passed by a legal authority (judge, headman, father, tribunal, or council of elders), principles that are intended to be applied universally (to all "same" problems in the future), that involve two parties locked in an *obligatio* relationship, and that are provided with a sanction of physical or nonphysical nature.[26]"

Since in every subgroup of a society where these attributes are observed we confront with a specific legal system; we can speak of

[21] Leopold Pospisil, *Anthropology of Law, A Comparative Theory*, Harper & Row Publishers, New York, pp. 98, 99.
[22] Ibid, p. 43.
[23] Ibid, p. 44.
[24] Ibid, p. 79.
[25] Ibid, pp. 82, 83.
[26] Ibid, p. 95.

the society as composed of "the multiplicity of legal systems"[27]. Hence, an individual may be said to be subject to "all the different legal systems of the subgroups to which he is a member[28]".

CONCLUSION

Sociological and anthropological studies of law provide us with a pluralistic point of view, acknowledging the fact that social groups are capable of producing law. Killings based on custom addressed above are hence qualified to be recognized as a practice of "law", as produced by the kinship groups or tribes, in this sense. The coercive means are at the disposal of the family (or tribal) counsels, which are ready to use these means in case of violation of norms (Weber). These norms are effectively regulating the conduct of the group's members, that is they are "living" in the observable reality of social life (Ehrlich). The practice is based on an active sociality and the group attributes a positive value to it (Gurvitch). The counsels represent the authority, decisions of which, as reached to be applicable in all the same cases, include the attributes of obligatio and sanction (Pospisil).

No matter it is called as "extra-state law" or "living law" or " spontaneous law" or "legal system of a subgroup", we may conclude that killings based on custom represent an order that may be called sociologically as "law", taking place in the society effectively besides the law of the state, though being criminalized by the latter. Socio-legal pluralism helps us to avoid associating "legal order" exclusively with the "legal order of the state" and to understand the situation where the same act may be considered as enforcement of a legal order (tribe's law) while possibly being regarded as violation of another (state's law) at the same time. Observing the continuous practice of killing someone who failed to

[27] Ibid, p. 112.
[28] Ibid, p. 107.

obey the costomary honour code as a socially accepted punishment, on the other hand, shows that the “death penalties” may continue to live in the legal systems of social groups, though it is removed officially from the state’s (e.g. Turkey’s) legal system.

It must be made clear at this point that calling the mentioned practices as “law” is on no account followed by an implied approval of these killings. Because, as Gurvitch rightly states, "The act of recognizing facts which realize values is quite different from direct participation in these values[29]”. Scientific description differs from ethical justification. Ongoing struggle against killings based on custom or so called “honour killings” in general, at national and international level, may be the subject of another article.

[29] Gurvitch, op.cit., p. 53.

BASES FOR THE EXCLUSION OF THE CRIMINAL ACT IN CRIMINAL LAW OF BOSNIA AND HERZGEGOVINA

By
BORISLAV PETROVIĆ PHD* AND DRAGAN JOVAŠEVIĆ PHD**

Introductory remarks

Lack of any of general, basic elements of the definition of the criminal act, of objective or subjective character, exempts that act (that is, the act committed by a person, with resulting consequences) from the character of criminal act[1]. It is regarded to the circumstances which an act of a man exempts from either social danger or illegality, or of both elements. Namely, the exclusion of these elements exists when the act, which is otherwise regulated by law as a criminal act, is considered as excusable, according to some special provision. Provisions which allow this otherwise “forbidden” act in a specific case exclude illegality, so that there is no criminal act in that case.

There are two bases for the exclusion of the criminal act in the criminal law of Bosnia and Herzegovina. They are: 1) general bases (which are specifically provided by law and may be found in any criminal act or for any perpetrator) and 2) special bases (

---

* **Borislav Petrović PhD, Associate Profesor, Faculty of Law in Sarajevo, Bosnia and Herzegovina and**
** **Dragan Jovašević PhD, Associate Professor, Faculty of Law in Niš, Republic of Serbia.**

[1] D. Jovašević, Krivično pravo, Opšti deo, Nomos, Beograd, 2006. p. 87-88

which are not specifically provided by law and could not be found in any criminal act or for any perpetrator)[2].

General bases in the criminal law of the Bosnia and Herzegovina are:

1) small insignificance or act of little significance[3] (article 25. of the Criminal code of the Federation of Bosnia and Herzegovina[4], article 25. of the Criminal code of the Brčko District of Bosnia and Herzegovina[5] and article 7. paragraph 2. of the Criminal code of the Republic Srpska[6]),

2) necessary defence (article 24. of the Criminal Code of the Republic of Bosnia and Herzegovina[7], article 26. of the Criminal code of the Federation of Bosnia and Herzegovina, article 26. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 11. of the Criminal code of the Republic Srpska) and

3) extreme necessity (article 25. of the Criminal code of the Republic of Bosnia and Herzegovina, article 27. of the Criminal code of the Federation of Bosnia and Herzegovina, article 27. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 12. of the Criminal code of the Republic Srpska).

Special bases for the exclusion of the criminal act are not specifically provided by law. They present a creation of the law theory and court practice (but some of them are seen in the

---

[2] B. Petrović, D. Jovašević, Krivično (kazneno pravo) Bosne i Hercegovine, Opći dio, Pravni fakultet, Sarajevo, 2005. p.155
[3] E. Foregger – E. Serini, Strafrecht Gesetzbuch, 9. Auflage, Wien, 1989. p.53-54
[4] Službene novine Federacije Bosne i Hercegovine broj : 36/2003, 37/2003, 21/2004 i 69/2004
[5] Službeni glasnik Brčko Distrikta Bosne i Hercegovine broj : 10/2003 i 45/2004
[6] Službeni glasnik Republike Srpske broj : 49/2003 i 108/2004
[7] Službeni glasnik Bosne i Hercegovine broj : 3/2003, 32/2003, 37/2003, 54/2004 i 61/2004

foreign legislations in specific cases)[8]. Specific bases usually include: 1) assent of the inflicted, 2) self-infliction, 3) performing the official duty, 4) superior's order, 5) the right for disciplinary or corrective punishment and 6) allowed risk. According to the fact that these special bases are not specifically provided by law, their effect and applicability are of controversial matter[9].

1. THE CRIME OF SMALL SIGNIFICANCE[10]

In the article 25. of Criminal code of the Federation of Bosnia and Herzegovina, article 25. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 7. paragraph 2. of the Criminal code of the Republic Srpska there is anticipated that the activity can not be considered as a criminal if it has small significance, no matter if it has characteristics of the crime defined by the law. Such situation can be solved by applying the principle of opportunity of the criminal persecution by the process mean in accordance with the provisions of the criminal law in Bosnia and Herzegovina about the criminal process.

For this institute existence there is necessary three conditions to be cumulatively fulfilled:

1) that the level of the committer guilt is low,

2) that the harmful consequence of the crime in inconsiderable or lacking and

---

[8] P. Novoselec, Opći dio kaznenog prava, Zagreb, 2004. p.162-163
[9] Z.Stojanović, Krivično pravo, Opšti deo, Beograd, 2005.p.148
[10] This general base for the exclusion of the criminal act defines several modern criminal codes : article 28. of the Criminal code of the Republic of Croatia, article 36 of the Criminal code of the Russian Federation, article 8 of the Criminal code of the Republic of Macedonia, article 9 of the Criminal code of the Republic of Montenegro and article 14 of the Criminal code of the Republic of Slovenia

3) if the general purpose of the criminal sanctions does not require the criminal sanction sentencing.

2. NECESSARY DEFENCE

According to provision article 24. of the Criminal Code of the Republic of Bosnia and Herzegovina, article 26. of Criminal code of the Federation of Bosnia and Herzegovina, article 26. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 11. of the Criminal code of the Republic Srpska, necessary defence is defence which is necessary for a perpetrator in order to protect himself or other person from an imminent illegal attack. It is a second base for the exclusion of the criminal act in criminal law in Bosnia and Herzegovina[11].

An act committed in necessary defence[12] is excusable because the legislator himself considers that the perpetrator of such act is authorised for commission of that act. From this definition, it results that necessary defence, in the sense of institute of criminal law, has to fulfil two conditions-the existence of attack and protection from such attack. But not every attack gives the right for necessary defence, nor every protection from attack is

[11] This base prescribes many modern criminal codes on similar way : article 29 of the Criminal code of the Republic of Croatia, article 37 of the Criminal code of the Russian Federation, article 22 of the Criminal code of the Republic of Israel, article 15 of the Criminal code of the Republic of Ukrain, article32 of the Criminal code of Federal Republic of Germany, article 12 of the Criminal code of the Republic of Bulgaria, article 9 of the Criminal code of the Republic of Macedonia, article 22 of the Greek Criminal code, article 13 of the Criminal code of the Republic of Belarus, article 11 of the Criminal code of the Republic of Slovenia and article 19 of the Criminal code of the Republic of Albania

[12] More : V. Timoškin, Nužna odbrana, Sarajevo, 1939. ; B: Ignjatović, Nužna odbrana u teoriji i praksi, Doboj, 1967.; D. Jovašević, T. Hašimbegović, Osnovi isključenja krivičnog dela, Institut za kriminološka i sociološka istraživanja, Beograd, 2001. ; V. Đurđić, D. Jovašević, Lj. Zdravković, Nužna odbana u krivičnom pravu, Niš,2004.

necessary defence. Attack, as well as protection from attack, has to fulfil conditions cumulatively provided by law.

2.1. Conditions for the existence of attack

Attack is every act aimed towards violating or endangering legal property or legal interest of a person[13]. It is most often undertaken by action, and sometimes by inaction. In order for an act to be relevant with the view to institute of necessary defence, it has to fulfil certain conditions, which are: attack has to be undertaken by man; attack has to be aimed against any legal property or legal interest of a person; attack has to be illegal; and attack has to be real[14].

1) *Attack can only be undertaken by man.*-If an act is not undertaken by man but by an animal or by a force of nature, then there is the existence of danger as an element of extreme necessity, but not as well necessary defence. However, if a person directed a force of nature (torrent, rockslide) in order to endanger other person or his legal property, or if an animal (a dangerous dog or a horse) is used as means for endangering protected property, than these cases are also considered as necessary defence. Attack could be undertaken by any person, no matter of the age, accountability or guilt. It could be undertaken by any action or inaction, as well as using any means which is suitable for violation or endangering some legal property[15].

[13] J. Šilović, Nužna odbrana, Zagreb,1910.p.97
[14] M. Tomanović, Nužna odbrana i krajnja nužda, Beograd, 1995.; D. Jovašević, Krivičnopravni značaj instituta nužne odbrane, Pravni zbornik, Podgorica, No, 1-2/1998. pp.128-143; D. Jovašević, Pravo na život i nužna odbrana, Pravni život, Beograd, No. 9/1998. pp.43-61
[15] P. Novoselec, Krivično pravo, Krivično delo i njegovi elementi, Osijek, 1990.p.35-36

Therefore, necessary defence is excusable in case of an actual attack (instantaneous or present), as well as in case of imminent attack. Whether the attack is imminent, is a question which is determined by court in each particular case, judging all the circumstances of the committed act and the perpetrator. The attack is imminent when there is a possibility (in time and place) of the close carrying out an attack[16]. But, it does not mean that necessary defence is excusable against future, undetermined in place and time, but indicated attacks. Measures of precaution and preventive protection against indicated or expected attacks are excusable only if they do not go over the limits of necessary measures for that specific moment.

2) *Attack has to be aimed against a person, his legal property or legal interest.*-Attacked or endangered properties, in the sense of necessary defence, could be different. Most often, life and physical integrity is being attacked, but sometimes it can be property, honour, reputation, dignity, moral. The object of attack could be any legal property or legal interest. Law does not explicitly state which are those goods that can be the objects of attack in the sense of necessary defence. Attack can be aimed against any legal property of the attacked person, but also against any legal property of some other physical or legal person. In that way, attack can be aimed at violating the property of a corporation, facility or some other organization, but also against state security and its constitution[17].

Therefore, necessary defence exists not only in case of protecting from the attack on a legal property, but also in case of protecting from the attack on any property of other person (physical or legal) if that person is not capable of protecting himself from such attack. There are theories in criminal law, according to which

[16] T. Živanović, Krivično pravo Kraljevine Jugoslavije, Opšti deo, Beograd, 1935.p.231
[17] B. Petrović, D. Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Pravni fakultet, Sarajevo,2005. p.146-149

some cases of protecting from the attack are not considered to be necessary defence, but called “necessary help”. In any case, the scope and necessity of defence depend in the first place on the nature of legal property which is attacked or endangered.

3) *Attack has to be illegal.*-Attack is illegal when it is not based on some legal regulation and when it is not undertaken on the bases of some legal authorisation. Therefore, attack which is undertaken during exercising duty according to some legal authorisation, is not illegal and necessary defence in that case is not excusable. However, if an authorised person oversteps the limits of legal authorisation, then such situation is changed into illegal attack against which necessary defence is allowed. On the other hand, violation of necessary defence also changes into illegal attack, in which case the attacker has the right for defence (because in this case he is in the state of necessary defence).

The right for necessary defence exists no matter if the attacker is conscious of illegality of his attack or not. Namely, it is enough that the attacked person objectively realises the attack. It is of no significance whether the attacker is guilty or not, as well as whether his act is punishable. Illegal attack could be undertaken by a child or by a mentally incompetent person. That means that necessary defence on necessary defence is not excusable. But, different situations in life can happen, when the attacked person anticipates the possibility of being attacked in certain place and time because of his relationship with some person. If in such situations anticipated attack is undertaken, it is considered as illegal[18].

Even more controversial situation is when a person provokes attack. There is no dilemma if the attacked person had previously endangered someone’s integrity or property. The problem arises if such attack is manifested verbally or only with concluding acts

---

[18] M. Radovanović, Krivično pravo, Opšti deo, Beograd, 1975. p.95

which irritate, provoke or underestimate the attacker[19]. Social component of the institute of necessary defence should be considered in such situations. Namely, necessary defence stands for protecting the rights from illegality, and because of that abuse of this institute is not excusable. If the attacked person had deliberately provoked the attack, so as to use it and violate the attacker or his property, than the attacked person has no right on necessary defence. Such cases are known as feign necessary defence[20].

4) *Attack has to be real.*-Namely, it has to exist really in the outside world. It means that it is necessary that the attack has already started or it is imminent. Whether an attack exists or not, is a factual question which is being solved by court in each specific case. Typical example of real attack is endangering life or making physical injuries to a person. If there is no real attack, but the attacked person had a wrong or incomplete impression or illusion of its existence, there is no basis for necessary defence. In such case there is putative, imaginable or ostensible necessary defence. This defence does not exclude the existence of a criminal act, but it could be a ground for exclusion of the guilt[21].

Therefore, putative necessary defence represents, in fact, the lack of conscience of the attacked person about some real circumstance of the attack. That is, in fact, wrong impression and conviction that the attack aimed at violation of some property is real. This mistake could be related to the conscience about the illegality of the attack (when there is legal mistake). In other words, putative necessary defence is reduced to unavoidable mistake, in broader or narrower sense that the attacked person is in a condition of real and objectively needed necessary defence. When judging the existence of necessary defence or its violation,

[19] F. Antolisei, Manuale di diritto penale, Parte generale, Milano, 1997.p.192-193
[20] Lj. Bavcon, A. Šelih, Kazensko pravo, Splošni del, Ljubljana, 1987, p.151
[21] Z. Stojanović, Komentar Krivičnog zakona SR Jugoslavije, Službeni list, Beograd,1999. p. 22-24

an act has to be seen on the whole, which means that it cannot be reduced and limited to only what had happened between the defendant and late (that is, the one who has suffered loss) immediately before the gun shot.

2.2. Conditions for the existence of defence

Defence or protection from the attack is every action of the attacked person aimed at eliminating, preventing or protecting from the attack. By protection from the attack, the attacked person himself violates or endangers some legal property of the attacker. This violation or endangerment represents, in essence, formal characteristics of some criminal act from the special part of criminal codes in Bosnia and Herzegovina (most often it is about a criminal act against life or physical integrity)[22].

Only in case when the attacked person, during the protection from attack, violates some property of the attacker, the existence of the institute of necessary defence is possible[23]. Necessary defence is not only the defence from the attack which endangers security of life of the attacked person, but every defence from present and illegal attack, if such defence was necessary for protection from the attack.

For the definition of needed defence, in the sense of penal law, it is absolutely necessary that the illegal attack is protected from by a punishable act towards the attacker. If such protection would not be considered as a punishable act, then it would be a situation beyond the area of penal law[24]. Defence, as an element of necessary defence, as well, has to fulfil certain conditions in order

---

[22] N. Srzentić, A. Stajić, Lj. Lazarević, Krivično pravo SFRJ, Opšti deo, Savremena administracija, Beograd, 1978.p.171
[23] G. Marjanovik, Makedonsko krivično pravo, Opšt del, Prosvetno delo, Skopje, 1998.p.183
[24] Đ. Avakumović, Teorija kaznenog prava, Beograd, 1887-1889.p.279

to be of criminal legal relevance. These conditions are: defence consists of protection from the attack; defence has to be aimed against the property of the attacker; defence has to be simultaneous with the attack, and defence has to be necessary for the protection from attack[25].

1*) Defence has to be consisted of protection from the attack.*-If defence is not aimed at protection or prevention of attack, than it is not an element of necessary defence. Defence, in fact, depends on the existence of attack. The kind of defence has to be according to the attack. Attacked person is not obliged to retreat before the attacker. On the contrary, he is authorised to frustrate and disable the real illegal attack, in the aim of defence of legal property, by simultaneous legal attack on the attacker's legal property.

2) *Defence has to be aimed against the attacker and against any of his legal property or legal interest.*-These properties could be various, like: life, body, estate, honour, reputation, human dignity, though most often situation is when life of the attacker is violated. But, there are situations in life, when it is about the violation or endangering legal property and the attacker, as well as some other person. Then, in relation to the property of the attacker, the attacked person acts in necessary defence, and in relation to the violation of property of some other person, he acts in extreme necessity (if all the conditions provided by law are fulfilled)[26]. That means that the attacked person, in order to protect his property, cannot put to extreme risk legal properties of other people. But, if the attacker had used properties of other person while committing an illegal attack as means of that attack, then, in case of violation those properties, there is necessary defence[27].

---

[25] P. Novoselac is thinking differently (P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.170-174

[26] Strafgesetzbuch Leipziger, Kommentar, Berlin-New York, 1985. p 163

[27] D. Jovašević, T. Hašimbegović, Osnovi isključenja krivičnog dela, Institut za kriminološka i sociološka istraživanja, Beograd, 2001.p.50

3) *Defence has to be simultaneous with attack.*-Defence is simultaneous if it was undertaken at time when attack has been imminent or when it began, but only up to the moment when it ceased. Attack is imminent when, from all the circumstances, it could be concluded that it was about to start, and when there was such danger that violation of legal property would occur in the next moment. The beginning of an act which could have direct consequences (death, physical injury, taking away, destroying or damaging property) is not crucial for beginning of the attack. Undertaken action which objectively represents imminent source of danger is essential.

Whether an attack is imminent or not is a factual question which is being solved by court in each particular case. Only threat of imminent attack, without undertaking previous actions from which it can be concluded that the attack was imminent, could not be the reason for undertaking the act of defence. Defence of future attack is not excusable either, but still undertaking of some measures of precaution and some protective measures which start to work automatically in the moment when the attack starts (like various alarm systems connected with electrical circuit) is allowed.

When the attack has started, defence could begin in the same moment. But, it often happens that the attacked person is not in position to react at the same time when the attack starts. In that case defence could be undertaken at any time during the attack. Continuity of defence has to coincide with the continuity of attack. When the attack has stopped, the right of the attacked on necessary defence stops, too.

An attack was ended if legal property of the attacked person has been violated and when danger has been caused (as a kind of consequence in cases of criminal acts of endangering), and when the attacker has committed the action of attack, but due to

accidental circumstances there was no violation of property of the attacked person. The right for necessary defence stops if the attack has finally and definitely ceased, but not in case when the attack was only temporarily ceased. Whether an attack has ceased or only temporarily ceased is a factual question which is being solved by court in each particular case. Attack has temporarily ceased if there is a possibility that it could be continued any moment.

