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THE INJURED PARTY AS AN INITIATOR OF CRIMINAL PROSECUTION

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Abstract

A criminal offence primarily infringes upon social interests. Therefore, official criminal prosecution conducted by the public prosecutor represents the dominant form of response to criminal offences. However, criminal legislation also provides for certain offences that primarily violate the personal interests of the injured party. The prosecution of persons accused of committing such offences is left to the initiative of the injured party. In this way, a certain degree of demonopolization of the state in the sphere of criminal prosecution is achieved. For the prosecution of persons suspected of committing certain criminal offences, the injured party may initiate criminal proceedings by filing a private charge. In such a case, any form of influence of the public prosecutor over the prosecution is excluded. On the other hand, prosecution upon the motion of the injured party reflects the injured party's initiating role. Nevertheless, although the injured party directly conditions the initiation of prosecution, the prosecution itself retains its official character. Furthermore, remnants of the *actio popularis* enable the participation of citizens in initiating criminal prosecution.

Keywords: *injured party; criminal prosecution; private charge; motion of the injured party; actio popu*

Introduction

The change in the physiognomy and general perception of criminal offence as a public rather than a private matter has resulted in the primacy of the public (societal) interest. The public interest is considered to be vital in the process of initiating criminal proceedings as compared to the private interest which was once predominant in the accusatorial criminal procedure system. At first, in times when that there was no strict differentiation between the executive and the judicial branch of government, criminal prosecution was instigated at the initiative of the inquirer (investigating judge). Later on, the 19th century criminal procedure reforms yielded a special independent institution called the public prosecution, which had the authority to institute the criminal prosecution.

The essence of the principle of officiality in criminal prosecution is reflected in the fact that criminal prosecution is instigated primarily in the public interest. Thus, the state has a monopoly on the criminal prosecution of the criminal offenders who are reasonably believed to have committed a criminal act. Thereby, the freedom of choice (volition) of the injured party whose rights have been violated or endangered by the commission of a criminal offence is irrelevant for instigating the criminal prosecution of a perpetrator of a criminal act. In contrast, in the accusatorial criminal procedure, there was the principle of *disposition* under which the criminal prosecution entirely depended on the volition of the injured party.

In the earlier criminal procedure literature, the predominant standpoint was that the scope of the officiality principle extended beyond the initiative to prosecute a criminal offender. Namely, the officiality principle was considered to be extending across the entire criminal procedure, including the obligation of the court to take relevant action *ex officio* aimed at establishing the material truth (Ogorelica, 1899; Bajer, 1988). This standpoint is based on the fact that there are two state bodies of authority, the public prosecutor and the criminal court, which are in charge of processing the penal request of the state to punish the accused criminal offender. However, the principle governing the strict differentiation of roles in criminal proceedings makes a clear distinction between the roles of the criminal prosecution and the criminal court. Although the procedural activity of the public prosecutor is fairly complementary to the activities of the court, the scope of the public prosecutor's activity is still confined to setting the criminal proceeding in motion and keeping it underway. The public prosecutor's activity is a product of the state monopoly on initiating the criminal prosecution of the suspected and accused offenders (in line with the officiality principle). On the other hand, the criminal court deliberation on the justifiability of the public prosecutor's penal request to prosecute and punish the accused (which is put into effect by the prosecutor who files a relevant charging document) is an obligation stemming from the principle of establishing the material truth.

1. The Process of Demonopolizing the Criminal Prosecution

There is no doubt that the predominant public interest in instigating the criminal prosecution against persons who are reasonably believed to have committed a criminal act does not mean that the commission of some criminal offences (including some groups of criminal offences) necessarily implies the violation of primarily private interests. The acknowledgement of this fact also implies the possibility of "*demonopolizing*" the criminal prosecution as an activity in the exclusive jurisdiction of the public prosecutor as an authorized exponent acting for and on behalf of the state. Thus, the criminal legislation has envisaged that the criminal prosecution of offenders whose activities are primarily aimed at violating private interests should (logically) be left to the initiative of the injured party/parties affected by the commission of such criminal acts. These persons are entitled to initiate criminal prosecution by filing a special prosecuting document called a *private criminal charge (complaint)* against the criminal offender whose illicit conduct has violated or endangered their legally protected rights or assets. This option is, therefore, an exception from the principle of officiality of the criminal prosecution.