4) *Defence has to be necessary for protection from attack.*-It is the defence which exists in case when attack cannot be prevented from in any other way except for violating the attacker's property. This means that violation of attacker's property has to be necessary, unavoidable in order to protect from the attack, so the intensity of defence is correspondent to the intensity of the attack and the manner and means which were used by attacker. When judging this necessity of defence, the equivalence between intensity of attack and intensity of defence in each particular case should be taken into consideration[28]. On the other hand, this proportion means that violation of the attacker's property is proportional with value of the property of the attacked person which was saved in this way[29].

2.3. Violation of necessary defence

If an attacked person, during the protection from attack on his or someone else's legal property, oversteps the limits of defence which is necessary for protection from that attack, there is violation or excerpt of necessary defence has prescribed in article 24. paragraf 3. of the Criminal Code of the Republic of Bosnia and

---

[28] P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.33; F. S. Pierra, La Guide de la defense penale, Paris,2003.p.59; H.H. Jescheck, Lehrbuch des Strafrechts, Allgemeiner teil, Berlin, 1988. p. 428

[29] R. Marino, R. Petrucci, Codice penale e leggi complementarii, Napoli, 2004. p.31; E. Foregger, E. Serini, Strafgesetzbuch, Wien, 1989. p.4

Herzegovina, article 26. paragraph 3. of the Criminal code of the Federation of Bosnia and Herzegovina, article 26. paragraph 3. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 11. paragrapf 3. of the Criminal code of the Republic Srpska.

This violation, according to intensity, exists when violated property of the attacker is of greater value then the property saved in this way. Another kind of violation of necessary defence, according to broadness, exists in case when the attacked person returns an attack which hasn't even started or hasn't been imminent, or if he/she continues violating the attacked property after the attack has finally and definitely stopped[30].

In these cases court is authorised to mitigate the sentence for a perpetrator of criminal act in violation of necessary defence. In case when violation of necessary defence was due to strong irritation or freight of the attacked person, court is authorised to release a perpetrator of such criminal act from the legal sentence.

3. EXTREME NECESSITY

Extreme necessity[31] represents third general basis for exclusion of the existence of a criminal act. Therefore, an act committed in the condition of extreme necessity is not a criminal act. Extreme

---

[30] Lj. Nešić, Krivično pravo, Opšti deo, Zemunska štampa, Beograd, 1991. p.96-97

[31] This base prescribes all modern crimianl codes on similar way: article 30 of the Criminal code of the Republic of Croatia, article 39 of the Criminal code of the Russian Federation, article 16 of the Criminal code of the Republic of Ukrain, articles 34 and 35 of the Criminal code of the Federal Republic of Germany, article 12a of the Criminal code of the Republic of Bulgaria, article 10 of the Criminal code of the Republic of Macedonia, article 25 of the Greek Criminal code, article 14 of the Criminal code of the Republic of Belarus, article 12 of the Criminal code of the Republic of Slovenia and article 20 of the Criminal code of the Republic of Albania

necessity, according to provision article 25. of the Criminal code of the Republic of Bosnia and Herzegovina, article 27. of the Criminal code of the Federation of Bosnia and Herzegovina, article 27. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 12. of the Criminal code of the Republic Srpska, exists when perpetrator committed an act in order to eliminate imminent obvious danger which could not be eliminated in some other way and if caused damage is not bigger than threatening damage.

In contrast to necessary defence which has been known in criminal law for a long time, extreme necessity has been introduced to criminal legislature as a separate institute recently, and it is of no such wide applicability in criminal law practice. The reason for this some authors find in the fact that, in this case, danger for someone's legal property comes from something else and not from a man, and in the fact that this case is about conflict or collision of two laws, and not of law and injustice[32].

From the legal definition it results that cumulative existence of certain conditions or assumptions is necessary in each particular case for the existence of extreme necessity. There are two basic elements which are necessary for the existence of such institute. They are: 1) a state of danger and 2) eliminating danger. Only in case that all conditions provided by law, which exist on the side of danger and on the side of eliminating danger, exist, can we say that an act was committed in extreme necessity.

3.1.Conditions for the existence of danger

Danger is the first element of extreme necessity. It actually represents harm by which security of a property is endangered

---

[32] M. Babić, Krajnja nužda u krivičnom pravu, Banja Luka, 1987. p.82 ; B. Čejović, Krivično pravo, Opšti deo, Beograd, 2002. p.87-88

and which threatens to damage or destroy it. It is actually every harm by which any legal property or legal interest of a person is endangered. Every possibility of violation or endangering someone's legal property is considered as danger. Danger marks such situation in which, according to objectively existing circumstances, could be justifiably assumed or predicted that violation of some legal property, disregarding the subject (physical or legal person) to which it belongs, is imminent. Therefore, danger is the state where some legal property is endangered and, according to circumstances of the particular case, there is imminent possibility of its violation.

There are several kinds of this danger and it is almost impossible to determine in advance in which way and manner they could be manifested in everyday life situations. Whether there is real danger of endangering some legal property of a perpetrator or some other person is being judged according to objective criteria of "reality of danger" in each specific case. Therefore, danger is the state where violation of endangered property is imminent and unavoidable. Danger and possibility of endangering or violation some legal property objectively exists, and it is a real category which results from everyday life and the environment, and it is stated in the prognosis about possible further development of the situation which is based on given circumstances of that situation[33].

Certain conditions for the existence of danger, cumulatively provided by law, have to be fulfilled so that the institute of extreme necessity in each particular case could exist. These conditions are[34]:

1) *Danger could be caused by man, animal, forces of nature (fire, water, earthquake) or objects*. Therefore, sources of danger could

[33] B.Čejović, Krivično pravo, Opšti deo, Službeni list, Beograd, 2002.p.179-181
[34] M. Babić, Krajnja nužda u krivičnom pravu, Banja Luka, 1987.p.59-61

be very different. Human action, in the sense of creating danger as an element of extreme necessity, should be differentiated from action in the sense of attack with the institute of necessary defence. Here, human action was not aimed at provoking danger for some legal property of other person, even more, there was no intention or aim in the conscience of a perpetrator. These are cases of various incautious or careless handling with inflammable, poisonous or explosive materials, driving power or vehicle, or during construction work, where danger for someone's legal property is caused.

Dangerous animals like dog, bull, ram, horse, wild animals can also cause danger for one's legal property. Forces of nature and natural disasters can also, suddenly and in great scope endanger properties of one person, or, more often, more people and sometimes even society in general. A person that is in the state of extreme necessity undertakes his duty which is aimed at eliminating or preventing this danger, by imminent action on the source of the danger. In case when an object is the source of danger, in the sense of institute of extreme necessity, it could be any device, machine or equipment which, during its use or exploitation, causes danger. Such object, when affected by certain external cause or damage, becomes extremely dangerous for people who use it.

2) *Any legal property or legal interest of any legal subject can be threatened by danger.* In contrast to previous decisions, when extreme necessity was excused only in case of attack on life and physical attack, present law provisions this kind of defence expand to all legal properties. Criminal code[35] of former Kingdom of Yugoslavia from 1929., in article 25. explicitly provides the properties which could be defended in case of extreme necessity: life, body, freedom, honour, estate, as well as any other property.

---

[35] M. Čubinski, Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije, Beograd, 1934. p.94-95

Criminal legislature in effect does not limit legal properties which could be protected in this way, but according to their nature and character, they are only the most significant properties, most often life and physical integrity.

But, not every kind of danger for these legal properties is relevant according to the institute of extreme necessity. It has to be the danger which has a character of social danger, and it has to be such danger which imminently endangers some legally protected property. This danger can be aimed against legal property of that person who eliminates such danger by his action, or against legal property of some other physical or legal person. In this second case, there is necessary help.

3) *Danger has to be simultaneous*. This means that danger is imminent, or already in progress, and only up to the point when danger is still in progress. Future, as well as finished danger, does not give the right for action in extreme necessity. It would be unacceptable if perpetrator, during the flood or fire, waited for some legal property to be destroyed, and then took measures for eliminating danger. Because in that case, these measures would obviously be late. According to this, depending on the kind, character, source and level of danger, perpetrator has the right to undertake some measures in order to eliminate danger which has already taken place and which will obviously soon endanger some of his legal property.

But, in the theory of criminal law, such opinions could be found, according to which extreme necessity is allowed, if it is obvious that in several days there would be a hurricane or that the flood would break levees and destroy a settlement, because it is considered that there is imminent danger of that. In conditions when very complicated technical and technological systems and procedures are used, such situations, according to which it is obvious that there would be some great harm, can also take place.

4) *Danger has to be real.* It should really exist in the real world-it should already be in progress or it should be imminent. Danger is real not only when there is a realised possibility of violation or endangering, when violation or endangering are already in effect, but also when it is imminent. This means that it is objectively and with certainty assumed that the danger for one's legal property is imminent.

Imaginary, illusory danger does not give the right for action in extreme necessity. In that case there is so called putative necessary defence. Namely, those are the situations when there is wrong or incomplete conscious or knowledge about the circumstances which really existed and which would possibly justify the action of perpetrator in extreme necessity. Then the perpetrator can only quote that he made a mistake about the existence of danger, which represents a factual basis for mitigating the sentence, but there is no extreme necessity. Therefore, not every danger is relevant according to the point of view of the institute of extreme necessity. It has to be danger of certain level and certain gravity. It results that not any, especially not an insignificant violation of legal property, can represent basis for the existence of this institute.

5) *Danger must not be blameable.* Danger is not blameable if it occurred by accident and if a person in danger is not to be blamed for it. If a person deliberately, or out of negligence, provokes danger for legal property, that person cannot quote action in the state of extreme necessity, in case when eliminating such danger he violates someone else's legal property. This means that in case of blameable provoking danger there is no extreme necessity, so that the person should be responsible for the criminal act committed during eliminating danger. S. Zuglia[36] considers that the fact that the endangered person anticipated or could anticipate that he could save himself or his legal property only by

[36] S. Zuglia, Stanje nužde, Veliki Bečkerek, 1920. p.45

violation of someone else's legal property, is obviously not enough for blaming it.

Danger which is not blameable should be considered differently from blameable danger which was provoked deliberately or out of negligence. Danger which was provoked without guilt does not exclude the right for action in extreme necessity. For example, a person who provoked fire by throwing away a cigarette end on the place where someone had previously spilled inflammable liquid, which this person didn't know, and couldn't know according to real circumstances, has the right to eliminate this danger by violation of legal property of some other person, especially if such act is of less significance then the property which is being saved. It is obvious that blameable danger excludes the existence of extreme necessity. All the more so, if a person provokes danger in order to use it as means for committing some previously planned criminal act. This means that the guilt should also include "blameworthiness" in some action.

3.2. Conditions for eliminating danger

The second element which is necessary for existence of the institute of extreme necessity is eliminating danger[37]. It is any action aimed at protection and preserving legal property which is endangered. By eliminating this danger someone else's legal property is violated (provided that it is not the legal property of that person who provoked danger , because in that case, there is necessary defence, if all the conditions provided by law are fulfilled). This violation has to be of character of some criminal act provided by law. Eliminating danger should also fulfil certain

[37] grupa autora, Komentar Krivičnog zakonika SR Jugoslavije, Beograd, 1995. p.60

conditions provided by law, in order to be criminal-legally relevant[38].

1) *Extreme necessity exists if danger could not be eliminated in some other way* (e.g. by escaping or calling for help), but only by violating legal property of some other person. This condition is not otherwise necessary in case of necessary defence, where the attacker's property is being violated, while in case of extreme necessity the property of someone else, who is most often innocent, is being violated. When judging whether this condition is fulfilled or not, all the circumstances of a particular case have to be taken into consideration, and according to them judge whether it was possible to eliminate given danger in some other way, under given circumstances.

According to the character of danger, time and circumstances under which it occurred, it is being judged whether this danger could have been eliminated in some other way. Eliminating danger has to be out of extreme necessity, it has to be the only way, extreme solution to avoid violation of endangered property. But, there are some opinions in theory, according to which this judgement has to be made according to objective possibilities, where means, manner, time and other circumstances which were at disposal of the perpetrator during the danger, as well as the choice of means and manner of eliminating danger, should be taken into consideration.

This means that, in case of danger, perpetrator, in first place, has to rescue himself from danger by escaping it, but if it is necessary that one's legal property is violated by this action, it has to be spared in the greatest possible way. It means that in certain case, the means manners and actions for eliminating danger which in the smallest way violate one's legal property, have to be used.

[38] M..Tomanović, Nužna odbrana i krajnja nužda, Službeni list, Beograd, 1995. p.67-72

Namely, court has to be assured (which is a factual question) that, according to all circumstances under which the act was committed, danger could not have been eliminated in some other way. On the other hand, if it is consolidated that caused danger could have been eliminated in some other way, and perpetrator thought that there was no other way, then it is the case of putative, imaginable extreme necessity.

2) *Eliminating danger has to be simultaneous with the existence of danger.* This means that, in first place, real danger, so danger which has already occurred or is imminent, should be eliminated. Eliminating danger should last only while there is danger. When danger ceases, there is no more eliminating danger in the sense of this general institute of criminal law.

3) *When eliminating danger, a person has to be in special psychical relation to his act and resulting consequences.* Such psychical relation, in first place, has to be reflected in the aim of committed action and in the motives for committing such action. This aim, in this case, is protection of one's legal property which is endangered by occurred danger. On the other hand, if a perpetrator violated one's legal property for some other reasons and motives which are not related to eliminating danger, then there is no extreme necessity and such act is punishable.

4) *Violation must not be of greater extent than the danger which was threatening.* Extreme necessity can exist only if saved property is of higher value than the violated one (sacrificed). Therefore, this institute cannot exist if violated property is of greater significance than the one which was saved from danger. This means that legal property by which violation danger is being eliminated has to be of less or at least of the same value or significance as the property which is being saved[39]. Namely, in cases of extreme necessity, in contrast to cases of necessary

[39] S.Frank, Teorija kaznenog prava, Zagreb, 1955. p. 128-129

defence, proportion or equivalence between endangered and violated property is important. it is completely understandable because, in cases of extreme necessity, there is conflict between two rights. Complete and complex judgement of particular situation, where hierarchy of properties which are protected and compared is important, is necessary for fulfilment of this condition.

It is considered that violation of material goods like: life, physical integrity, freedom, honour is fundamentally greater than violation of material goods such as estate. Moreover, easier compensable violations of properties of the same kind are less harmful. However, there is a question whether the institute of extreme necessity can exists in case when there are two properties of the same value (e.g. two lives-violator and perpetrator)[40].

According to objective theory, society in this case has no reason to prefer one legal property to another, and because of that it is completely indifferent and disinterested about the question of whose property will actually be violated and whose will be saved. In case of conflict of two interests or two properties of the same value, society has no excuse, but also no reason to give advantage to one of them, but still, criminal law provides that there is extreme necessity in case when, during the elimination of danger, caused harm is equal to threatening harm, considering psychical condition of the person, especially in case of danger for some more significant legal property (e.g. life, body).

Comprehension, according to which extreme necessity also exists in case of conflict between two properties of the same value, was introduced in criminal law of former SFR Yugoslavia, by amendment of Criminal code dating from 1959. Up to then, extreme necessity had only been related to violation of properties

[40] N. Srzentić, A. Stajić, Lj. Lazarević, Krivično pravo SFRJ, Opšti deo, Savremena administracija, Beograd, 1978.p.176

of less value than the property which was saved by eliminating danger. Therefore, the existence of proportion between property which is endangered by occurred danger and property which is violated during elimination of such danger, is very important for the existence of extreme necessity.

3.3. Violation of extreme necessity

If a perpetrator, during eliminating danger for his own or someone else's legal property, oversteps the limit of extreme necessity which was set under condition that caused harm is not greater than threatening harm, there is violation or excess of extreme necessity. Therefore, violation of extreme necessity exists when a person eliminates danger from a legal property and during that action violates someone's property which is of higher value or greater significance than the property being protected. An act committed in violation of extreme necessity is a criminal act and a person who committed it is responsible according to general principles of criminal law. Most often violation of extreme necessity happens in situations when a person who eliminates danger is not in a position to estimate values of both legal properties and the level of excusable action when eliminating danger and causing harm to one's legal property[41].

But, not only is in practice very difficult do determine whether a criminal act is punishable, whether it was committed out of extreme necessity and whether extreme necessity is violated, but the criminal-legal theory has no definite attitude about where the limits of extreme necessity are. Some authors say that violation of extreme necessity cannot represent the basis which has influence on mitigation or exemption of sentence. Namely, an act committed out of extreme necessity, is committed towards

[41] Lj. Nešić, Krivično pravo, Opšti deo, Zemunska štampa, Beograd, 1991. p.99-100

properties of innocent, disinterested people, and not against the property of the attacker. This is the case of collision of two laws, so in this case, a perpetrator of such act should not be in favour when being punished, if such act was committed in violation of extreme necessity.

Other theories say that violation of extreme necessity is especially significant in situations when a perpetrator is under psychical pressure due to danger for his protected property. In such psychical condition a perpetrator undertakes the action of eliminating danger, so in case of overstepping the limits of extreme necessity, the sentence for a perpetrator can be mitigated. In fact, the problem of overstepping the limit of extreme necessity is about the question whether caused harm is greater than threatening harm and whether eliminating danger could have been done by less harm of one's legal property than the harm which was really done. Therefore, an act committed in violation of extreme necessity is a criminal act for which the perpetrator is responsible, but, facultatively, there is a possibility of mitigating sentence.

But, there are cases where violation of extreme necessity results from specific psychical condition of the perpetrator which was caused by occurred danger. This psychical condition can be of such intensity that it causes the condition of temporary mental derangement. Such derangement can be of such intensity that it can exempt criminal responsibility to some extent.

When violation of extreme necessity happened under special extenuating circumstances, court is authorised to mitigate the sentence or to exempt the perpetrator from sentence. Whether conditions for the existence of extreme necessity are fulfilled, whether there is violation of extreme necessity and whether all that is done under extenuating circumstances (of objective and subjective nature) is a factual question which is being solved by board of judges in each particular case. violation of extreme

necessity is also a situation where a perpetrator himself caused danger, but out of negligence, so, while eliminating such danger, violates some legal property. In that case also, mitigating sentences (facultative) are provided by law.

3.4. Duty to expose to danger

Extreme necessity is a general institute of criminal law. It could by used by all people, under condition that all conditions, cumulatively provided by law, are fulfilled. This institute is applicable in case of any criminal act aimed against any property. But, there is an exception to this general rule. Namely, there is no extreme necessity (which in other words means that there is a criminal act for which the perpetrator is responsible), if a person was obliged to expose to danger[42]. Therefore, duty (obligation) to expose to danger excludes the applicability of the institute of extreme necessity. If such person commits an act in order to eliminate danger for some of his legal property (and this means his life and body as well), this person shall be criminally responsible and punished for the committed act, though all conditions of extreme necessity provided by law exist.

By provision article 25. paragrapf 4. of the Criminal code of the Republic of Bosnia and Herzegovina, article 27. paragraph 4. of the Criminal code of the Federation of Bosnia and Herzegovina, article 27. paragraph 4. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 12. paragraph 4. of the Criminal code of the Republic Srpska applicability of institute of extreme necessity for perpetrators who were in duty to expose to danger is excluded, and it is necessary for the court to judge whether such duty to expose to danger existed for those people, taking into consideration all circumstances in specific situation.

[42] B. Čejović, Krivično pravo, Opšti deo, Beograd, 2002. p. 93

A person who is in duty to expose to danger cannot refuse carrying out such duty, according to the institute of extreme necessity. In Bosnia and Herzegovina there is a great number of people in organs, organizations and facilities who cannot use this institution: military service, police, firemen, people who handle inflammable, poisonous, radioactive and explosive materials, prison guards and others. Those are people who are obliged to undertake actions and act according to specific rules, with necessary and high caution, because, by accepting such professions, they also accepted a risk for being in such dangerous situations themselves.

Therefore, these people are obliged to sacrifice their own properties, even the most important ones, if they are in danger while performing their jobs or taking care of confidential affairs and assignments. So, there is a collision between their right to live (which is, as a natural law, absolute and inviolable) and duty for exposing to danger and endangering life in certain situations. In theory, an idea according to which duty to expose to danger does not exist always and in each case, but only then when, according to all circumstances of subjective and objective character, in certain case can be concluded that such person is really obliged to expose to danger, is accepted. This means that duty to expose to danger is not of absolute nature, as it could be concluded at first sight. In other words, possibility of quoting extreme necessity for these people is not completely excluded, so there are examples when firemen are not obliged to jump into fire at any price in order to extinguish fire, especially when such chances are small, and danger, which they are exposed to, is very big.

BASIC LITERATURE

Antolisei F., Manuale di diritto penale, Parte generale, Milano, 1997.
Avakumović Dj., Teorija kaznenog prava, Beograd, 1887-1889.
Babić M., Krajnja nužda u krivičnom pravu, Banja Luka, 1987.
Babić M., Komentari krivičnih zakona u Bosni i Hercegovini, Sarajevo, 2005.
Bačić F., Krivično pravo, Opći dio, Zagreb, 1978.
Bačić F., Komentar Krivičnog zakonika Republike Hrvatske, 2005.
Bavcon Lj., Šelih A., Kazensko pravo, Splošnij del, Ljubljana, 1987.
Čejović B., Krivično pravo u sudskoj praksi, Knjiga prva, Opši deo, Beograd, 1985.
Čejović B., Krivično pravo, Opšti deo, Beograd, 2002.
Djordjević M., Djordjević Dj., Krivično pravo, Beograd, 2005.
Djurdjić V., Jovašević D., Medjunarodno krivično pravo, Beograd, 2003.
Djurdjić V., Jovašević D., Praktikum za krivično pravo, Knjiga prva, Opšti deo, Beograd, 2003.
Djurdjić V., Jovašević D., Zdravković Lj., Nužna odbrana u krivičnom pravu, Niš, 2004.
Foregger E., Serini E., Strafgesetzbuch , Wien, 1989.
grupa autora, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 1995.
Horvatić Ž., Kazneno pravo, Opći dio, Zagreb, 2003.
Jovanović Lj., Jovašević D., Krivično pravo, Opšti deo, Beograd, 2002.
Jovašević D., Lexicon of criminal law, Beograd, 2006.
Jovašević D., Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002.
Jovašević D., Hašimbegović T., Osnovi isključenja krivičnog dela, Beograd, 2001.
Jovašević D., Krivični zakonik Republike Srbije sa komentarom, Beograd, 2006.

Jovašević D., Krivično pravo,Opšti deo, Beograd, 2006.
Kambovski V., Krivično pravo, Opšt del, Skoplje, 2005.
Lazarević Lj., Vučković B., Vučković V., Komentar Krivičnog zakonika Republike Crne Gore, Cetinje, 2004.
Marjanović G., Makedonsko krivično pravo, Opšt del, Skoplje, 1998.
Nešić Lj., Krivično pravo, Opšti deo, Beograd, 1991.
Novoselac P. Krivično pravo, Krivično djelo i njegovi elementi, Osijek, 1990.
Novoselac P., Opći dio kaznenog prava, Zagreb, 2004.
Pavišić B., Komentar Kaznenog zakonika Republike Hrvatske, Rijeka, 2003.
Penko B., Strolig K., Kazenski zakonik Republike Slovenije, Ljubljana 1999.
Petrović B., Jovašević D., Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005.
Radovanović M., Krivično pravo, Opšti deo, Beograd, 1976.
Srzentić N., Stajić A., Lazarević Lj., Krivično pravo SFRJ; Opšti deo, Beograd, 1978.
Šilović J., Nužna odbrana, Zagreb, 1910.
Tahović J., Krivično pravo, Opšti deo, Beograd, 1961.
Tomanović M., Nužna odbrana i krajnja nužda, Beograd, 1995.

A PROPOSAL OF A UNIFORM CODE FOR POLITICAL CRIMES AND TERRORISM

BY DR. ANWAR FRANGI [1]

1. There is a fundamental conflict between the way research envisages political crimes and its way of envisioning terrorism. On one hand, political offense is considered to be a type of conflict when it involves violent action, rather than a method of warfare. On the other hand, research conceives of terrorism as a method of warfare, not as a type of conflict. One research seems to conflict with the other when taken together. How to remedy this situation?

2. Political crimes are acts committed by individuals or groups against the government, and are generally motivated by political intent. Three kinds of activities may be classified as political crimes: (1) illegal acts undertaken in an attempt to change the existing structure of political power; (2) illegal efforts to seize power, and (3) the refusal to obey the law because of political or ideological beliefs.[2]

Terrorism involves a violent act or an act dangerous to human life

[1] *LL.M.* 1994, Harvard Law School (Massachusetts, USA); *LL.M.* 1992, American University Washington College of Law (Washington, D.C.); *Ph.D.* 1986, University of Poitiers Law School (France); *D.E.A.* 1983, University of Poitiers Law School (France); *LL.B.* 1982, Lebanese University Law School (Lebanon). Dr. Frangi is professor of human rights and researcher at the Holy Spirit University of Kaslik (Lebanon), and professor of international law at La Sagesse University Faculty of Law (Lebanon).

[2] G.M. Sykes, *The Future of Crime* (Washington, D.C.: U.S. Government Printing Office, 1980) at 48, quoted in D.S. Eitzen & D.A. Timmer, *Criminology: Crime and Criminal Justice* (John Wiley & Sons, Inc., 1985) at 322.

that appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping. The following acts are deemed acts of terrorism:[3]

1. Bombs attacks with or without previous warning, in public places attended essentially by civilians, i.e., stores, shopping streets, bus stops, administrative centers, hotels, cinemas, places of worship, bars;
2. Attacks against civilian transports, i.e., airplanes, trains, subways, buses, specific cars;
3. Attacks against civilian properties, generally economic;
4. Attacks against opposing personalities, i.e., members of governments, leaders of political guerilla movements, other political or religious personalities, e.g., potential opposing personalities, traitors and collaborators, not to mention those belonging to police, diplomatic or economic services.

3. All political crime can be described as an individual or a collective violent or non-violent act. And all terrorism can be described as an individual or a collective violent act. Some types of terrorism involve violent actions that qualify as political conflicts, such as indiscriminate shelling of civilians. Other types of terrorism, however, involve violent actions that fall, according to ICRC, in the category of conflicts beyond that of tension,[4] but do not

[3] Michel Veuthey, *Guérilla et Droit Humanitaire* (Genève: Comité International de la Croix-Rouge, 1983) at 148-152.

[4] ICRC provides the following description of 'internal tensions': "While situations of internal disorder - and even more, those of civil war - often lead to the arrest of large numbers of persons because of their acts or their political attitudes, this phenomenon is likewise found in *situations which are not marked by acts of violence*, but which reflect internal tensions of a political, racial that the established governments and their police dispose of such powerful means of repression that an armed insurrection is often practically impossible. This may

qualify as political conflicts, such as bomb attacks or hijacking. The former types of terrorism may be carried out in time of war, the latter in time of peace.

4. Taking the above characteristics together, we can get 20 combinations, political offence or terrorism being an individual or a collective act of violence, characterized as tension, disturbance or armed conflict, and carried out at the national or international level, in time of peace or in time of war.

5. Terrorism is deemed an individual or a collective act of violence, classified as disturbance, and carried out at the national or international level, in time of peace or in time of war. On the other hand, a political offence is deemed an individual or a collective violent or non-violent act, classified as tension, disturbance or armed conflict, and carried out at the national level, in time of peace or in time of war.

6. Accordingly, the common denominator for political crimes and terrorism is that both are:

---

give rise to situations of internal tensions which are characterized by the fact that the governmental authorities keep full control of the events and undertake the massive internment of persons they consider dangerous to their security. (emphasis added). International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 24 May-12 June 1971, Vol. V, "Protection of Victims of Non-International Armed Conflicts" at 89. Accordingly, the following acts may be qualified as 'internal tensions': Massive arrests; a large number of 'political' detainees; probable existence of maltreatment or inhumane conditions of detention; suspension of fundamental judicial guarantees, because of either the proclamation of a state of exception or a *de facto* situation; allegations of disappearances. *See Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, Comité International de la Croix-Rouge (Genève: 1986) at 1379. Civil disobedience is deemed to be 'tension' when it does not manifest acts of violence. Under civil disobedience can be included, e.g., sit-in; draft card burning; peaceful strike, etc.

1. Carried out individually and collectively;
2. Can be described, in accordance with ICRC's classification of conflicts, as acts of violence that constitute a disturbance;
3. Can be carried out at the national level;
4. In time of peace and in time of war.

7. And the difference between both acts is the following:
1. Only can non-violent individual and group political offenses be described, in accordance with ICRC's classification of conflicts, as 'tension'.
2. Only can group political offenses be described, in accordance with ICRC's classification of conflicts, as armed conflicts, terrorism being considered only a method of warfare and not a type of conflict.

8. Following the above review, it is possible to draw the following uniform laws that may help to mark the boundary between political crimes and terrorism.

Article I:
Every individual political offence, if not violent, is pure political offence.

Article II:
Every group political offence, if not violent, is tension.

Comments:
Not individual political offence, rather group political offence, can be considered a conflict. Now a situation of internal tensions is not marked by acts of violence. Therefore, a non-violent group political offence is deemed a tension.

Article III:
Every political offence, be it individual or collective, and which is carried out in time of peace, is not a political offence if it is deemed

an international crime.

Comments:
A political offence can be conceived at international level only under Extradition Law. Extradition is an international procedure under which a State B grants a request to deliver a person who took refugee on its territories to the requesting State A which intends to pass judgment on him or to enforce a sentence passed on him. There is, however, an exception to this procedure, where State B may refuse to grant the request to the requesting State A, if the offence is of "political" character. This is commonly known as *the Political Offence Exception to Extradition Law*. But, there is a considerable retreat from this exception when the offence on which the request is based qualifies as international crime. This is commonly known as *the Exception to the Political Offence Exception to Extradition Law*. This retreat has been noted under, *e.g.*, The European Convention on the Repression of Terrorism (27 January 1977).

Article IV:
No act of terrorism, be it individual or collective, and whether carried out in time of peace or in time of war, is qualified as tension.

Comments:
Situations of internal tensions are not marked by acts of violence. But acts of terrorism are acts of violence. Therefore, situations of internal tensions are not marked by acts of terrorism.

Article V:
All terrorism, be it individual or collective, is conceived at a level beyond that of tension.

Comments:
Situations of internal disturbances are marked by acts of

violence. But acts of terrorism are acts of violence. Therefore, situations of disturbance are marked by acts of terrorism.

Article VI:
Some terrorism, be it individual or collective, is disturbance.

Comments:
According to ICRC, situations of internal disturbances involve situations in which there exists not a non-international armed conflict as such, but a confrontation within the country, characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, from the spontaneous generation of acts of revolt all the way to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. *See* International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971, Vol. V, "Protection of Victims of Non-International Armed Conflicts", p. 79. Under disturbances all acts of violence short of armed conflicts may be included, e.g., "riots," "violent strikes," and protests.

Article VII:
Some terrorism, be it individual or collective, is armed conflict.[5]

Article VIII:
All individual or group terrorism is a method of warfare when it is considered at armed conflict level.

Article IX:

[5] *E.g.*, indiscriminate bombardment.

No terrorism is a type of conflict.[6]

Notwithstanding the previous provision, terrorism is disturbance when it is characterized by certain duration.[7]

Article X:
All individual political offence, if violent, is terrorism.

Comments:
An *individual* political offense is deemed "tension," notwithstanding the fact that it may degenerate into "disturbance" or even an "armed conflict."

Article XI:
At the opposite ends of the conflict spectrum, political offence or terrorism, be it individual or collective, can be committed in time of peace or in time of war.

Comments:
1. Tension and international armed conflicts are at opposite ends of the conflict spectrum, the former being the lowest, the latter the highest, in intensity.
2. Acts of violence are not required at tension level. Now, political crimes can be violent or non-violent, whereas terrorism involves only violent acts. Therefore, political crimes to the contrary of terrorism can be qualified as "tension."
3. Although it is conceivable that political crimes would be carried out at international level in time of war, it is inconceivable that they would be carried out at international level in time of peace. Terrorism, however, can be performed at international level in time of peace and in time of war.

---

[6] Since acts of terrorism are only recognized as a method of warfare.

[7] *See* Comments to Article VI

There is, however, only one case where a political crime may be envisaged at international level. *See comments* to Article III *supra*.

Article XII:

1. Political crimes and terrorism can be identical, if both are deemed an act or a conflict at national level.

1a. Individual political crimes and terrorism are not identical if both are deemed types of conflict other than disturbance, and if individual political crime involves violent action.

Comments:
Common Articles 50/51/130/147 state as follows:
"Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Indiscriminate attacks against protected civilians or civilian property can, therefore, be considered as grave breaches, *i.e.*, war crimes. But war crimes are international crimes. Therefore, grave breaches committed during armed conflicts can not qualify as political crimes even though committed for political motives or reasons, the political character of an offence being excluded when the offence is deemed an international crime.

However, indiscriminate attacks against protected civilians or civilian property are defined by the Fourth Geneva Convention as acts of terrorism. (Article 33(1) of the Fourth Convention which states that "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." *See also* Anwar Frangi, *The Internationalized Non-International Armed Conflict in Lebanon: 1975-1990, Introduction to Confligology*, 22 CAP.U.L.REV. 965 (Fall 1993), pp. 29-33. Therefore, an act that would be considered as a political offence to the contrary, may be qualified as an act of terrorism. In this context, one act may be taken for the other identically. The outcome however can be different depending on whether the armed conflict is of international or non-international character. If the armed conflict is of international character, and if "willful killing" and the extensive destruction of property are war crimes according to the above Article, and if terrorism under Article 33(1) of the Fourth Convention can actually be either a willful killing or an extensive destruction of property, the political character of an offence is excluded. And the act of terrorism may not be identical with the political offence since at the international level only international crime may be considered. But if the armed conflict is not of international character, an indiscriminate attack against civilians or civilian property may be qualified as either political offence or terrorism when the indiscriminate attack is committed for political intimidation, as for example, is the case of the Syrian shelling of the Christian civilians and civilian property in 1976 and 1989. In this context, it can be said that both acts are identical. But, if grave breaches are considered as customary international law applicable in armed conflict not of international character, both acts would, therefore, be not identical. This, however, has not been considered the case by humanitarian law scholars (*id.* at 94, note 270).

1b. Individual political crimes and terrorism are not identical if both are deemed types of conflict beyond tension, and if individual

political crime involves not violent action.

1c. Group political crimes and terrorism can be identical if both are deemed types of conflict other than disturbance, and if group political crime involves violent action.

> Comments:
> The "durable" character required by ICRC at the level of "disturbance" may be envisaged for acts of terrorism when sporadic acts of violence are steadily committed, as shows the situation in Lebanon from October 2004 to November 2006. The crucial issue, however, stems from the fact that an act of terrorism is generally recognized as a method of warfare, rather than a type of conflict. I answer that the issue is legitimate when the act of terrorism is considered *per se*. The issue would, however, be not legitimate, if considered *inter se*. If a political offence can be considered as a type of conflict, and if an act of terrorism can be identical to a political offence, it is therefore incomprehensible why an act of terrorism should not be considered as a type of conflict when it bears the characteristics of a political offence.

2. Political crimes and terrorism can be identical at international level, in time of peace, if political crime which is deemed as such at national level is deemed terrorism at international level.

CONCLUSION

9. Marking the boundary between political crimes and terrorism helps not only to qualify the relation between both concepts, but also to define that which poses a growing threat to international peace and brotherhood.

LA PROBLEMATIQUE DE L'INTERRUPTION VOLONTAIRE DE LA GROSSESSE EN FRANCE

par Mădălin-Savu TICU

1. Délimitations nécessaires

Plusieurs auteurs utilisent le terme «avortement» comme synonyme pour définir le syntagme «interruption volontaire de la grossesse». On doit bien délimiter ces deux notions car on risque de transformer la simplification d'un syntagme dans la mystification du terme «avortement».

Selon le dictionnaire Larousse, «avorter» signifie «expulser un foetus avant terme». Dans cette définition il ne s'agit pas de la notion de «volonté» comme c'est le cas du syntagme «interruption volontaire de la grossesse».

Si on peut parler d'une interruption volontaire de la grossesse, ça signifie qu'on peut aussi bien poser en discussion une interruption involontaire de la grossesse, c'est-à-dire une interruption qui n'a pas été désirée par la femme enceinte et qui a été causée par des circonstances variées (comme un accident, par exemple).

L'avortement comprend donc dans sa sphère l'IVG aussi bien que l'interruption involontaire de la grossesse ; l'IVG c'est un cas particulier de l'avortement, comme celui-ci c'est un cas particulier dans lequel se trouve la femme enceinte.

Cette délimitation était nécessaire parce que les textes legislatifs visent seulement l'IVG (donc, le cas de l'intervention de la volonté), et non pas l'avortement vu comme une interruption involontaire de la grossesse (le cas d'une perte indésirable). Le

critère de cette délimitation c'est donc la volonté de la femme enceinte.

2. Considérations religieuses et morales

Le sixième commandement biblique – «Que tu ne tues pas» - demontre que toute forme de vie (spécialement la vie humaine) est sacrée.

Pour la religion, le respect de la vie a, comme base, une sorte d'euphorie – «La vie est elle-même une merveille qui peut te couper la respiration[1]».

L'avortement (l'IVG), le suicide et l'euthanasie sont incompatibles avec une pratique rigoureuse de la religion chrétienne (catholique ou orthodoxe). Les lois de l'Église de Rome y sont opposées. Pourtant, ces libertés n'en existent pas moins : elles découlent du principe de laicité de l'État[2].

Le 30 mars 1995 le Vatican a rendu publique la onzième encyclique du Pape Jean-Paul II, intitulée Evangelicum Vitae, dans laquelle le Saint Père dénonce l'avortement, l'euthanasie, la contraception, la procréation artificielle, les manipulations et les destructions d'embryons. Les États démocratiques ont été qualifiés de « tyrans » quand ils ont légalisé l'avortement ou certaines formes d'euthanasie (Le Monde, 31 mars 1995)[3].

Dans une lettre adrésée aux femmes, qu'il a rendu publique le 10 juillet 1995, le Pape renouvelle sa condamnation de toute IVG, même à la suite d'un viol (situation qui peut être assimilée à la détresse dans la vision de la loi).

[1] Le Catéchisme des évêques catholoques Hollandais
[2] Claude Leclercq, *Libertés publiques*, pag. 219
[3] Ibidem, pag. 219

De l'autre côté intervient la morale. Le problème de la naissance souleve beaucoup de questions en ce qui concerne la procréation artificielle, le diagnostic prénatal et l'interruption volontaire de la grossesse.

Parallèlement, le droit à la vie de l'embryon humain a été remis en question : au droit de l'enfant a naître, on a opposé le droit de la femme sur son propre corps, qui peut aller jusqu'à l'avortement[4]. Mais droit contre droit, qui peut choisir ? La loi paraît jouer ici entre des équilibres qui la dépassent[5].

L'enfant n'est pas un objet destiné à satisfaire l'envie des adultes, mais une personne humaine, et c'est lui qui constitue la finalité de toute forme de procréation[6], même si au début il s'agit d'un embryon.

Selon la formule du Comité national d'éthique, l'embryon est « une personne humaine potentielle ». Détruire l'embryon, c'est donc porter une atteinte anticipée à la vie d'une personne.

Ce comité, dont le titre officiel est *Comité consultatif national d'éthique pour les sciences de la vie et de la* santé, a été institué par un décret du 23 février 1983. Il est chargé de donner son avis sur les problèmes moraux souléves par la recherche dans les domaines de la biologie, de la médecine et de la santé (art.1 du décret). Ces avis possèdent une réelle autorité morale et peuvent « inspirer » le législateur ou le pouvoir réglementaire[7].