On the other hand, the factor which plays a significant role in the process of relaxing the state monopoly on criminal prosecution is the fact that the public prosecutor may not initiate a criminal proceeding without receiving the injured party's *motion to prosecute* a criminal offender. Therefore, the injured party's motion to prosecute is a procedural presumption for the initial activity of the public prosecutor aimed at setting the criminal proceeding in motion. The injured party's failure to file a motion to prosecute as well as a withdrawal of a submitted one are procedural impediments for initiating or proceeding with the criminal prosecution. The prosecution based on an injured party's motion to prosecute is a *limitation* rather than an exception from the principle of officiality considering the fact that the primary role of the injured party in prosecuting a criminal offender (by means of this motion) comes down to the injured party's consent to initiating and keeping the initiative activity of the public prosecutor underway; in that context, the public prosecutor has an exclusive authority to convince the competent court to accept the initiative and set the criminal proceeding in motion (Radulović, 2015; Grubač, 2006). Besides, criminal offences which are subject to public prosecution upon the injured party's motion to prosecute fall into the group of criminal offences which are subject to the criminal prosecution *ex officio*.

The process of "*demonopolizing*" the criminal prosecution is also reflected in the option available to the persons who are not directly injured by the commission of a criminal act; they may initiate a criminal proceeding by filing the so-called *popular (class) action claim*, derived from the Roman law institute of *actio popularis*, which is also part of the contemporary Anglo-Saxon law. Under the

action popularis system, the instigation of criminal prosecution does not rest on the precondition of being a passive participant of the committed criminal act.

The state monopoly on prosecuting the perpetrators of criminal offences is further diminished by the increasingly current tendency of applying *consensual* proceedings, which are aimed at either diverting or terminating the criminal proceedings. The process of relaxing the state monopoly on initiating criminal prosecution is also reflected in the legally recognized impact of the volition of the accused person on the decision of the public prosecutor to initiate a criminal proceeding.

1.1. Criminal Prosecution upon a Private Criminal Complaint

The possibility of instigating criminal prosecution on the basis of the injured party's private criminal charges (complaint) is a result of the legislator's belief (expressed in the special part of the Serbian Criminal Code) that the commission of some criminal acts predominantly implies a violation or endangerment of one's private interests, in which case the public interest comes second. It applies to less serious criminal offences aimed at violating the private rights and assets of an individual (such as: honour, reputation, physical integrity, property, etc). Hence, the criminal prosecution of such criminal offences is left to the initiative of the directly affected or injured persons who

may, in compliance with the conditions prescribed by the law, obtain the procedural status of a *private prosecutor* entitled to initiate a private prosecution.

The criminal prosecution based on a private criminal complaint is a reflection of the legal and political conception of the state to allow the injured party to directly put into effect the penal request to punish the offender; in each specific case, it is a matter of choice (volition) of the injured party whether this private criminal complaint will be put into effect. Therefore, the state has incriminated specific forms of unlawful conduct in order to protect the interests of individuals; however, the criminal proceeding aimed at exercising the protection of these interests has been left to the volition of the passive participant in the criminal offence (the injured party). Thus, the instigation of a criminal proceeding fully rests on the volition of the injured party, who is also entitled to choose some other way of protecting his/her interests (such as: settlement, conciliation, forgiveness, etc.).