Mais ce ne sont que des avis et le comité ne possède donc aucun pouvoir de décision ou de contrainte à l'égard d'un laboratoire ou d'une équipe de chercheurs. Il peut être saisi par les présidents de l'Assemblée nationale ou du Sénat, par un membre du gouvernement, par une fondation reconnue d'utilité publique, par

---

[4] Jean Rivero, *Les libertés publiques*, PUF, Thémis, 1997, tome 2, pag. 107
[5]A. Sériaux, L. Sermet, D. Viriot-Barrial, Droits et libertés fondamentaux, pag. 106
[6] Jean Rivero, *Les libertés publiques*, PUF, Thémis, 1997, tome 2, pag. 107
[7] Yves Madiot, *Droits de l'homme*, Masson, 2000, pag. 151

un établissement d'enseignement supérieur et il peut se saisir de questions particulières entrant dans son champ de compétences.

3. Reconnaissance de l'IVG

La première loi permettant une certaine régulation des naissances n'est adoptée qu'en 1967 : la stérilisation volontaire est clandestine alors que sont encouragées bon nombre de mesures favorisant la procreation artificielle[8].

De même, le droit de refuser la procréation et l'IVG, c'est-à-dire le droit de la femme à disposer de son corps, n'ont été reconnus qu'en 1975-1979, en raison de l'opposition, nombreux adversaires natalistes assimilant « l'avortement » à un acte de mort.
Mais on se trouve devant un paradoxe : bon nombre de partisans du retour de l'interdiction de l'IVG sont néanmoins partisans de la peine de mort ! Or, précisément le « droit de toute personne à la vie » (art. 2 de la CESDH ; art. 6 du Pacte International de 1966) concerne la peine capitale et ne saurait être interprété comme un droit de protection de l'embryon[9].

L'IVG a été introduit comme liberté de la personne à une date récente en France. Elle est régie par trois textes législatifs[10] :

a) *la loi du 17 janvier 1975* (dite « loi Veil ») avait un caractère provisoire. Elle suspendait pendant une période de cinq ans l'application des dispositions des quatre premiers alinéas de l'article 317 du Code pénal lorsque l'IVG était pratiquée avant la fin de la dixième semaine par un médecin dans un établissement d'hospitalisation public ou un établissement d'hospitalisation privé offrant certaines garanties afin de lutter contre les risques

[8] Robert Charvin, Jean-Jacques Sueur, *Droits de l'homme et libertés de la personne*
[9] Robert Charvin, Jean-Jacques Sueur, *Droits de l'homme et libertés de la personne*, pag. 93
[10] Claude Leclercq, *Libertés publiques*, pag. 219

sanitaires entraînés par les avortements clandestins.

b) *la loi du 31 decembre 1979*. Cette loi a mis fin au caractère provisoire des dispositions de la loi de 1975. Elle dispose, en effet, que les quatre premiers alinéas de l'article 317 du Code pénal ne s'appliquent pas lorsque l'IVG est pratiquée pour motif thérapeutique, soit avant la fin de la dixième semaine par un médecin dans un établissement d'hospitalisation public ou dans un établissement d'hospitalisation privé dans les conditions déjà énoncées par la loi du 17 janvier 1975.

c) *la loi du 31 décembre 1982* a mis à la charge de la Sécurité sociale les frais entraînés par les soins et l'hospitalisation en cas d'IVG. En assimilant l'IVG à un acte medical ordinaire dont la collectivité assume les frais quelle que soit la situation pécuniaire de l'intéressé, elle risque de le banaliser aux yeux du plus grand nombre[11].

En ce qui concerne la loi du 17 janvier 1975, précisé par la loi du 31 décembre 1979, elle ne garantit pas le droit à l'IVG, mais organise seulement sa tolérance. Seule la « femme en situation de détresse » peut être admise à bénéficier d'une IVG. L'article 317 du Code pénal pénalisant l'avortement demeure en vigueur à la seule exception des cas prévus par la loi précitée[12].

La même loi de janvier 1975 a été reconnue conforme à la Constitution par le Conseil constitutionnel, par sa décision du 15 janvier 1975. La Haute Juridiction a énoncé que « la loi relative à l'IVG respecte la liberté des personnes appelées à recourir ou à participer à une IVG, qu'il s'agisse d'une décision de détresse ou d'un motif thérapeutique ; que, dès lors, elle ne porte pas atteinte au principe de liberté posé à l'article 2 de la Déclaration des droits de l'homme et du citoyen » (Les grandes décisions du Conseil

---

[11] Jean Rivero, *Les libertés publiques*, PUF, Thémis, 1997, tome 2, pag. 115

[12] Robert Charvin, Jean-Jacques Sueur, *Droits de l'homme et libertés de la personne*, pag. 99

constitutionnel, Dalloz, 8-ème édition, 1995, pag. 299)[13].

Les lois de 1979 et de 1982 n'ont pas fait l'objet d'un recours devant le Conseil constitutionnel. En toute hypothèse, ce dernier n'aurait pu que confirmer sa position de principe telle qu'affirmée dans la décision du 15 janvier 1975.

La loi du 27 janvier 1993 portant diverses dispositions d'ordre social et, à ce titre, loi « fourre-tout », a été déférée au Conseil constitutionnel, lequel, dans sa décision du 21 janvier 1993, a considéré que la dépénalisation de l'avortement opéré par la femme sur elle-même n'était pas contraire à la Constitution.

Quant au Conseil d'État, celui-ci, par un arrêt d'assemblée du 21 décembre 1990, a jugé que la loi de 1975 ayant autorisé l'IVG n'était pas incompatible avec l'article 2 de la CESDH, ni à l'article 6 du Pacte international sur les droits civils et politiques de 1966, ces deux textes ayant été ratifiés par la France. L'article 6 dudit pacte énonce : « Le droit à la vie est inhérant à la personne humaine. Ce droit doit être protégé par la loi. Nul ne peut être arbitrairement privé de sa vie »[14].

Un peu plus tard, la Chambre criminelle de la Cour de cassation, dans trois arrêts datés du 27 novembre 1996, à jugé que la loi Veil de 1975 était compatible avec la Convention européenne des droits de l'homme, le Pacte international des droits civils et politiques et la Convention de New York sur les droits de l'enfant.
La Cour de cassation a, en outre, contesté que la loi Veil enfreigne la Convention de Genève sur l'esclavage, comme l'affirmaient les militants anti-avortement et que l'IVG soit un crime de génocide ou un acte de torture.

---

[13] Claude Leclercq, *Libertés publiques*, pag. 220
[14] Ibidem, pag. 221

4. Conditions de l'IVG

Les conditions qui autorisent l'atteinte au principe fondamental du « respect de tout être humain dès le commencement de la vie » que constitue l'IVG sont de quatre sortes[15] :

1) *une condition de temps* : l'IVG ne peut intervenir après la fin de la douzième semaine.

2) *une condition de motif* : La « situation de détresse » dans laquelle son état met la femme, situation dont elle est seule juge ; par là se trouve exclu l'avortement dit « de convenance », motivé, par exemple, par la révélation à l'occasion d'un examen prénatal du sexe de l'enfant à naître, qui ne correspond pas au souhait des parents.

3) *une condition technique* : L'avortement ne peut être pratiqué que par un médecin dans un hôpital public ou dans un hôpital privé offrant certaines garanties, ceci pour lutter contre les risques sanitaires inhérents aux avortements clandestins. Cette condition disparaît avec la nouvelle technique d'avortement que constitue l'utilisation, dès la fécondation, d'un médicament abortif, mis en vente en 1988. Mais il ne peut être délivré que sur ordonnance médicale et, en même temps, les autres conditions demeurent.

4) *des conditions de procédure* : Visite à un médecin, qui doit avertir l'intéressée des risques médicaux qu'elle prend et lui furnir toutes indications sur les aides qu'elle peut recevoir si elle renonce à son projet ; dans un second temps, consultation d'un organisme agréé, afin d'étudier l'ensemble du problème et notamment ses aspects sociaux ; enfin, si après ces consultations destinées à éclairer l'intéressée, celle-ci persiste dans son projet, demande écrite adressée au médecin.

[15] Jean Rivero, *Les libertés publiques*, PUF, Thémis, 1997, tome 2

Ces conditions sont écartées lorsque la poursuite de la grossesse met en péril grave la santé de la femme, ou lorsqu'il s'avère que l'enfant à naître sera atteint d'une affection incurable : dans ce cas, que le développement du diagnostic prénatal peut rendre plus fréquent, l'IVG, qui prend un caractère thérapeutique, peut être décidée à toute époque sur avis de deux médecins[16].

La loi entend préserver non seulement la liberté de la femme, qui reste maîtresse d'une décision que les consultations prescrites ont seulement pour but d'éclairer, mais encore celle du médecin – qui peut refuser de pratiquer l'avortement, mais doit en aviser celle qui vient le consulter dès la première visite -, celle du personnel hospitalier, qui n'est pas tenu de participer à l'interruption, et celle des hôpitaux privés, qui peuvent refuser de s'y prêter, les uns et les autres pour des motifs de conscience[17].

Il s'agit donc d'une « clause de conscience » qui appartient aux médecins et au personnel hospitalier et qui peut être invoquée pour refuser la pratique de l'IVG et même les services sociaux imposent à la candidate à l'IVG une « leçon de morale » traditionnelle[18].

Toutefois, il s'agit dans la pratique d'une étape dans l'extension des droits de la femme : celle-ci apprécie elle-même « l'état de détresse » mentionné par la loi et le Conseil d'État considère que la femme majeure peut décider deule de recourir à l'IVG (sans prise en considération de son mari).

En ce qui concerne la femme mineure, la loi prévoit qu'il n'est pas nécessairé qu'en principe le consentement de l'autorité d'un parent ; si la femme a gardé le secret, le medecin doit essayer de la convaincre de recueillir l'aprobation d'un de ses parents. Si la mineure ne veut pas, elle doit se faire accompagnée par une

[16] Ibidem, pag. 114
[17] Ibidem, pag. 114
[18] Robert Charvin, Jean-Jacques Sueur, *Droits de l'homme et libertés de la personne*

personne majeure de son choix.

5. L'IVG dans le Code pénal

La majorité des pays de l'Europe ont inscrit l'IVG dans leurs Codes pénaux, contrairement à la France qui l'avait inscrit dans le Code de la santé. Mais l'article 223-10 du Nouveau Code pénal (entré en vigueur le 1-er mars 1994) prévoit une infraction nouvelle : l'interruption de grossesse sans le consentement de la femme enceinte est punie de 5 ans d'emprisonnement et de 500.000 F d'amende.

On ajoutera que l'article 38 de la loi du 27 janvier 1993 a abrogé les dispositions du Code pénal qui sanctionnaient l'avortement pratiqué par la femme sur elle-même. En revanche, l'article 223-12 du Nouveau Code pénal réprime le fait de fournir à la femme les moyens matériaux de pratique sur elle-même une IVG. La peine prévue est de trois ans d'emprisonnement et de 300.000 F d'amende. Ces peines sont portées à 5 ans d'emprisonnement et de 500.000 F d'amende lorsque l'infraction est commise de façon habituelle.

Aux termes de la loi du 27 janvier 1993 portant diverses mesures d'ordre social, est puni d'un emprisonnement de deux mois et d'une amende de 2.000 F à 30.000 F ou de l'une de ces deux peines seulement, le fait d'êmpecher ou de tenter d'êmpecher une IVG, soit en perturbant l'accès aux établissements hospitaliers ou la libre circulation à l'intérieur de ces établissements ; soit, en exerçant des menaces ou tout acte d'intimidation à l'encontre des personnels médicaux et non medicaux travaillant dans ces etablissements ou des femmes venues y subir une IVG.

Le 30 mai 2001 est intervenue la loi sur l'allongement à douze semaines du délai pendant lequel peut être pratiquée une IVG lorsque la femme enceinte se trouve dans une situation de détresse.

Les sénateurs ont saisi le Conseil constitutionnel considerant que l'allongement de 10 à 12 semaines portait atteinte au respect de la vie et de la dignité humaine et ils invoquaient aussi le risque de la dérive eugénique.

Dans sa décision, le Conseil a déclarés conformes à la Constitution les articles 2,4,5,8 ainsi que le V de l'article 19 de la li relative à l'IVG et à la contraception.

En ce qui concerne ce délai, si le médecin pratique une IVG après la 12 semaine, il est puni à une peine de 2 ans de prison et a une amende de 20.000 F.

6. Conclusions

Le droit à la sexualité, détachée de la procréation, est consacré par la Convention européenne (art. 12 et 14) qui assure aux femmes « les moyens d'accéder aux services médicaux, y compris ceux qui concernent la planification de la famille ». Le principe est celui de la liberté de la femme de décider librement du nombre et de l'espacement des naissances, ainsi que celle d'accéder « aux moyens nécessaires pour leur permettre d'exercer ces droits » (art. 16).

C'est la loi du 28 décembre 1967, modifiée par la loi du 4 decembre 1974 (prévoyant la prise en charge par la Sécurité sociale des médicaments et objets contraceptifs) qui reconnaît avec quelques réserves le droit à la contraception.

L'article 7 de la loi de 1967 et l'article 5 de la loi de 1974 interdisent néanmois toute propagande antinataliste, alors que la propagande nataliste est légale parce que jugée légitime par tradition. La publicité pour les moyens contraceptifs n'est légale qu'associée avec l'action préventive contre les maladies sexuellement transmissibles. La loi du 31 juillet 1920 sanctionnait

la propagande anticonceptionnelle d'une peine de 6 mois de prison et d'une amende (le régime de Vichy en fit un abondant usage).

L'IVG était à l'époque soumise à un régime répressif : la loi du 27 mars 1923 correctionnalisait l'avortement et la jurisprudence et la jurisprudence était rigoureuse.

Le droit à l'avortement a suscité non seulement des réserves philosophiques ou religieuses, légitimes, mais aussi des actions tendant à faire échec à la réalisation de notre droit, contraires à la loi, donc punissables (les « commandos anti-avortement »).
Mais on peut bien trouver l'autre situation : la naissance d'un enfant à la suite de l'échec d'un avortement demandé par la mère. Selon la jurisprudence cu Conseil d'État, cette situation « n'est pas génératrice d'un préjudice de nature à ouvrir à la mère un droit à réparation » (CE, 2 juillet 1982, Mlle R., Rec. 206) sauf circonstances particulières (dommages subis par l'enfant lui-même : CE, 27 sept. 1989, Mme Karl, Rec. 176).

Les cas d'avortements permis sont des exceptions, ce qui tend à faire admettre a contrario que, pour le reste, l'embryon a bien droit a la vie (*exceptionis sont strictissime interpretationes*).
Le Code de la santé publique envisage deux cas où l'IVG peut être pratiquée :

1) celui, qui ne peut intervenir qu'avant la fin de la 12-ème semaine de grossesse, où l'état physique ou moral de la feme enceinte la place « dans une situation de détresse » (art.L.162-1, CSP) dont seule elle est juge ;

2) celui, qui peut intervenir « à tout époque de grossesse », où la poursuite de celle-ci « met en peril grave la santé de la femme » ou encore lorsqu'il apparaît que l'enfant a naître est « atteint d'une affection d'une particulière gravité reconnue comme incurable au moment du diagnostic », la décision, toujours prise par la mère (sauf situation d'urgence et si

la mère ne peut donner son consentement) devant être néanmoins précédée d'un examen, d'une discussion contradictoire de deux médecins, qui sont requis d'attester *unanimiter* que les circonstances autorisant le recours à l'avortement sont bien remplies (art. L.162-12, CSP)[19].

[19] A. Sériaux, L. Sermet, D. Viriot-Barrial, Droits et libertés fondamentaux, pag. 106

LEGAL REQUIREMENTS FOR ADOPTION UNDER TURKISH LAW

DR. ERKAN KÜÇÜKGÜNGÖR*

The concept of adoption which is of great importance for Turkish society is regulated under Turkish law similar to the other countries which are under the influence of Roman law[1]. The regulations regarding adoption in Turkish Civil Code are mainly influenced by the Swiss Civil Code[2]. Adoption, which constitutes an artificial legitimacy between the parents and the adopted child, differs from the natural way that arises upon birth[3]. As a result of the recent amendments with respect to Turkish Civil Code, the act of adoption can no longer be regarded as an agreement of family law but has become primarily a judicial act[4].

* **Ankara University, Faculty of Law, TURKEY**

1 Ataay, A.: Medeni Hukukta Evlat Edinme *(Adoption in Civil Law)*, İstanbul 1957, pp. 15 *et seq.*; Berki, Ş.: Alman, İsviçre ve Türk Medeni Kanunlarında Evlat Edinme *(Adoption in German, Swiss and Turkish Civil Codes)*, Ankara, pp. 3 *et seq.*; Gürkan, Ü.: Evlat Edinme ve Beslemelerin Hukuki Durumu *(Adoption and the Legal Status of Fosters)*, Türk Hukuku ve Toplumu Üzerine İncelemeler, Ankara 1974, pp. 63 *et seq.*

2 Demir, M.: Bazı Ülke Yasaları ile Karşılaştırmalı Olarak Evlat Edinmenin Yasal Koşulları *(Legal Requirements of Adoption in comparison with some Country Rules)*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, C. 52, 2003, S. 3, p. 254.

3 Akıntürk, T.: Yeni Medeni Kanuna Uyarlanmış Aile Hukuku *(The Family Law Amended with New Civil Code)*, C. 2, 6. bası, İstanbul 2002, p. 361; Oğuzman, M.K./ Dural, M.: Aile Hukuku *(Family Law)*, 2. bası, İstanbul 1998, p. 245; Demir, p. 254.

4 Akıntürk, p. 362; Demir, p. 254.

Despite the fact that the act of adoption can be performed with unlawful purposes such as with the aim of debarring the legal heirs from the legal share of inheritance, it has continued to be used as a legal instrument due to its benefits i.e. granting a protection for the orphaned or abandoned children by way of providing them a family while giving a chance to have a son/daughter for childless spouses[5].

In Roman law there are two kinds of adoption which has different characteristics and legal effects: adoption of a *homo sui iuris,* in its technical sense named as *adrogatio* and adoption of a *homo alieni iuris,* namely *adoptio* in the narrower sense[6].

Adrogatio resulted in the ending of a family as the adopted *sui iuris* could no longer keep its status of *sui iuris*[7]. The act of

---

[5] Tekinay, S. S.: Türk Aile Hukuku *(Turkish Family Law)*, 6. bası, İstanbul 1990, p. 445; Hatemi, H.: Aile Hukuku *(Family Law)*, İstanbul 1999, p. 116; Ataay, p. 14; Akıntürk, p. 362; Akyüz, E.: Ulusal ve Uluslararası Hukukta Çocuğun Haklarının ve Güvenliğinin Korunması *(The Safeguarding of Children and the Protection of Children's Rights in National and International Law)*, İnsan Hakları Eğitimi Dizisi, Ankara 2000, p. 123; Şıpka, Ş.: 4721 Sayılı Türk Medeni Kanunu'nun Evlat Edinme'ye İlişkin Hükümlerinin İncelenmesi *(The Examining of the Rules of 4721 Turkish Civil Code regarding Adoption)*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, C. 57, 1999, S. 1-2, pp. 303-305; Velidedeoğlu, H.V.: Türk Medeni Hukuku, Aile Hukuku *(Turkish Civil Law, Family Law)*, İstanbul 1965, p. 345; Serozan, R.: Çocuk Hukuku *(Law of Children)*, İstanbul 2000, p. 143; Altaş, H.: Evlatlık Sözleşmesinde Amaç *(The Purpose in Adoption Agreement)*, Türk Hukuk Dünyası, Mayıs 2000, Yıl: 1, S. 1, pp. 103-106.

[6] Talamanca, M.: Istituzioni di diritto romano, Milano 1990, p. 125; Schulz, F.: Classical Roman Law, Oxford 1969, p. 143; Buckland, W.W.: A Text-Book of Roman Law from Augustus to Justinian, Cambridge 1950, p. 121.

[7] Buckland, p. 124; Leage, R.W.: Roman Private Law, Founded on the Institutes of Gaius and Justinian; London 1942, pp. 85-86; Muirhead,

adrogatio consisted of an investigation conducted by the pontiffs on the basis of admissibility to test whether the case before them fulfilled all the legal conditions or not. This was followed by the *comitia curiata,* convoked and directed by the *Pontifex Maximus,* to examine the case[8]. As the approval of the adrogator *(adrogans)*, the *adrogatus* and especially the members of the *comitia curiata* were required, *adrogatio* could be regarded as a legislative act. Once the approval was maintained by them, the adrogated person became a *filius familias* of the adrogating one. After the *comitia curiata* replaced by thirty lictors as representatives of the citizens, the proceeding regarding the *adrogatio* remained unchanged. However *Diocletianus* declared that the rescript of the emperor would be enough instead of the vote of the *comitia* and that new form of *adrogatio* was followed by Justinian as well[9].

Adoptio was the adoption of *homo alieni iuris* and consisted of the ending of the original family and forming of a relation with the new family[10]. With this act 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 termination of the *patria potestas* by the third *mancipatio,* in order to accomplish the act of adoption, a following *in iure cessio* was necessary for the child

---

J.S.: An Outline of Roman Law, Glasgow 1947, p. 69; Watson, A.: Roman Law and Comparative Law, Georgia 1991, p. 34; Lindsay, H.: Adoption in Greek Law: Some Comparisons with the Roman World, Newcastle Law Review, 3, 1998- 1999, p. 97.

[8] Talamanca, p. 125; Buckland, p. 124; Leage, p. 86; Nicholas, B.: An Introduction to Roman Law, Oxford 1962, p. 77; Kaser, M. (Translated by Dannenbring, R.): Roman Private Law, Durban 1965, p. 261; Watson, p. 34.

[9] Talamanca, p. 126; Di Marzo, S. (Translated by Umur, Z.): Roma Hukuku *(Roman Law)*, İstanbul 1954, p. 139; Buckland, p. 124-125; Kaser, p. 261; Leage, pp. 86-87.; Umur, Z.: Roma Hukuku *(Roman Law)*, İstanbul 1982, p. 392.

[10] Leage, p. 83; Nicholas, p. 77; Talamanca, p. 127.

to fall under the *patria potestas* of the new adoptive father. In Justinian time, the old form was replaced by an agreement between *adoptans*, *adoptandus*, and the father of the latter made before the court. This agreement was registered to the records (*acta*) of the court[11].

During both the early and the classical periods, as a result of *adoptio* the *adoptandus* passed from one family to another and fell into the new *patria potestas* of his adoptive father being regarded as a natural son. By the same token the agnatic family tie with the old family and all the rights depended on *patria potestas* of the *adoptandus* was replaced by the new rights, especially the right of succession[12]. In Justinian time a differentiation was made 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 in this type of *adoptio* the adopted person left his old agnatic family completely and fell into the new *patria potestas* of his adoptive father[13]. However, the adoption of a person by the ones apart from his close agnatic relatives was called *adoptio minus plena* in which the adopted child continued to stay in his old agnatic family, but he was now falling into the authority of his adoptive father[14].

1. Adoption of Minors

---

[11] Nicholas, p. 78; Kaser, p. 263; Leage, p. 85; Burdick, W.L.: The Principles of Roman Law and their Relation to Modern Law, New York 1938, p. 249; Erdoğmuş, B.: Roma Hukuku *(Roman Law)*, Istanbul 1992, p. 125.

[12] Nicholas, p. 78; Buckland, p. 122; Leage, pp. 84-85.

[13] Buckland, p. 123; Kaser, p. 263; Leage, p. 85; Nicholas, p. 79; Burdick, p. 250; Karadeniz-Çelebican, Ö.: Roma Hukuku *(Roman Law)*, Ankara 2004, p. 159.

[14] Buckland, p. 123.

In Turkish law the rules regarding adoption are compatible with "1967 Convention of the Council of Europe on the Adoption of Minors"[15] and "1996 European Convention on the Exercise of Children's Rights"[16].

The first requirement for the adoption of a minor (a person under the age of 18) is that such adoption must be preceded by a care and possession period of at least one year (Turkish Civil Code Art. 305/1). This period is considered necessary to ensure that the future adopting parents are genuinely capable of bringing up the child. On the other hand this requirement, with the purpose of protecting the minor efficiently, aims at providing the adoption of the child by the ones who know him closely[17]. After completion of the necessary period of care and the filing of an application by the adopting parents, a detailed inquiry must be undertaken by the court in order to finalise the adoption by taking into consideration the conditions of the specific case[18].

The minor should also have benefit from the act of adoption. In other words, an adoption may only be granted if, considering all the circumstances, it serves the child's welfare[19]. This rule can be regarded as the main requirement for adoption. For that reason, before the court jurisdiction regarding adoption, the court must investigate all the conditions and circumstances with respect to interest of the child. This investigation includes the hearing of the related individuals and, if necessary, the consultation with experts on family and children (TCC Art. 316/1). The adopting

---

[15] Turkey has signed but not yet ratified the related Convention.

[16] This Convention has been both signed and ratified by Turkey. For the details on this Convention, see: Akyüz, p. 19; Oğuz, P.: 1. İstanbul Çocuk Kurultayı Bildirileri, İstanbul Çocukları Vakfı, İstanbul 2000; Akıllıoğlu, T.: Çocuk Haklarına Dair Sözleşme *(The Convention on Children's Rights)*, Ankara, 1995.

[17] Akyüz, p. 130.

[18] Akyüz, p. 130; Demir, pp. 257-258.

[19] Akyüz, p. 142; Demir, p. 259.

parties need not be childless; however, if any, the possible interests of the natural children of the adopter should be taken into consideration by the court during the jurisdiction (TCC Art. 305/2).

Based on the idea that the rules regarding adoption aim at providing the child new parents, i.e., a father and a mother, main attitude in Turkish law is to limit the adoption to married couples. Therefore, under TCC as a general rule only married couples can adopt jointly (TCC Art. 306/1). In that sense joint adoption other than by married couples is not allowed. Married persons may adopt jointly either if they have been married for five years or they have both reached the age of 30 (TCC Art. 306/2).

However, in a step-parent situation one spouse is permitted to adopt the child of the other. In the case of an adoption of a stepchild, the spouses must have been married for at least a year before adoption or the adopting spouse must reach the age of 30 (TCC Art. 306/3). The general principle that lies behind this provision is to provide convergence between a step child and a natural one[20]. Additionally adoption by one spouse alone can also be permitted if a joint adoption is impossible, i.e., if one spouse is permanently mentally incapable, or absent and untraceable for more than two years, or if the parties have been separated by a court jurisdiction for more than two years (TCC Art. 307/2).

A sole adoption is also open to unmarried persons, such as, single, widowed, or divorced ones. The aforementioned requirement of reaching the age of 30 at the time of adoption applies to unmarried persons as well (TCC Art. 307/1).

In any situation of adoption permitted by law the adopting parent must be at least 18 years older than the adopted person (TCC Art. 308/1). This rule is another reflection of the general approach aiming at maintaining resemblance between the artificial

[20] Serozan, pp. 145-146; Demir, p. 262.

legitimacy created by adoption and the natural one created by birth (*adoptio imitatur naturam*)[21].

Before the decision with respect to adoption is given by the court, the persons related to the act of adoption must give their consent. Among those related persons the consent of the child to be adopted, if only he is mentally capable, is required at the first place (TCC Art. 308/2). If the child is under guardianship of a person other than his mother and father, the guardianship courts is authorised to give the consent without his mental capacity being taken into consideration (TCC Art. 308/3). Additionally, adoption requires the consent of the natural mother and father of the child, no matter they have the guardianship of the child or not (TCC Art. 309/1). Consent must be expressed orally or in writing to the guardianship court where the child or his natural mother and the father reside (TCC Art. 309/2). Mentioning the future adopting parents is not necessary for the validity of the consent. Likewise the consent would still be valid if they are not determined at the time of the consent (TCC Art. 309/3). Consent by the parents cannot be given validly until six weeks after the birth of the child, and is revocable during the six weeks after it has been given (TCC Art. 310). If a parent is unknown, or absent and untraceable, or permanently mentally incapable, or has violated his parental duty of care to the child, consent of that parent is not required (TCC Art. 311). In this case, a decision is given by the guardianship court proving that such consent is not required (TCC Art. 312/2).

2. Adoption of Adults and Persons under Guardianship

Adoption of an adult or a person under guardianship is allowed only under restricted conditions. In such situations the rules regarding the adoption of minors in TCC can be comparably

[21] Serozan, p. 144. This rule has its roots from Roman law. For details, see: Schulz, p. 148; Buckland, p. 123; Leage, p. 89; Di Marzo, p. 141.

applied where necessary (TCC Art. 313/3).

For the adoption of the adults and people under guardianship to be valid, definite approval of the natural children of the adoptive parents, if any, is required (TCC Art. 313/1)[22].

In addition to this general condition, adoptive parents must have extended care and assistance to the prospective adoptee for at least five years due to his mental or physical incapability (TCC Art. 313/1,1) or his infancy (TCC Art. 313/1,2) or other reasonable situations (TCC Art. 313/1,3). A married person can only adopt upon the approval of his/her spouse (TCC Art. 313/2).

In the absence of the required consent without any justifiable legal reason, any person who has the right to give consent can request the court to invalidate the act of adoption, if such invalidation would not extremely violate the interests of the adoptee (TCC Art. 317). In practice, according to the decisions of Turkish Supreme Court consent of the other spouse to adoption is related to public order and therefore absence of such consent, invalidates the adoption[23]. If one of the legal requirements for adoption is not fulfilled, public prosecutor or any related person can apply to the court for the invalidation of the adoption (TCC Art. 318/1). This application can be made within a year after being informed of such situation and in five year time after adoption (TCC Art. 319).

Adoption involves the complete legal transfer of parental rights and responsibilities from one set of parents to another, i.e., adopting parents (TCC Art. 314/1). For the child it provides full legal membership of a family in addition to the one into which he

---

[22] According to the previous version of TCC effective before the latest amendment in 2005, however, for such an adoption to be valid, it was required that the adoptive parents did not have any children of their own.

[23] 2. Hukuk Dairesi, 4.5.1999, 3028/5099 (R.G. 5.6.1999/23716).

or she was born. In that sense the child becomes legal child of the adopting parents and is treated, for all purposes in the same manner as a natural child of the adopting parents.

The major result of the adoption is that while the adopted child achieves full integration into the adopting family, he/she does not become separated from his or her natural family. With the act of adoption the adopted person becomes legal heir of the adopted parents (TCC Art. 314/2). Besides, in order not to overcome the right of the adopted person to inherit from his/her natural parents, a note is made to relate his old family information with the new one in the family register. Additionally the court decision with respect to adoption is also inserted to the register as well (TCC Art. 314/5).

The adopted minor receives the family name of the adopting parents while the adopted adult has an option to choose the family name of the new family or the old one. A new first name can be given to the adopted minor if the adopting parents prefer so (TCC Art. 314/3). Disclosure or investigation of facts and documents connected to the adoption are forbidden, unless there is a court order or permission given by the adopted person (TCC Art. 314/6).

.

ABSENCE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AS A JUSTIFICATION FOR PUBLIC EMERGENCY

BY DR. ANWAR FRANGI*

INTRODUCTION

1. Article 4 of the International Covenant on Civil and Political Rights[1] provides that a State may derogate from its obligation under the Covenant "in times of public emergency which threaten the life of the nation." No derogation, however, may be made from certain rights, such as the right to life (Article 6); the right not to be subject to torture or to cruel, inhuman or degrading punishment (Article 7); the right not to be held in slavery (Article 8); the right not to be imprisoned on the ground of inability to fulfill a contractual obligation (Article 11); the right not to be prosecuted for a 'retroactive' crime or subject to a 'retroactive' punishment (Article 15); the right to recognition everywhere as a person before the law (Article 16), and the right to freedom of thought, conscience and religion (Article 18).

---

* *LL.M.* 1994, Harvard Law School (Massachusetts, USA); *LL.M.* 1992, American University Washington College of Law (Washington, D.C.); *Ph.D.* 1986, University of Poitiers Law School (France); *D.E.A.* 1983, University of Poitiers Law School (France); *LL.B.* 1982, Lebanese University Law School (Lebanon). Dr. Frangi is professor of human rights and researcher at the Holy Spirit University of Kaslik (Lebanon), and professor of international law at La Sagesse University Faculty of Law (Lebanon).

[1] *Adopted* December 19, 1966, *entered into force* March 23, 1976, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). (Hereinafter, "ICCPR").

2. Public emergency involves a situation which is created by various temporary factors leading to serious threat affecting the population as a whole.[2] The kinds of circumstances that may give rise to public emergency have conventionally been classified as (a) a serious political crisis, such as armed conflicts or internal disorder, and (b) natural disaster.

3. It is, however, important to appreciate whether public emergency can be caused by absence of economic, social and cultural rights, such as the kinds of famine that occurred in China in the 1930s and 1940s, serious discrimination between persons on grounds of birth or social origin, extreme poverty, enormous disparities between the rich and the poor, the concentration of wealth in the hands of a few, the neglect of the rural poor, chronic unemployment, wide-spread corruption, lack of education and health care.[3]

---

[2] *See* N. Questiaux, *Study of the Implication for Human Rights of Recent Development Concerning Situations Known as States of Siege or Emergency*, E/CN.4/Sub.2/1982/15 (27 July 1982), para. 23 ("a crisis situation affecting the population as a whole and constituting a threat to the organized existence of the community which forms the base of the State"); Steven Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts" in Vasak & Alston, eds., *The International Dimensions of Human Rights*, UNESCO, 1982, vol. 1, 175 ("In short, an 'emergency situation' will be understood here as one resulting from temporary conditions which place institutions of the State in a precarious position and which leads the authorities to feel justified in suspending the application of certain principles"); *La notion de période d'exception en matière des droits de l'homme*, 4 Revue de Droits de l'Homme 822 (1974). *See also* ILO Convention No. 29 on Forced Labor (1930). (The prohibition against forced or compulsory labor shall not include "any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insects or vegetable pests, and in general any circumstance that would endanger the existence or the well being of the whole or part of the population").

[3] *See* International Law Association, Montreal Report (1982) at 90-91. *See also* Stephen Marks, *supra* note 2 at 175 ("The fact remains that until a new international economic order is achieved, the economic and social conditions of

4. In considering whether public emergency can arise from absence or enjoyment of civil and political rights, in relation to absence or enjoyment of economic, social and cultural rights, eight combinations may be distinguished as follows:

1. ***Enjoyment of economic, social and cultural rights generating enjoyment of civil and political rights***; where enjoyment of economic, social, and cultural rights is a pre-requisite for the effective exercise of civil and political rights.[4]

2. ***Enjoyment of economic, social and cultural rights generating absence of civil and political rights***; where enjoyment of economic, social, and cultural rights may not necessarily generate enjoyment of civil and political rights.[5] Let alone the fact that the concept of 'welfare' is so relative in context that it varies according to the nature of the regime.[6]

---

underdevelopment will constitute an emergency situation making the implementation of at least some human rights difficult, if not impossible.").

[4] *See* E/CN.4/SR.1442, where the delegate of USSR states that "the exercise of economic and social rights is a prerequisite for the exercise of all human rights and fundamental freedoms;" E/CN.4/SR.1339 where the delegate of India states, at 3, para. 7, that "the enjoyment of economic and social rights was a prerequisite for the effective exercise of other rights which could only be achieved when countries had reached a reasonable level of economic and social development."

[5] *See*, *e.g.*, A/C.3/32/SR.54, where the delegate of Uruguay "reminded his fellow Latin Americans of the failure of the social revolution to be converted into progress in the area of civil and political rights in many countries..., [and] of economic progress in South Africa combined with the most terrible violations of human rights."

[6] *See* International Law Association, Belgrade Report (1980) at 102 ("Authoritarian regimes seek to justify curtailment of civil and political rights on the pretext that, given the economic backwardness and poverty in their societies, rapid economic development and the removal of poverty demand higher priority than the enjoyment of civil and political rights, and so the latter must be traded off for the former.").

3. ***Enjoyment of civil and political rights generating enjoyment of economic, social and cultural rights***; where the effective exercise of political rights, such as the right to vote, can force the government to take measures that will ensure full realization of economic, social and cultural rights.

4. Enjoyment of civil and political rights generating absence of economic, social and cultural rights;

5. ***Absence of economic, social and cultural rights generating absence of civil and political rights***; where thwarting the exercise of economic, social, and cultural rights may generate a situation in which the exercise of civil and political rights becomes difficult.[7]

6. ***Absence of economic, social and cultural rights generating enjoyment of civil and political rights***; where economic and political underdevelopment, for example, may justify the poor man's having "a real interest in the right to vote, to the extent that his difficulties result from government policies."[8]

7. ***Absence of civil and political rights generating absence of economic, social and cultural rights***; where thwarting the exercise of civil and political rights can lead to a situation in which the enjoyment of economic, social and cultural

---

[7] *See* Resolution XVII of the International Conference on Human Rights (Teheran, 1968), which explains, at paragraph 13, that "[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social, and cultural rights, is impossible, the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

[8] J. Donnelly, *Recent Trends in U.N. Human Rights Activity: Description and Polemic*, 35 International Organization (Autumn 1981) 633, 645.

rights becomes difficult.

8. ***Absence of civil and political rights generating enjoyment of economic, social and cultural rights.*** This is supported by Article 9(2) of the Universal Declaration of Human Rights,[9] Article 4 of the International Covenant on Economic, Social and Cultural Rights,[10] and Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[11] Also, the relationship between both types of human rights may be

---

[9] 10 December 1948, U.N.G.A. Res. 217A (III), 3 U.N. GAOR 71, U.N. Doc. A/810 (1948). (Hereinafter, "UDHR"). Article 9(2) of UDHR states as follows:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the *general welfare* in a democratic society. (emphasis added)

[10] *Adopted* December 16, 1966, *entered into force* January 3, 1976, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316 (1967). (Hereinafter, "ESCR"). Article 4 of ESCR states as follows:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the *general welfare* in a democratic society. (emphasis added)

[11] *Opened for signature* November 4, 1950, *entered into force*, September 3, 1953, 218 U.N.T.S. 221, Europ. T.S. No. 5. Article 8(2) of ECHR states as follows:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the *economic well-being* of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (emphasis added)

evoked to support restrictions placed on civil and political rights so that economic, social and cultural rights may be enjoyed. For civil and political rights are dependent on economic, social, and cultural rights.[12] The right to vote, for example, is likely to be of little significance to an undernourished, unemployed, and uneducated person whose children are starving because of drought or economic and political underdevelopment.[13]

5. This paper deals with combination 3.5, namely, whether absence of economic, social and cultural rights constitutes an emergency where the enjoyment of civil and political rights may be restricted.

6. Absence of economic, social, and cultural rights can lead to group crimes;[14] and group crimes are absence of enjoyment of civil

---

[12] *See*, *e.g.*, E/CN.4/SR.1341 (position of Iran: "Respect for psychological and political rights are frequently almost unattainable as long as the realization of material rights was not guaranteed"; also in E/CN.4/SR.1389, p. 2, para. 4: "it is unrealistic to expect civil and political rights and individual freedoms to be respected without prior implementation of economic and social rights..."); A/C.3/32/SR.53 (position of Pakistan: "[C]ivil and political liberties, which normally represented a higher standard in socio-political development, could best be promoted once basic human needs had been met"); E/CN.4/SR.1340 (position of Yugoslavia at 2, para. 2: "[E]fforts by developing countries to assure freedom from fear and want for their citizens were of no avail unless the developed nations took practical steps towards creating a more equitable world economic order.").

[13] *See* Belgrade Report, *supra* note 6 at 108, para. 73: "Where the minimum material conditions for a decent life are not available to the majority of the people, where extreme poverty effectively denies to people access to courts and legal remedies for the violation of their rights, where affluent and privileged minorities can manipulate the rules of a system to their advantage, constitutional guarantees are seen to be illusory in protecting the civil and political rights of the poor and powerless majorities...".