In the professional public as well as in the judicial practice, there are certain reservations about the legal possibility of initiating a criminal proceeding by filing a private criminal charge (complaint). The skepticism stems from the image of the private claimant as a frivolous litigant (*querulant*) who may take the criminal law instruments lightly and use them without due consideration for frivolous purposes. It is worth noting that the lack of expedience and efficiency is mostly apparent in criminal matters involving private criminal charges. Moreover, there is a tendency in the legislation to impose additional requirements which burden the exercise of the criminal law protection by this legal instrument. Such circumstances have urged the theoreticians to point out to the importance of the private criminal complaint as a

significant instrument for safeguarding social values. Namely, the Criminal Code of Serbia comprises a substantial number of criminal offences which may be subject to criminal prosecution on the basis of a private criminal complaint (even though most criminal offences are still subject to the criminal prosecution *ex officio*). The participation of criminal offences which are subject to an *ex officio* prosecution in the total crime rate generally exceeds the overall percentage of these offences as prescribed in the criminal legislation. On the other hand, the fact is that the private claimants' personality profiles may include pathologically structured individuals even though the total number of such litigants (*querulants*) may be negligible in the overall psychological structure of private claimants. Yet, the vast majority of private claimants fall into the personality profile of individuals struggling to protect their legal interests envisaged in the Criminal Code. As an instrument for initiating a criminal proceeding, the private criminal complaint has been given additional credibility in a catalogue of presumed reactions of the injured party to a possibility of being denied the option to file a private complaint. Unfortunately, a possible alternative to the non-existence of the right to file a private criminal complaint might be an act of retribution towards the criminal offender by using illegal means of immediate satisfaction (such as: retaliation, retort, payback, etc.). All these circumstances assert and confirm the need to recognize the effectiveness of the private criminal complaint as an instrument for initiating criminal prosecution (Grubač, 2008).

A private criminal charge (complaint) is an autonomous prosecution instrument at the disposal of a private claimant which is aimed at initiating and running a criminal proceeding without any participation of the public prosecutor. In the comparative legislation, there is a possibility of combining the private criminal complaint and the public prosecution charges (indictment), which is not the case in the Serbian positive law. In the *German law*, for instance, the public prosecutor has the authority to file a private criminal complaint to raise charges for and on behalf of a private claimant in case it is deemed to be a matter of public interest (§ 376 of the German Criminal Procedure Code - *Strafprozessordnung (StPo)*). Moreover, the public prosecutor may take over the criminal prosecution from the private claimant at any time in the criminal proceedings until the moment when the court judgment has become effective (§ 377 para. 2 of the *StPo*). In that case, the private claimant assumes the role of a *subsidiary prosecutor*.

The intertwining of the private criminal complaint and the public criminal charges is also allowed in the Russian legislation. *In the Russian Federation*, the public prosecutor may (without receiving a prior motion of the injured party) initiate a criminal proceeding in cases where the criminal offence is subject to prosecution on the basis of a private criminal complaint, providing that the criminal offence has a "special social importance" or providing that the injured party is incapable of protecting his/her rights alone (due to vulnerability, dependant position towards the defendant, etc.). In addition, the public prosecutor may also take over the

prosecution from the private claimant, in which case the private criminal complaint is turned into a public charge (indictment). In that case, the injured party is still left with some (yet restricted) rights in the criminal proceeding but the injured party is not entitled to abandon the charges because he/she is no more a *dominus littis* of the criminal prosecution (Article 20, para. 4 of the Criminal Procedure Code of the Russian Federation).