[14] *See* F. Menghistu, "The Satisfaction of Survival Requirements," in B.G. Ramcharan, ed., *The Right to Life in International Law* (The Netherlands: M. Nijhoff, 1985) 63, 68 ("Failure to meet basic economic and social needs can lead to civil and military disobedience, civil war, political violence and anarchy."). *See also*

and political rights; and absence of civil and political rights constitutes a situation which threatens the life of the nation. Therefore, absence of economic, social and cultural rights constitutes an emergency where the enjoyment of civil and political rights may be restricted.

Absence of Economic and Social Rights As a Cause of Group Crimes:

6. Absence of the right to work[15] and of the right to just and favorable conditions of work[16] can generate absence of civil rights.

E/CN.4/SR.1339, p. 4, para. 9, India ("The importance of economic, social and cultural rights lay in the fact that the realization of those rights was the first stage in bringing about a just and happy world free from violence."); E/CN.4/SR.1339, p. 8, para. 33, Bulgaria ("The realization of those rights was linked to the consolidation of peace and security, détente…").

[15] Article 6(1) of ESCR reads as follows:

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

[16] Article 7 ESCR recognizes the right of everyone to the enjoyment of just and favorable conditions of work. This right includes:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

If government policies tend to obstruct this right, the development of human nature would, therefore, be blocked.[17] Unemployment can generate periodic outbursts of collective rioting and revolt,[18] and disturbances.[19] Also, absence of adequate standard of living[20]

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

[17] *See* G. Vold, *Theoretical Criminology* (Oxford: Oxford University Press, 1979) at 165 (Marx believed that since in an industrialized capitalist society, there are large numbers of people who are unemployed and underemployed... these people become demoralized and are subject to all forms of crime and vice.); Paul Q. Hirst, "Marx and Engels on Law, Crime and Morality", in I. Taylor, P. Walton & J. Young, *Critical Criminology* (London: Rontledge & Kegan Paul, 1975) 203-232.

[18] *See* D.S. Eitzen & D.A. Timmer, *Criminology: Crime and Criminal Justice* (New York: John Wiley & Sons, 1985) at 160 ("As the conditions of ghetto life in the United States ensure high rates of individual crime in the streets, they also lead to periodic outbursts of collective rioting and revolt. Indeed, the revolt in the ghettos of American cities is not nearly as amazing as--given the realities of everyday ghetto life--the fact that it has not happened more often"). *See also* California Governor's Commission on the Los Angeles Riots. *Violence in the city-An End or a Beginning?* Report prepared by John A. McCone and others (Sacramento, 1965), quoted in G.M. Sykes, *Criminology* (New York: Harcourt Brace Jovanovich, Inc., 1978) at 158 ("rioting was to be attributed to riffraff, to individuals coming from the ranks of the unemployed.")

[19] In 1893, the United States had three million unemployed workers and more than six hundred bank failures. After years of bustling economic growth with rampant speculation in the stock market and overextended industrial production, corporate profits fell rapidly and wages dropped drastically. Labor, acknowledging the depressed economic conditions, submitted to management's stringent measures. The economy showed some improvement the following year, but it failed to make a substantial recovery. Restless, labor responded with an explosion of strikes and disturbances. *See, e.g.*, N.N. Kittrie & E.D. Wedlock, Jr., eds., *The Tree of Liberty, A documentary History of Rebellion and Political Crime in America* (The Johns Hopkins University Press, 1986), docs. 20, 62, 168, 214, 219.

[20] Article 11(1) ESCR states as follows:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his

can generate absence of civil[21] and political rights.[22]

7. Absence of the right to protection of and assistance to the family[23] can generate absence of civil and political rights. Absence

> family, including adequate food, clothing and housing, and to the continuous improvement of living conditions….

[21] *International Action in the Field of Social Defense*, 1966-1967, UN Doc. E/CN.5/C2/Rs (1966) ("It seems logical to associate poverty to criminality or to attribute the increasing criminality to poverty. This approach has been stressed by the Economic and Social Council and the Secretariat of the United Nations, whose general view has been that crime problems lie deep in the processes of economic and social development and must be resolved within them."). *See also* L.A. Ferman, J.L. Kornbluh & A. Haber, eds., *Poverty in America; A Book of Readings* (Ann Arbor: University of Michigan Press (1965) at 5 ("Failure to provide adequate goods, services, and housing for everyone permits crime and other forms of deviant behavior to develop, and economic fluctuations and the maldistribution of wealth contribute to these deviations.")

[22] *See* M.B. Clinard & D.J. Abbott, *Crime in Developing Countries; A Comparative Perspective* (John Wiley & Sons, Inc., 1973) at 173 ("[P]overty in any country, developed or developing, seriously affects health, life expectancy, infant mortality rates, housing, quality of family life, community as well as individual living, and educational opportunity. Above all, individual and collective poverty limits social participation, particularly in political, social, and economic spheres.")

[23] Article 10 of ICCPR reads as follows:

> The States Parties to the present Covenant recognize that:
>
> 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children…
> 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
> 3. Special measures of protection and assistance should be taken on behalf of all children and young persons

of the right to protection of and assistance to the family can best be derived from three concepts: (i) "corruptive family," (ii) "broken home," and (iii) "deficient family," with a subsequent increased probability of an absence of civil and political rights, *i.e.*, crimes.[24] "Corruptive family" is that where education is one factor which would create a conflict between family code and society code.[25] The 'bad example' of the family is more likely to be applied by him who was raised in that family, than the 'good example' of society. According to Gabriel Tarde's laws of imitations,[26] a person is more

> without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.

[24] For a review of the relationship between "broken homes" and delinquency *see, e.g.*, C.J. Browning, *Differential Impact of Family Disorganization on Male Adolescents*, 8 Social Problems 37-44 (1960); T.P. Monahan, *Family Status and the Delinquent child: A Reappraisal and Some New Findings*, 35 Social Forces 250-258 (1957); C. Shaw & H.D. Mckay, *Are Broken Homes a Causative Factor in Juvenile Delinquency?*, 10 Social Forces 514-524 (1932); J. Toby, *The Differential Impact of Family Disorganization*, 22 American Sociological Review 402-412 (1957).

[25] The "conflict of cultures" of Thorsten Sellin can be interpreted as follows: Criminality can be produced when, in general, an opposition exists between two different "codes" in one nation: (a) a moral code governing a particular circle, e.g., family, professional circle, ethnic groups, etc., and (b) a moral code governing the general society.

[26] Gabriel Tarde (1843-1904), a French Sociologist, has proposed three "laws of imitation" by which he has explained, among others, the process of criminality. The three laws of imitation can be summarized as follows:

> 1st Law: A person imitates more him who is close to him than him who is away from him.

likely to imitate those who are close to him than those who are away from him. As such, a crime may arise as a result of a person having been nurtured in a 'non-healthy' family which has deviated from the 'healthy' family structure in a given society.[27]

Absence of enjoyment of civil rights can also be generated by "broken home." The term "broken home," as a cause of absence of civil rights, can be restricted to divorce, desertion, or separation. A person lacks the protection of and assistance to family when s/he experiences the trouble caused by the scenes of divorce, desertion or separation. This trouble has been considered to constitute an indirect cause of crimes.

Absence of enjoyment of civil rights can also be generated by "deficient family." A person lacks the protection of and assistance to his/her family when the latter has (i) an affective, and (ii) an educative deficiency. A family has an affective deficiency when a child experiences a lack of, or an excessive love which in either case would disrupt his normal co-existence with society. On the other hand, a family has an educative deficiency when a child experiences two extreme reactions from his parents regarding his behavior,

2nd Law: A person imitates more him who is in a higher social rank than him who is in a lower rank.
3rd Law: A person imitates him who adopts a new "model of criminality" rather than an old one.

[27] Principle 2 of the United Nations Declaration of the Rights of the Child, *adopted* on 20 November 1959, Res. 1386 (XIV), states that

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

either a total *laisser-aller* or a severe sanction attitude. The lack of protection of and assistance to the family because of affective and educative deficiencies, has been considered to be one of the causes of absence of civil rights enjoyment, where a child, "the father of the adult" as Wordsworth has described it, confused by his parents reactions to his behavior, may be led to crime by his own errors of reactions to others' behavior. In sum, if absent, the right to protection of and assistance to family, as a social right, may generate absence of civil and political rights.

Family as the primary component of society plays a major role in shaping the course of society. If corrupted, family may therefore contribute to the generation of vice in a given society. In fact, rioters are most likely to be unemployed, from a broken home, and relatively uneducated.[28]

Absence of Cultural Rights As a Cause of Group Crimes:

8. Absence of cultural rights[29] can fundamentally be explained by the 'conflicts of cultures' theory. It is considered that criminality can be originated from an antagonism between two moral commandments on which two different cultures are based. According to Thorsten Sellin, criminality occurs when an individual finds himself in conflict with the particular rules of his original sub-culture and the general rules of the 'official culture' of the nation as a whole. At this intersection between two different cultures, individuals in community with others belonging to the same sub-

[28] G.M. Sykes, *supra* note 2 at 158.

[29] Article 15 of ESCR recognizes "...the right of everyone (a) to take part in cultural life, (b) to enjoy the benefits of scientific progress and its application, [and] to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Article 1 of the Declaration of Principles of International Co-operation adopted in 1966 by the General Conference of Unesco states that "(1) each culture has a dignity and value which must be respected and preserved, (2) every people has the right and the duty to develop its culture..."

culture, being not integrated totally in the 'official culture,' would follow the moral command of their own sub-culture. Now, if the moral commandment on which their sub-culture is based is in conflict with the moral command on which the penal code of the 'official culture' is based, they would more likely choose the one closest to them in compliance with Gabriel Tarde's laws of imitation stated above. Criminality, therefore, would be the result of the supremacy of a non-official sub-culture over the national 'official culture.'

Absence of civil and political rights generated by absence of cultural rights can therefore occur when a sub-culture is subject to discrimination, and not protected legally, by the national 'official culture,' which would generate into a conflict between the two different cultures, the sub-culture rejecting a forced assimilation to the 'national official culture;' and when a sub-culture is not subject to discrimination but not protected legally, which would come to be a reason for the supremacy of the rights 'granted' by the sub-culture over the rights granted by the 'official culture.'

9. Absence of civil and political rights generated by absence of enjoyment of cultural rights can also be explained by the 'differential association' theory suggested by E. Sutherland and D. Cressey.[30] Absence of civil and political rights may occur when a

---

[30] *See* E.H. Sutherland & D.R. Cressey, *Criminology* (J.B. Lippincott Co., 1979) (tenth edition), pp. 77-97 ("Sutherland believed that a criminal is rarely in contact only with "criminal groups." On the contrary, the criminal experiences the life of several groups, some of them favoring violation of the "official" law, others not favoring violation of that law. Under the former "gangs" or "prison cells" can be cited. Under the latter "family" or "school groups" in general can be cited. Now, every "social group" transmits its own "culture," which can have favorable or unfavorable definitions to the violation of the law. All the definitions can be acquired during what Sutherland & Cressey has called a "learning process." An individual becomes delinquent when his learning process becomes associated with a criminal behavior pattern of a group. As Sutherland & Cressey put it: "A person becomes a delinquent because of an excess of

sub-culture being denied the rights to enjoy its own sub-culture is associated with an overabundance of 'criminal behavior pattern' vis-à-vis 'anticriminal behavior patterns' favored by the 'general cultural.'

10. Absence of civil and political rights generated by absence of cultural rights can equally be derived from different fields where the conflict of cultures may be applied, such as the moral field (arbitrary laws); social field (gypsies); political field (dominion of a particular ideology); criminological field (criminal sub-culture of urban areas).

11. In sum, absence of economic, social and cultural rights as described above can lead to group crimes, riots and disturbance. But group crimes, riots and disturbance create a situation where enjoyment of civil and political rights becomes difficult. Thus, absence of enjoyment of economic, social and cultural rights constitutes an emergency where the enjoyment of civil and political rights may be restricted.

12. But, it is understood that absence of economic, social and cultural rights can generate restriction of only derogable civil and political rights. I ask: Should the enjoyment of non-derogable civil rights, such as the right to life, be restricted for the realization of economic, social, and cultural rights?

CONCLUSION:

13. Some scholars admit that no justification can be made for any restriction imposed on any of the non-derogable civil and political rights on the grounds that such restrictions are necessary

---

definitions favorable to violation of law over definition unfavorable to violation of law."

for the realization of economic, social, and cultural rights.[31] They argue that the right to life is a non-derogable civil right; and it is essentially the right to be safeguard against arbitrary killing.[32] Now, homicide may be carried out through a variety of means, including starving someone, exposing a person to extreme temperature or contamination with disease. The mere toleration of malnutrition by a State will not be regarded as a violation of the human right to life, whereas purposeful denial of access to food to a prisoner, is a different matter; and failure to reduce infant mortality is not within Article 6, while practicing or tolerating infanticide would violate the article.[33]

Thus, these people claim that there is difference between the right to life and the right to living; for the right to life as such is not generally deemed a right to an appropriate standard of living.[34] The satisfaction of survival requirement, they say, is included in the right to an adequate standard of living,[35] as well as in the right to food and to health.[36] Thus, they conclude that there is no point in

---

[31] *See* Belgrade Report, *supra* note 6 at 107.

[32] Article 6(1) of ICCPR states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[33] Yoram Dinstein, "The Right to Life, Physical Integrity and Liberty", in Louis Henkin, ed., *The International Bill of Human Rights* (New York: Columbia University Press, 1981) 114, 115.

[34] Przetacznik, *The Right to Life as a Basic Human Right*, 9 Hum. Rts. J. 585, 586, 603 (1976).

[35] *See* Article 11 of ESCR cited *supra* at note 20.

[36] Article 12 of ECSR reads as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

introducing a 'survival requirement' component into the right to life concept;[37] for since the right to life is a civil right, it does not guarantee any person against death from famine, cold or lack of medical attention.[38] According to these scholars, then, it is just not conceivable that the right to life, as the right to be safeguard against arbitrary killing, would be restricted under any circumstance whatsoever, for the realization of the economic, social and cultural rights.

14. Other groups of scholars, however, believe that this approach is a narrow understanding of the right to life, which is no longer adequate.[39] They base their argument on the World Bank

---

> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> *(a)* The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> *(b)* The improvement of all aspects of environmental and industrial hygiene;
> *(c)* The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> *(d)* The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[37] B.G. Ramcharan, "The Concept and Dimensions of the Right to Life", in B.G. Ramcharan, ed., *supra* note 14 at 9.

[38] N. Robinson, *The Universal Declaration of Human Rights* 106 (1958), quoted in Y. Dinstein, *supra* note 33 at 115.

[39] B.G. Ramcharan, *supra* note 37 at 6:

> The right to life encompasses not merely protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country....The duty of the State to assure satisfaction of the survival requirements of every person within

reports which show that in the poorest regions of low-income countries, half of all children die during the first year of life; and among survivors, disability, debility, and temporary incapacity are often serious problems. Accordingly, they suggest recognizing a 'satisfaction of survival requirements' component in the right to life concept.[40]

Some scholars, who belong to this group, have come to the same conclusion by exploring different avenue of arguments. They basically say that if the health of society is profoundly affected by the status of the economy, then the maladjustments of society, such as crimes, should also be affected by the status of the economy.[41]

> its jurisdiction must be considered as unavoidable component of the right to life in its modern sense. Any other conclusion is unacceptable in a world in which millions of children die each year on account of hunger and disease, and in which millions of human beings have their life-span drastically reduced for the same reasons.

[40] B.G. Ramcharan, *supra* note 37 at 10. *See also* the observations of Government of Australia on the draft international covenant on civil and political rights, GAOR, Tenth Session, Annexe-10, 28-I at 12 ("Two elements have engaged the attention of the draftsmen during the preparation of…article [6]. These may be described as, firstly, expression of what might be termed a traditional imperative of all civilized societies- "Thou shalt not kill"- and secondly, some positive provision concerning the right to life which, although not defined in the Covenant or in the Universal Declaration, may be assumed to mean the right of every person to preservation and enjoyment of his existence as an individual. In the earlier drafts, attention was concentrated on the first element, but at the sixth session of the Commission, attention was given to the second element by providing that 'the right to life shall be protected by Law'."). The European Commission on Human Rights has also held that the concept that "everyone's life shall be protected by law" enjoins the State not only to refrain life "intentionally" but, further, to take appropriate steps to safeguard life. *See* Decision on Admissibility, Application 7154/75, cited in B.G. Ramcharan, *supra* note 14 at 10.

[41] *See* G. Vold, *supra* note 17 at 164 ("[T]he problems and maladjustments of society, such as crime, are also the product of and affected by the existing economy."). *See also* N.N. Kittrie & E.D. Wedlock, Jr., eds., *supra* note 19, doc. 363. The rising of crime in Algeria, for example, was attributed to inadequate

They derive support for their argument from governments which still "rely excessively on the thesis that improvement of material conditions will considerably reduce, if not eradicate, crime and juvenile delinquency."[42] We infer from their argument that the 'right to living' comes to be a ground for self-defense, and a justification for the absence of the 'right to life.'[43]

15. Both groups seem not to be in disagreement. The first group does not argue restriction on the right to life for the realization of economic, social and cultural rights. Similarly, the second group of scholars. They recognize a 'satisfaction of survival requirements' component in the concept of the right to life. Thus, both groups basically emphasize the non-derogable character of the right to life. Yet, the argument of the second group conveys a wider sense of the right to life.

16. There seems to be, however, some confusion over what is the nature of the second group's argument. For we infer from their opinion that the 'satisfaction of survival requirements' is equivalent

---

economic development. *See Report au IVème Congrès des Nations Unies Pour les Préventions du Crime et le Traitement des Délinquants*, Ministère de la Justice, République Algérienne Démocratique et Populaire, Imprimerie Officielle, Alger, 1970.

[42] M. Lopez-Rey, *Crime: An Analytical Appraisal* (New York: Praeger, and London: Routledge & Kegan Paul, 1970) at 21.

[43] *See* D.S. Eitzen & D.A. Timmer, *supra* note 18 at 160 citing John Conyers ("when survival is at stake, it should not be surprising that criminal activity begins to resemble an opportunity rather than a cost, work rather than deviance, and a possibly profitable undertaking that is superior to a coerced existence directed by welfare bureaucrats."). *See also id.* at 373 ("the process of capitalist industrialization led to increasing economic inequality and exploitation and class stratification. Rioting became an essential political strategy of an underclass (a surplus population) and a working class suffering the increasing economic deprivation.").

to the 'right to be safeguard from arbitrary killing;' otherwise, they would not believe the right to life to be non-derogable. Does this mean that economic, social and cultural rights should also be conceived as non-derogable rights under all circumstances?

BIBLIOGRAPHY

Browning, C.J., *Differential Impact of Family Disorganization on Male Adolescents*, 8 Social Problems 37-44 (1960).

Clinard, M.B. & Abbott, D.J., *Crime in Developing Countries; A Comparative Perspective* (John Wiley & Sons, Inc., 1973).

Donnelly, J., *Recent Trends in U.N. Human Rights Activity: Description and Polemic*, 35 International Organization (Autumn 1981) 633.

Eitzen, D.S. & Timmer, D.A., *Criminology: Crime and Criminal Justice* (New York: John Wiley & Sons, 1985).

Ferman, L.A., Kornbluh, J.L. & Haber, A., eds., *Poverty in America; A Book of Readings* (Ann Arbor: University of Michigan Press (1965).

Henkin, L., ed., *The International Bill of Human Rights* (New York: Columbia University Press, 1981).

IECOSOCR, G.A. Res. 2200, 21 GAOR Supp. 16, UN Doc. A/6316 at 49 (1966).

ILO Convention No. 29 on Forced Labor (1930).

International Action in the Field of Social Defense, 1966-1967, UN Doc. E/CN.5/C2/Rs (1966).

International Law Association, Belgrade Report (1980).

International Law Association, Montreal Report (1982).

Kittrie, N.N. & Wedlock, E.D., Jr., eds., *The Tree of Liberty, A documentary History of Rebellion and Political Crime in America* (The Johns Hopkins University Press, 1986).

Lopez-Rey, M., *Crime: An Analytical Appraisal* (New York: Praeger, and London: Routledge & Kegan Paul, 1970).

Monahan, T.P., *Family Status and the Delinquent child: A Reappraisal and Some New Findings*, 35 Social Forces 250-258 (1957).

Przetacznik, *The Right to Life as a Basic Human Right*, 9 Hum. Rts. J. 585 (1976).

Rapport au IVème Congrès des Nations Unies Pour les Préventions du Crime et le Traitement des Délinquants, Ministère de la Justice, République Algérienne Démocratique et Populaire, Imprimerie Officielle, Alger, 1970.

Resolution XVII of the International Conference on Human Rights (Teheran, 1968).

Shaw, C. & Mckay, H.D., *Are Broken Homes a Causative Factor in Juvenile Delinquency?*, 10 Social Forces 514-524 (1932).

Sutherland, E.H. & Cressey, D.R., *Criminology* (J.B. Lippincott Co., 1979) (tenth edition).

Sykes, G.M., *Criminology* (New York: Harcourt Brace Jovanovich, Inc., 1978).

Taylor, I., Walton, P. & Young, J., *Critical Criminology* (London: Rontledge & Kegan Paul, 1975).

Toby, J., *The Differential Impact of Family Disorganization*, 22 American Sociological Review 402-412 (1957).

Vasak & Alston, eds., *The International Dimensions of Human Rights*, UNESCO, 1982, vol. 1, 175

Vold, G., *Theoretical Criminology* (Oxford University Press, Oxford: 1979).

LEGAL AND JUDICIAL STRUGGLES WITH POLYGAMOUS MARRIAGES IN MORMON SOCIETY (1830-1887)

BY DIDEM ÖZALPAT

1.INTRODUCTION

The Mormon religion, established by Josepf Smith with the name of "The Church of Jesus Christ of Latter-Day Saint in 1830 in New York,[1] has a rich and complicated history. The Church of Jesus Christ of Latter-Day Saints, one of several Christian religious movements arising in the United States in the 1800s, grew and improved by the time. Mormonism, a worldwide religion with a large following in Canada, Mexico and Latin America and growing numbers in Europe, Asia and Africa, has a large membership of about nine million. The international headquarters of the LDS Church is located in Salt Lake City, Utah. Nevertheless, there are many members, living in California and other western states.[2]

2. THE THEOLOGICAL BACKGROUND OF POLYGAMOUS MARRIAGES

Joseph Smith established the new religion with a few followers in Fayette, New York, in 1830. He collected his revelations and

---

[1] Brewster, Pamela R., Mothers and Goddesses: American Women in the Mormon Subculture, Michigan 1990, p.40 ; Çolak, Melek, "Osmanlı İmparatorluğu'nda Mormonlar", Tarih ve Toplum, İletişim Yayınları, Haziran 2001, Sayı: 210, Cilt: 35, p.23-24

[2] Altman, Irwin and Joseph Ginat, Polygamous Families in Contemporary Society, Cambridge University Press, 1996, p.21

writings, founded a press and printed the "Doctrine and Covenants", an important theological announcement, in November 1835. It has been argued that "the deeper roots of his theology lay in his interpretation of the Old Testament. His concept of the kingdom of God paralleled Israelite theocracy.....Smith' theology of marriage and family too may have drawn on ancient Israelite traditions. Like the biblical patriarchs of old, Mormon males empowered with priesthood were entitled to receive divine guidance in family matters. Women,on the other hand, were denied both priesthood and hierarchic positions. This Old Testament focus evidently also drew Smith the idea of biblical polgamy as part of the "restitution of all things." Based on the polygamous practices of biblical patriarchs like Abraham, Isaac and Jacob, he used this theology to justify the plural marriages with the aim of strengthening the family unit and forming a well-built social structure.[3]

Joseph Smith made a statement on July 12, 1843 that he took a revelation from God regarding polygamy, which is still canonized in the Doctrine and Covenants/Section 132. He argued that the Lord ordered him to marry virgins in order to multiply and fill up the earth. This was the only published reason shown by Joseph Smith for the practice of polygamy.[4] The revelation included the following:[5]

"Verily, *thus saith the Lord* unto you my servant Joseph, that inasmuch as you have inquired of my hand to know and understand wherein *I, the Lord Justified* my servants Abraham, Isaac, and Jacob, as also Moses, David and Solomon, my servants,

---

3 Altman-Ginat, p.23-25

4 "Mormon Polygamy Overview", http://www.i4m.com/think/polygamy/polygamy_summary.html

5 Tanner, Jerald& Sandra, "Covering Up Mormon Polygamy" http://www.xmission.com/,http://www.xmission.com/~country/slcm/slcm94b.htm

as touching the principle and *doctrine of their having many wives and concubines*...Behold, and lo, I am the Lord thy God, and will answer thee as touching this matter. Therefore, prepare thy heart to receive and obey the instructions...For behold, I reveal unto you a new and everlasting covenant; and if ye abide not that covenant, *then are ye damned;* for no one can reject this covenant and be permitted to enter into my glory...And let mine handmaid, Emma Smith [Joseph Smith's wife] receive *all those that have been given unto my servant Joseph,* and who are virtuous and pure before me; and those who are not pure, and have said they were pure, *shall be destroyed,* saith the Lord God. And again, as pertaining to the law of the priesthood- if any man espouse a virgin, and desire to espouse another, then he is justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else. *And if he have ten virgins given unto him* by this law, he cannot commit adultery, for they belong to him and they are given unto him; therefore is he justified." (*Doctrine and Covenants,* Section 132, verses 1-3, 52, 61-62)

The revelation indicated polgynous practices of biblical patriarchs and distinguished between marriages for time and marriages for eternity. Joseph Smith described marriage as a religious ceremony. He stated that a man and a woman could make spiritual marriages under the participation of the church for a life together in the hereafter. Civil marriages were accepted as invalid. Women had to marry or seal to "worthy" or "righteous" men so as to obtain a place in heaven.[6] Mormon women's place in heaven was dependent upon whether they married to "worthy" or "righteous" men.

Joseph Smith's revelations and the other writings of the period justified not only the practice of polygyny, but also the secondary status of Mormon women. Women were described as being dependent on men; their unique roles were to be perfect

---

6 Altman-Ginat, p.26-27

homemakers and mothers; "Support, encourage and strenghten your husband as patriarch in the home" was the most important duty of Mormon women[7] and women were considered to be endowed with monogamic tendencies and men with polygamic ones.[8]

3. THE LEGAL AND JUDICIAL STRUGGLES WITH POLYGAMY

Despite the efforts of John Smith and his followers to legitimize polygamy, the Mormon church didn't at the beginning support polygamy.[9] Moreover, the Church leaders did not formally pronounce polgamy until 1852 as the official church doctrine.[10] After the announcement[11] made in 1852 by Brigham Young, successor of Joseph Smith and prophet of the Church of Jesus Christ of Latter-day Saints , the Mormons practiced vigorously polygamy. As the consequence of this announcement, the long and hard struggle over religious liberty, marriage and law became apparent.[12]
Shortly after arriving in Utah, Mormons got a shortly hold of the influential political power in the territory and played a major role in local economics and politics. They used their political power to

---

7 Brewster, Pamela R., Mothers and Goddesses: American Women in the Mormon Subculture, Michigan, 1990, p.92

8 Altman-Ginat, p.27

9 Chambers, David L., "Polygamy and Same-Sex Marriage", Hofstra Law Review, Vol.26, No.1, 1997, p.61-62

10 Chambers, p. 62; Altman-Ginat, p.32

11 The revelation on spritual marriage was first declared in 1852,August 29. It was introduced at a special conference that was held in Great Salt Lake City, for more details, see Andrew Jenson, Church Chronology, August 29, 1852, Sunday, Journal of Discourses, Vol.1, p.53

12 Gordon, Sarah, The Mormon Question Polygamy and Constitutional Conflict in Nineteenth-Century America, The University of North Carolina Press, 2001, http://www.ibiblio.org/uncpress/chapters/gordon_mormon.html,

carry on the practice of polygamous marriages and to keep the Utah Territorial Legislature under their thumb. Although the Utah Territorial Legislature did not openly recognize plural marriages legally, it made laws to reconcile the lives of Mormon polygamous families. For instance, the legislature enacted a special law regarding the inheritance rights of illegitimate children.[13] It stipulated that "Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court, that he was the father of such illegitimate child or children". However, the 1852 statute acted as a protection for the inheritance rights of polygamist's children .[14]

As for the Congress, it struggled with polygamy and illegal cohabitation approximately over a thirty-year period by enacting a series of laws including the Morrill Act of 1862, the Poland Act of 1874, the Edmunds Act of 1882, and the Edmunds-Tucker Act of 1887, with the purpose of weakening the Mormon Church.[15] This process was also supported with the anti-poligamist statements of the representatives. For instance, in 1870, Shelby Cuilom, one of the Congressional representatives, argued that "Polygamy… is regarded by the civilized world as opposed to law and order, decency and Christianity; and the prosperity of the state…Instead of being a holy principle, receiving the sanction of Heaven, it is an institution founded in lustful and unbridled passions of men…"[16]

In 1862, the Republican-controlled U.S. Congress enacted the Morrill Anti-Bigamy Law, signed by President Abraham Lincoln.

---

13 Chambers, p.63

14 "The 1852 Utah Territorial Legislature Enactment On Inheritance of Illegitimate "Polygamists" Children: A Novelty Among Legitimacy Statutes", http://www.Idshistory.net/pc/illegit.htm; Chambers, p.63

15 Chambers, p.63

16 Donovan, James M., "DOMA: A Unconstitutional Establishment of Fundamentalist Christianity", Michigan Journal of Gender Law, Vol.4, 1997, p.363; Chambers, p.64

It was the first basic legislation that was designed to make bigamy a felony punishable by a 500$ fine and five years of imprisonment.[17] However, the Civil War delayed enforcement of the law. After the war, the federal government perceived that the enforcement of the law was impossible since territorial courts were in LDS hands. To cope with this situation, Congress passed the Poland Act of 1874, transferring jurisdiction over criminal proceedings—including cases involving polygamy— from local courts to federal prosecutors and courts .[18]

Inspite of these laws, Mormons kept on practicing polygamy. To test the constitutionality of the laws, George Reynolds became a voluntary defendant. In 1879, the case came before the Supreme Court that upheld the Morrill Anti-Bigamy Law. In 1877, George Reynolds, secretary of Brigham Young, was charged with bigamy after marrying his second wife, Amelia Jane Schofield, in a religious ceremony. He was found guilty by the District Court for the third Judicial District of the Territory of Utah. He was sentenced to pay $500 and spend two years in prison. After this conviction, Reynolds appealed to the Supreme Court of the Utah Territory. Before the Supreme Court, he argued that the law violated the First Amendment of the U.S. Constitution[19],

---

[17] "Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.", "Reynolds v. United States", http://en.wikipedia.org/wiki/Reynolds_v._United_States; Porter, Perry L., "A Chronology of Federal Legislationon Polygamy", http://www.Idshistory.net/pc/chron.htm

[18] Barrus, Roger M., "Political History", www.lightplanet.com/mormons/daily/politics/ Political_History_EOM.htm

[19] "Congress make no law respecting an establishment of religion, or prohibiting the free exercise of thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.", First Amendment to

arranging the "free exercise" of religion and it was his religious duty to practice polygamy.[20]

However, in 1879, the U.S. Supreme Court rejected Reynolds' argument and upheld the conviction of lower court. The Supreme Court concluded that

Congress was deprived of all legislative power ove mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order....As a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief ? To permit this would be to make the professed doctrines of religious belief superior to the law of the land , and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. Reynolds v. United States 98 U.S. 145(1878) [21]

While drawing a border between the interests of state and freedom of religion for the first time in 1878, the Supreme Court made a reference to the letter of Thomas Jefferson in which he stated that there was a distinction between religious belief and action.[22]

Religion is a matter which lies solely between man and his God;

---

the United States Constitution, 1787, http://www.bdt.com/home/budryerson/rfra2.htm

20 "Reynolds v. United States", http://en.wikipedia.org/wiki/Reynolds_v._United_States

21 "U.S. Supreme Court Reynolds v. U.S., 98 U.S. 145 (1878)", http://thisnation.com/library/print/ reynolds2.html

22 For more details, see "Reynolds v.United States", http://en.wikipedia.org/wiki/Reynolds_v._United_States, Güran, Sait, "Din ve İnanç Hürriyetinin Özgür Kullanımına Bir Örnek Olay", Uluslararası Anayasa Hukuku Kurultayı 9-13 Ocak 2001, Türkiye Barolar Birliği Yayınları

the legislative powers of the government reach actions only and not opinions,-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof, 'thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, convinced he has no natural right in opposition to his social duties. Reynolds v.United States 98 US. 145(1878)[23]

After Reynolds decision, John Taylor, the new church president, declared a revelation, encouraging all priesthood officers to continue practicing plural marriages.[24] Despite of Taylor's resistance, the most importmant blow on the Mormons came up with the Edmunds Act of 1882 and the Edmunds/Tucker Law of 1887 that put pressure on the Church by menacing Mormons' civil rights and Church property rights.[25]

The Edmunds Act prohibited not only bigamy, but also bigamous cohabitation. Furthermore, polygynists barred from jury service or public office. All registration and elective offices in Utah Territory were vacated; an independent committee was appointed to control elections to break Mormon influence and only men who swore that they didn't practice plural marriages were allowed to vote.[26]

---

[23] "U.S. Supreme Court Reynolds v. U.S., 98 U.S. 145 (1878)", http://thisnation.com/library/print/ reynolds2.html

[24] "…Polygamy is a divine institution.It has been handed down direct from God. The United States cannot abolish it. No nation on also bigamous cohabitation earth can prevent it, nor all the nations of the earth combined . I defy the United States. I will obey God.", Altman-Ginat, p. 34

[25] "History of Polygamy in Utah", http://www.onlineutah.com/polygamyhistoryembry.shtml

[26] For further information, see "History of the Church of Jesus Christ of Latter-day Saints", http://www.answers.com/topic/history-of-the-church-of-jesus-christ-of-latter-day-saints", Barrus, Roger M., "Political History",

Since the Edmunds Act was insufficient in controlling polygamy in Utah, Congress approved the Edmunds-Tucker Act in 1887 to close the loopholes of the Edmunds Act.[27] This new law brought very hard provisions for the Mormons:[28]

> *A wife or wives could be forced to testify against their husbands.
>
> *All marriages performed were to be recorded with a probate court.
>
> *Woman suffrage was abolished (to restrict the Mormon elective franchise).
>
> *A test oath was reintroduced into Utah's elective process: voting, serving on juries,or holding public office were conditional upon signing the oath pledging obedience to and support of all anti-polygamy laws.
> *Probate judges were to be appointed by the President of the Unites States.
>
> *The Church's Perpetual Emigrating Fund Company was dissolved.

By the end of the 1880s, over a thousand polygynist Mormon men had been imprisoned by the federal agents; Church leaders as well as many of its members went into hiding on the underground to avoid arrest; many others were expunged from the voting rolls and most of the Church property had been transferred to the

http://www.lightplanet.com/mormons/daily/politics/Political_History_EOM.htm, Altman-Ginat, p.35

[27] "History of Polygamy in Utah", http://www.onlineutah.com/polygamyhistoryembry.shtml

[28] Porter, Perry L., "A Chronology of Federal Legislation on Polygamy",http://www.Idshistory.net/ pc/chron.htm,

trusted individuals and local organizations.[29]

Under the pressure of United States, Wilford Woodruff, the successor of Mormon Church President John Taylor, changed the church's policy. In 1890, he issued the Manifesto, which stated," Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with members of the Church over which I preside to have them do likewise...". Nevertheless, Wilford Woodruff didn't announce that polygamy was wrong, only said that he declared his intention to submit to the law of the land. In return , the Church could protect its assets; arrests and prosecutions reduced. Finally, statehood came in 1896.[30] However, Utah Constitution of 1896 prohibited polygamous marriages forever.[31]

Throughout these years, some women were affected from polygamous marriages badly. Many first wives consented to their husbands' plural marriages; some women had to accept; some others weren't informed of the second marriages until they took place. A few shared their experiences about the abuses publicly. Congress formed funds to supply a home for women who wanted to escape from such marriages. However, large numbers of Mormon women came together to support plural marriage since they believed that their husbands were practicing the requirements of their religions. [32]

---

[29] Chambers, p.65

[30] Altman-Ginat, p.36

[31] For the related article of Utah Constitution, see http://www.polygamyinfo.com/law.htm; Altman-Ginat, p.37

[32] Chambers, p.66

REFERENCES

Altman, Irwin and Joseph Ginat, Polygamous Families in Contemporary Society, Cambridge University Press, 1996

Andrew Jenson, Church Chronology, August 29, 1852, Sunday, Journal of Discourses, Vol.1, p.53

Barrus, Roger M., "Political History", www.lightplanet.com/mormons/daily/politics/Political_History_EOM.htm

Brewster, Pamela R., Mothers and Goddesses: American Women in the Mormon Subculture, Michigan 1990

Chambers, David L., "Polygamy and Same-Sex Marriage", Hofstra Law Review, Vol.26, No.1, 1997

Çolak, Melek, "Osmanlı İmparatorluğu'nda Mormonlar", Tarih ve Toplum, İletişim Yayınları, Haziran 2001, Sayı: 210, Cilt: 35, p.23-24

Donovan, James M., "DOMA: A Unconstitutional Establishment of Fundamentalist Christianity", Michigan Journal of Gender Law, Vol.4

First Amendment of the United States Constitution, 1787, http://www.bdt.com/home/budryerson/rfra2.htm

Gordon, Sarah, The Mormon Question Polygamy and Constitutional Conflict in Nineteenth-Century America, The University of North Carolina Press, 2001 http://www.ibiblio.org/uncpress/chapters/gordon_mormon.html

Güran, Sait, "Din ve İnanç Hürriyetinin Özgür Kullanımına Bir Örnek Olay", Uluslararası Anayasa Hukuku Kurultayı 9-13 Ocak 2001, Türkiye Barolar Birliği Yayınları

"History of Polygamy in Utah",

http://www.onlineutah.com/polygamyhistoryembry.shtml

"History of the Church of Jesus Christ of Latter-day Saints", http://www.answers.com/topic/history-of-the-church-of-jesus-christ-of-latter-day-saints

http://www.polygamyinfo.com/law.htm

"Mormon Polygamy Overview", http://www.i4m.com/think/polygamy/polygamy_summary.html

Porter, Perry L., "A Chronology of Federal Legislationon Polygamy", http://www.ldshistory.net/pc/chron.htm

Reynolds v. United States", http://en.wikipedia.org/wiki/Reynolds_v._United_States

"The 1852 Utah Territorial Legislature Enactment On Inheritance of Illegitimate "Polygamists" Children: A Novelty Among Legitimacy Statutes", http://www.ldshistory.net/pc/illegit.htm

U.S. Supreme Court Reynolds v. U.S., 98 U.S. 145 (1878)", http://thisnation.com/library/print/reynolds2.html

THE GUILT IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA

PROF. DRAGAN JOVAŠEVIĆ PHD*

1. NOTION OF GUILTY IN CRIMINAL LAW

The crime execution is the institute for the punishment application towards its committer. But in order to apply the punishment it is necessary that the committer is guilty. The guilt represents the assemble of subjective conditions that determine physical condition of the committer and his attitude towards the crime[1]. It indicates the following:

1) the committer moral responsibility,

2) the committer behaving – morally responsible or as the result of negligence and

3) the existence of consciousness respectively duty or possibility of the committer consciousness about the action prohibition existence (article 22 Criminal code of the Republic of Serbia[2]).