A private criminal complaint is a procedural instrument by means of which the injured party initiates a criminal proceeding. However, being unskilled in the law, the injured party could easily make a procedural error by mistakenly submitting a *criminal report* (to inform the prosecutor about a committed crime) instead of filing a *private criminal complaint* (to initiate a criminal prosecution). Unlike the private criminal complaint, the criminal report is an extra-procedural instrument which is primarily aimed at informing the public prosecutor about a committed criminal offence and its most likely perpetrator. In order to provide for the criminal prosecution in cases where a criminal report has been (mistakenly) filed for criminal offences which are subject to prosecution upon a private criminal complaint, the *Serbian* legislator has prescribed that the criminal report filed within the time limit stipulated for the submission of a private criminal complaint shall be regarded as a timely submitted private criminal complaint (Article 54, para. 3 of the Criminal Procedure Code of Serbia). On the contrary, if the injured party has filed a private criminal complaint concerning some criminal offence which is subject to the *ex officio* prosecution, the court shall discard the private criminal complaint, which shall thereupon be served on the public prosecutor for further consideration (Article 235 of the Serbian Criminal Procedure Code).

The Criminal Code of the Republic of Serbia has envisaged a corpus of criminal offences for the commission of which the offenders may be prosecuted on the basis of a private criminal charge (complaint). Thus, for example, a private criminal complaint is applicable in case of a violation of personal dignity, honour and reputation (Article 177 of the Criminal Code of Serbia), as well as for the commission of the following criminal offences: a minor bodily injury (Article 12, para. 4 of the CC); an unauthorized wiretapping and recording of conversations (Article 143, para. 1 and 2 of the CC); a petty theft, embezzlement and fraud (Article 219, para. 1 of the CC); a violation of privacy/ confidentiality of correspondence (Article 142, para. 1 and 2 of the CC of Serbia).

1.2. Criminal Prosecution upon the Injured Party's Motion to Prosecute

The principle of officiality in criminal prosecution mainly implies the primacy of the state initiative in the process of initiating a criminal proceeding over the volition of the injured party, who acts as an initial trigger in activating the judicial decision-making mechanism aimed at establishing the legal ground for culpability of the accused person. However, the criminal prosecution *ex officio* does not necessarily imply a lack of initiative of the injured party to sanction the criminal offender who is

prosecuted *ex officio*. Pursuant to the new Criminal Code of Serbia,¹ the revival of the criminal prosecution regime instituted upon the injured party's motion to prosecute actually promotes the legitimacy of the freedom of choice (volition) of the injured party as a relevant factor in prosecuting the perpetrators of criminal offences which are subject to criminal prosecution *ex officio*.

The option of instituting criminal prosecution upon a motion of the injured party is rooted in the concurrent and corresponding relevance of both public and private interests in the criminal prosecution of the perpetrators of particular criminal offences. As compared to the criminal prosecution based on the private criminal complaint where the public interest is (by the force of law) subordinate to the private interests of the injured party, the injured party's motion to prosecute does not preclude the authority of the public prosecutor to initiate a criminal proceeding. As for the criminal offences which are subject to criminal prosecution *ex officio*, the state monopoly to instigate criminal prosecution is only relatively relaxed by instituting this private motion to prosecute as a prerequisite for the procedural activity of the public prosecutor. The fact that the instigation of a criminal proceeding may counteract or frustrate the interests of the injured party is the conceptual basis for preconditioning the criminal prosecution *ex officio* by this motion to prosecute (perceived as an expression of the volition of the party directly affected by the illegal act of the accused person). Namely, in some circumstances, the injured party may be additionally traumatized by the instigated criminal proceeding, which may lead to the so-called *secondary victimization* of the injured party. In order to prevent such a possibility in cases where a commission of a criminal act primarily implies a violation of a private interest (which certainly does not exclude the public interest), the Serbian legislator has “demonopolized” (to some extent) the public prosecution by making it rest upon the initiative of the injured party. Moreover, the public interest sometimes depends on the presence of the private interest (e.g. in petty theft). Preconditioning the public interest by a private interest may also be a consequence of the fact that some criminal offences permeate into the private interests of the injured party as well as the perpetrator (e.g. in case of property misdemeanours involving some damage or harm to a next of kin) (Jescheck, 1978).