Whereas that these are subjective, psychical elements consisted of will and consciousness, and can be expressed in different ways and in different intensity, the guilt is as well as its constituents gradable[3]. Also there must be some guilt at the moment of the

* **Faculty of Law, University of Niš, Republic of Serbia**

[1] D. Jovašević, Krivično pravo, Opšti deo, Nomos, Beograd, 2006. p.109-111; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.211

[2] Službeni glasnik Republike Srbije No. 85/2005 ; More : D. Jovašević, Krivični zakonik Republike Srbije sa komentarom, Službeni list, Beograd, 2006.

[3] S. Frank, Kazneno pravo, Zagreb, 1950. p.30; B. Čejović, Krivično pravo, Opšti deo, Beograd, 2002. p. 207

crime execution.

2. THE MORAL RESPONSIBILITY

The moral responsibility is an assembly of intellectual and willing elements that make person thinking, reasoning, and deciding about his behavior and to guide it. It contains two groups of abilities: intellectual and willing[4]. The intellectual capability is in legal criminal consideration consisted of the crime committer capability to understand the significance of his action, to be aware of it as the forbidden and unlawful activity that is realized by his action. The willing capability is the possibility of guiding with his activities, steps so the outside and inside barriers are overcome, so the decision is to be realized by undertaking or missing the particular action in sense of its importance understanding.

The New Criminal Code of the Republic of Serbia from 2005. year in the article 23. determines the idea of moral irresponsibility considering that it excludes the guilt. According to this legal provision the committer is not guilty for the legally determined crime if he was not able to recognize the significance of his activity or was not able to guide his own steps as the result of insanity or any harder mental disabilities[5]. In the case when the committer is partially moral responsible, he is guilty but he can be sentenced the smoother punishment.

The Criminal Code of the Republic of Serbia in the article 23 defines four forms of mental disturbance that bring to the moral irresponsibility, or significantly decreased moral responsibility[6]:

[4] Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. p. 69

[5] Lj. Jovanović, D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2003. p.179-180

[6] Z. Ćirić, Osnove sudske psihijatrije, Niš, 2004. p. 28; D. Kozarić Kovačić, M. Grubišić Ilić, V. Grozdanić, Forenzička psihijatrija, Zagreb, 2005. p.24

1) the insanity,

2) mental disturbances,

3) mental development lag, and

4) other more serious mental disturbances.

In the psychiatry there is no unique categorization and qualification that could be generally accepted. That is why our legislator gives wider definitions that explain only general forms of mental disturbance expressions, so providing the possibility that the determination of particular and specific forms is done in accordance with contemporary results of psychiatry.

3. SIGNIFICANTLY DECREASED RESPONSIBILITY

Significantly decreased responsibility[7] is a significantly decreased of the crime committer to reason and decide about his steps[8]. Namely, between the mental health and mental disturbance that causes the moral irresponsibility there are many conditions between the extreme responsibility and irresponsibility[9].

If the committer was not morally responsible he can not be punished for the committed crime, except if he brought himself in

[7] This institut prescribes several modern criminal codes : article11 of the Criminal code of the Swiss Federation, article 42 of the Criminal code of the Republic of Croatia, article 16, paragraph 2 of the Criminal code of the Republic of Slovenia, article 33 paragraph 2 of the Criminal code of the Republic of Bulgaria, article 22 of the Criminal code of the Russian Federation, article 35 of the Greek Criminal code, article 122-1 of the French Criminal code and article 25 paragraph 2 of the Criminal code of the Republic of Poland

[8] P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.223; Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. p.76-77

[9] D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. p.49-55; P. Kobe, Lj. Bavcon, Kazenski zakonik z pojasnili in sudno prakso, Ljubljana, 1970. p.8

such condition by consumption of alcohol, drugs or in some similar way[10]. So there is the possibility the morally irresponsible crime committer to be guilty if he purposely makes himself morally irresponsible. That is the offended moral irresponsibility anticipated in the article 24 of the Criminal code of the Republic of Serbia that is in the theory called *actions liberae in causa*[11].

In such cases the committer guilt is determined according to his condition before he committed the crime. If in this way the committer made himself to commit the crime under the significantly moral irresponsible condition, then there is no reason to be punished by the smoother punishment.

Namely, bringing in temporary condition of moral irresponsibility, it is considered that the person used himself as the mean of the crime execution, so because of that he has to be guilty for the committed crime. So the guilt of the *actions liberae in causa*[12] is based on the fact that the committer at the moment of bringing himself in the condition of moral irresponsibility realizes the cause of the consequence if he was morally responsible in that moment.

For the criminal responsibility existence in the case of *actions liberae in causa* the following conditions have to be fulfilled:

1) the person is only temporary not morally responsible,

2) the person was aware at the moment of causing the moral irresponsibility,

---

[10] Ž. Vinpulšek, Utjecaj alkohola kod izvršenja krivičnog djela, Zagreb, 1969. p. 424

[11] F. Bačić, Krivično pravo, Opšti deo, Zagreb, 1978. p. 249

[12] This institut prescribes in other criminal codes on similar way : article 23 of the Criminal code of the Russian Federation, article 36 of the Greek Criminal code, article 25, paragraph 3 of the Criminal code of the Poland, article 12 of the Criminal code of the Swiss Federation and article 12 of the Criminal code of the Kingdom of Spain

3) when the committer was not morally responsible he committed the crime with the premeditation or by the neglect and

4) there is the relation between the produced consequence and the action as a result of person's moral irresponsibility.

4. SPECIAL CASES OF GUILT

In the contemporary criminal law[13] the guilt is based on the subjective responsibilities in every particular case. But there are the situations when there is the objective responsibility – based on the caused consequence. There are exceptional cases so they have to be restrictively considered. The responsibility for the crimes executed by the press and other means of the public information, are anticipated by the Criminal code of the Republic of Serbia in the article 38 – 41. The international law recognizes the command responsibility and in the theory the question of the collective governing bodies responsibility is recognized.

4.1. The responsibility for the crimes executed by the press and other means of the public information

The crime made by means of public information[14] has dual nature:

1) the general responsibility – the responsibility of the author of the information published in the newspaper or announced on the television etc. and

2) the responsibility in accordance with specific rules or the

[13] J. Klotter, T. Edwards, Criminal law, Cincinati, 1998. p.82-83
[14] This responsibility prescribes some modern criminal codes : article 48 of the Criminal code of the Republic of Croatia, article 27 of the Criminal code of the Swiss Federation and article 28 of the Criminal code of the Republic of Montenegro

specific responsibility for the editor, publisher, journalist etc.

The specific responsibility is the specific form of responsibility for some persons that contributed to the crime execution and whose responsibility can not be determine according to the general rules about the criminal responsibility. It occurs if:

1) until the main inquest termination in front of the court of first instance the author is still unknown, and the case is about the crime for which there can be sentenced the punishment as 5 years of prison or stricter,

2) the information was published without the author's permission and

3) at the moment of the information announcing, there were and are still present some legal disturbances for the author persecution. Here is the question about so-called cascade responsibility of more persons for the committed crime.

But, the new Criminal code in the article 41. specifically anticipated "the information source protection". This is how the editor or his replacement, the publisher, the producer are not obliged to discover the author of some information except in two cases: 1) if for the committed crime in the law is anticipated the punishment of 5 years of law or stricter and 2) if such crime would be prevented.

4.2. The command responsibility

The command responsibility represents the responsibility of political or military superiors for their inferiors' activities, in cases when he knew, or didn't know but has reasons to know that the inferior did or would have done the crime, and he didn't implement any measure in order to prevent such crime or to punish the inferior.

This special form of the criminal responsibility for some specific international crimes (genocides, crimes against humanity, war crimes) anticipate the international Criminal law :

1) article 7 paragraph 3. of the Statute of the international tribunal for the proceeding of persons responsible for serious injuries of the international law starts at the territory of the SFRY since 1991. and

2) article 28. of the Rome's statute of the International Criminal Court.

This kind of responsibility is called in the theory: the responsibility of the superior, the responsibility for the inferiors' activities and the responsibility fore someone else's mistake, stands against the principles of the subjective responsibility. Its essence is in missing the obligation to acting, and in this way there is established the superior's responsibility for the inferior's activities[15].

According to the article 7. paragraph 2. of the Statute of the "Hague tribunal" it is the responsibility of the superior if he knew or could have known that his inferior was related with some crime committing or he committed on his own, and the superior\ missed necessary and reasonable measure to prevent the crime committing or to punish the inferior for the committed crime.

According to the article 28 of the Rome's statute the military commander is responsible for the crime executed by the military forces under his command as a result of his mistake in two cases:

1) when the person new or should have known that his forces

[15] More : C. Van de Wyngaert, International criminal law, Hague, London, Boston, 2001. ; Basic Documents UN International Criminal Tribunal for the former Yugoslavia, The Hague, 1995. ; D. Radulović, Medjunarodno krivično pravo, Podgorica, 1999; V. Djurdjić, D. Jovašević, Medjunarodno krivično pravo, Beograd, 2003.; M. Škulić, Medjunarodni krivični sud, Beograd, 2005.

execute or are ready to commit some crime and

2) when the person did not do all necessary and reasonable measures within his power to prevent such actions execution or to proceed the problem to the authorized juridical organs.

5. THE PREMEDITATION

The premeditation (dolus) is the highest form of guilt as a conscious and willing tending of the committer towards his action realization. It is the conscious and willing realization of the criminal action[16].

Trough the premeditation the psychical relation of the committer towards the action as his realization, his attitude towards the consequence as a change in the outside world that occurs on the object of attack that he caused or contributed to its causing, is most entirely expressed. The committer of the crime executed with the premeditation the committer is always punished.

The crime is executed with the premeditation (article 25. Criminal code of the Republic of Serbia) when the committer was aware of his action and wanted his execution or when the committer was aware that he could have committed the action, so he accepted that[17]. From the definitions given by the law there are two kinds of premeditation: direct and eventual, while in the special part there is anticipated also the third kind of the premeditation – the premeditation at once or the sudden premeditation: the murder at once (the article 115. Criminal code) and hard body injury at once (the article 121. paragraph 5. Criminal code).

The direct premeditation occurs when the committer was aware

[16] G. Marjanovik, Makedonsko krivično pravo, Opšt del, Skoplje, 1998. p.172; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p. 247; D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.118-120;
[17] R. Lange, Strafgesetzbuch, Berlin, 1956. p.180

of his action and wanted its execution. There are two elements necessary to provide the premeditation existence. These are the awareness of the action and the action volition, intellectual and voluntary, related to the committed crime.

The eventual premeditation is other form of premeditation. It occurs when the committer was aware that by his acting or not acting there can occur the prohibited consequence, so he complied with that. Comparing with the direct premeditation here the elements of consciousness and the will are more lightly expressed. It is consisted of two elements, and these are: the consciousness about the crime occurrence possibility and complying with the crime consequence.

6. The neglect

The neglect[18] (culpa) is the involuntarily realization of the crime. According to the article 26 of Criminal code of the Republic of Serbia it occurs when the committer was aware that by his action he can commit the crime, but he thought that would not have happened or he could have prevented that or when he was not aware that with his activity he would commit the crime. The psychological relation of the committer towards the realized action is expressed only trough one component, trough the awareness about the not willing consequence occurrence possibility or in the possibility of awareness existence[19]. The neglect is in the contemporary theory considered as a problem of the crime being. Comparing with the premeditation, the neglect does not bring the culpability, but only when the law specifically prescribes.

[18] Neglect has prescribing on similar way in other modern criminal codes : article 6 of the Criminal code of the Republic of Austria, article 28 of the Criminal code of the Greek Criminal code and article18. paragraph 2 of the Criminal code of the Swiss Federation

[19] C. Roxin, Strafrecht, Allgemeiner teil, Band I, Munchen, 1997. p.920

In criminal law in Republic of Serbia there are two kinds of the neglect: the conscious and the unconscious, while the juridical theory recognizes and the professional neglect.

The conscious neglect (luxuria) occurs when the committer was aware that the forbidden consequence can occur but he supposed it would not happen and he would be able to remove it. This neglect is consisted of two elements: the awareness of the crime consequence occurrence possibility and the belief that it will not occur or will be prevented by the committer[20].

The unconsciousness neglect (negligentia)[21] exists when the committer was not aware of the forbidden consequence occurrence possibility even he was obliged or could have been aware of that possibility. Also here are two elements:

1) lacking in consciousness according to the consequence. He didn't have the idea about the possibilities of the consequence occurrence and

2) the committer, according to the present circumstances and his own characteristics, was obliged and could have been aware of the possibility the forbidden consequence to occur.

The professional neglect[22] is the neglect of the person that is by his vocation or occupation (profession) obliged to be more careful than other persons in executing some activities from his branch. According to the possession of the professional orientation and expert knowledge, it is considered as the harder form of the neglect. Criminal code in the Republic of Serbia doe not anticipate this type of the neglect. It doesn't mean that its existence can be taken in account as the aggravating circumstance in the punishment estimation.

---

[20] M. Babović, Nehat u krivičnom pravu, Beograd, 1985. p.82
[21] J. Klotter, T. Edwards, Criminal law, Cincinati, 1998. p.35-41
[22] This form of neglect is prescribing article 131 of the Criminal code of the Republic of Bulgaria and article 221 of the Japan Criminal code

7. THE RESPONSIBILITY FOR THE HARDER CONSEQUENCE

The Criminal code of the Republic of Serbia in the article 27 anticipates the specific responsibility for the crime qualified with the harder consequence. It occurs when the committer undertakes the action in order to cause the particular consequence, but he realizes the harder consequences than one he intended to, respectively the one that could have been expected. The harder consequence should be a product of the action of the basic crime. The harder form of the consequence occurs because the activity is executed with the means or in the way that is dangerous, so it is not occasional but willing caused.

For the existence of the crime qualified with the harder consequence the cumulative fulfilling of the following conditions is necessary:

1) the executive action of the basic crime undertaking, with the premeditation or neglect,

2) the harder consequence occurrence than the expected one,

3) the existence of the conditional or causal relation between the executed action and its consequence,

4) in relation to the harder consequence the committer has to deal with the premeditation or neglect,

5) lacking in another crime being characteristics and

6) the anticipation of the stricter punishing in the law for such crime.

8. BASES OF EXCLUSION OF THE GILTY

New criminal law in Republic of Serbia is prescribing tri bases of

the exclusion of the guilty (also criminal offence because the guilty is subjective constitutive element of criminal offence)[23] :

1) force and threat
2) real delusion
3) legal delusion.

8.1.The force and the threat

The first base that excludes the guilty is the force and the threat and they are anticipated in the article 21 of the Criminal code of the Republic of Serbia.

The force is applying of overpowering physical, mechanical or other power that comes from the outside (or from another person) under its activity such person realizes the legally determined crime characteristics. If that force was overpowering (which means that the evil that was threatening could not be removed in any other way but the executive crime execution), then there is no crime. But, in such case, the person who applied the force is considered as the crime committer (the indirect executor who used the person, towards whom threat power was applied, as a mean of the relating crime).

If there was the threat or the applied force towards some person was not overpowering, the punishment towards him can be melted. The threat is some person's evil anticipation, the expression that provides another person to recognize the incoming evil if he does not occur according to his demand of doing or missing some action. Such threat has to be direct, realistic, possible and irremovable in order to be considered as relevant.

[23] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. p.136-140; P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p.214-216; Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. p.71-73

8.2. Delusion

Without the guilt existence at the committer side, there is no crime so the excluded institutes are called subjective institutes of the crime exclusion. In our law, beside the moral irresponsibility at the crime committer side (article of 23 of Criminal code) the code specifically determined that there is no guilt of such person not even when the executive action is undertaken in real (article of 28 Criminal code) and legal (article of 29. Criminal code) delusion[24]. The elusion (eror) is the existence of wrong or incomplete idea about some circumstance. The delusion can exist related to the real or legal circumstances, so there are two type of delusion:

1) the real delusion and

2) the legal delusion.

The real delusion[25] (eror facti) is the delusion about the existence of the real circumstance of the crime. The real crime circumstances can be related to the characteristic of the action or some other real circumstances that have some criminal legal significance[26]. There are two types of this kind of delusion: 1) in narrower and 2) in wider meaning.

The real delusion in narrower meaning is the delusion about the circumstances that represent legally determined characteristic of the crime being. On the other hand, the real delusion in wider meaning is the delusion about the realistic circumstances that are not contained in the crime being[27]. It exists when the committer was aware of all characteristics of the crime, but he had the wrong idea about some real circumstance existence that could make the

---

[24] D. Jovašević, Leksikon krivičnog prava, Beograd, 2002. p.619-620
[25] This institut prescribes some of the modern criminal codes : article 14 of the Spain Criminal code and article 30 of the Greek Criminal code
[26] N. Srzentić, A. Stajić,Krivično pravo FNRJ; Opšti deo, Beograd, 1957. p.217
[27] P. Novoselac, Opći dio kaznenog prava, Zagreb, 2004. p. 256

action allowed, if it really existed. The committer who undertook the action or acting or not acting in the real delusion is not guilty for the committed crime, but if he came in delusion by the neglect, then he is guilty only if the law specifically determines the punishment for the consequence causing by the neglect.

The legal delusion[28] (eror iuris) is the delusion about the crime prohibition respectively about the prohibition of the committed crime by the norms of the positive law. The action prohibition has a wider character than the crime determination in the criminal law. That way understood legal delusion represents the wrong idea about the legal significance of the crime. According to that, the crime committer is in the legal delusion if with the valid reasons didn't know that his action is prohibited (article of 29 Criminal code).

Here the committer is aware of all the circumstances that make the characteristics of the committing crime, but he is not aware that such action is the crime. The person who didn't know, nor could have known, nor was obliged to know that his action is forbidden (the irremovable legal delusion) is not guilty for the caused consequence[29]. But, if such person was in legal delusion, but was obliged and could have known about the prohibition of his action (the removable legal delusion), then he is punished with the punishment prescribed by the law, but can be punished even with the smoother punishment[30].

[28] This base of the exclusion of the guilty prescribes in modern criminal codes : article 122-3 of the French Criminal code, article 31 of the Greek Criminal code, article 24 of the Criminal code of the Republic of Poland, article 14 of the Spain Criminal code and article 19 of the Criminal code of the Republic of Montenegro
[29] D. Jovašević, O pravnoj zabludi u krivičnom pravu, Glasnik AK Vojvodine, Novi Sad, No. 9/1997. p.311-327
[30] M.Cremona, Criminal law, London, 1989. p.219-223

BASIC LITERATURE

Čejović B., **Krivično pravo, Opšti deo**, Službeni list SRJ, Beograd, 2002.

Đorđević M., Đorđević Đ., **Krivično pravo**, Projuris, Beograd, 2005.

Đurđić V., Jovašević D., **Međunarodno krivično pravo**, Nomos, Beograd, 2003.

Đurđić V., Jovašević D**.,** Praktikum za krivično pravo, Knjiga prva , Opšti deo, Službeni glasnik, Beograd, 2003.

Jovanović Lj., Jovašević D., **Krivično pravo, Opšti deo**, Nomos, Beograd, 2002.

Jovašević D., **Komentar Krivičnog zakona SR Jugoslavije**, Službeni glasnik, Beograd,2002.

Jovašević D., **Komentar Krivičnog zakona Republike Srbije**, Nomos, Beograd, 2003.

Jovašević D., **Krivični zakonik Republike Srbije sa uvodnim komentarom,** Službeni list SCG, Beograd, 2006.

Jovašević D., **Zakon o izvršenju krivičnih sankcija sa uvodnim komentarom**, Službeni list SCG, Beograd, 2006.

Jovašević D., **Krivično pravo, Opšti deo**, Nomos, Beograd, 2006.

Jovašević D., **Leksikon krivičnog prava**, Službeni glasnik, Beograd, 2006.

Lazarević Lj., Vučković B., Vučković V., **Komentar Krivičnog Republike Crne Gore**, Obod,Cetinje, 2004.

Lazarević Lj., **Komentar Krivičnog zakonika Republike Srbije,** Savremena administracija, Beograd, 2006.

Petrović B., Jovašević D., **Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio**, Pravni fakultet, Sarajevo, 2005.