However, after the prosecutor has accepted the injured party's motion to prosecute and put it into effect by raising criminal charges and presenting the indictment in court, the injured party still does not have the capacity to prosecute the criminal offender. The injured party may file a subsidiary (private) criminal complaint only if the public prosecutor has failed to initiate a criminal proceeding or if the prosecutor has dropped the criminal charges during the criminal proceeding. Given that the acceptance of the injured party's motion to prosecute does not end the public prosecution, in such a case the injured party *de facto* has the prosecutor's

¹ The Criminal Code of Serbia, Official Gazette of RS, no. 85, 2005

public charges (indictment) at his/her disposal. As a matter of fact, the public prosecutor may not initiate a criminal proceeding without receiving the injured party's motion to prosecute. Moreover, the injured party may withdraw the motion to prosecute, thus procuring the discharge of the instigated criminal proceeding. Thus, the law has recognized the legitimacy of the impact of the injured party's freedom of choice (volition) to pursue criminal prosecution of the perpetrators of particular criminal offences, which eventually urged some theoreticians to designate the injured party as a *dominus littis* of this type of criminal prosecution (Škulić, 2009).

Having received full legal recognition, the impact of the injured party's motion to prosecute indisputably relaxes the public prosecutor's monopoly to initiate criminal proceedings concerning offences which are subject to criminal prosecution *ex officio*. However, there is no common agreement in the criminal law theory on the legal nature of this institute. The majority opinion is that the injured party's motion to prosecute is a *procedural presumption* for initiating and running the criminal proceeding. Being a kind of request to punish the accused, the injured party's motion to prosecute is a prerequisite

for the (subsequent) initiative of the public prosecutor without which a criminal proceeding may neither be instigated nor kept underway (Pfeiffer, 2003; Škulić, 2009; Vasiljević, 1964; Ilić, 1968, Radulović, 1999). As opposed to this standpoint, some theoreticians suggest that the injured party's motion to prosecute has been given the effect of a substantive law instrument. This standpoint is based on the factual support that the volition and resolve of the state to punish the accused offender is determined by the volition and resolve of the injured party. In case when the volition of one party depends on the volition of another party, the latter (i.e. the volition of the injured party) has the decisive role in that relation. Hence, the injured party's motion to prosecute is not only a procedural presumption for initiating and running a criminal proceeding but also a substantive law institute (Bajer, 1972).

Being an instrument for initiating the procedural activity of the public prosecutor, the injured party's motion to prosecute contributes to the process of *demonopolizing* the criminal prosecution. The state monopoly on criminal prosecution is diminished by the circumstance that the criminal prosecution of some criminal offences is precluded by the volition of the injured party. Therefore, the criminal prosecution based on the injured party's motion to prosecute is a departure from the officiality principle (Platzgummer 1984; Cigler, 1995). The fact that the criminal prosecution rests upon the injured party's freedom of choice has urged some theoreticians to perceive this circumstance as an exception from the legality principle (Bejatović, 1994).

The motion to initiate a criminal prosecution is a limitation to the officiality principle, which is a presumption for the principle of legality of the criminal prosecution. Under the principle of officiality, the state has the authority to institute the penal request to punish the accused, irrespective of and independent from the volition of the injured party. On the other hand, under the legality principle, the competent state authority (public prosecutor) is obliged to perform the state-awarded

crime prevention task stemming from the principle of officiality. Yet, the rationale of exceptions from the principle of officiality and the principle of legality is quite different. In criminal offences which are subject to criminal prosecution upon the injured party's motion to prosecute, the absence of such a motion is a bar to the penal request for punishment based on the volition of the injured party. In contrast, the exercise of the principle of opportuneness of criminal prosecution (as a general divergence from the principle of legality) is manifested in the non-initiation of a criminal proceeding based on the assessment of the competent prosecuting authority (public prosecutor) that such an action would be ineffective (Cigler, 1994). All things considered, it follows that preconditioning the criminal prosecution by a motion to prosecute is a departure from the principle of officiality.

The Serbian substantive and procedural criminal legislation contains positive law solutions which reaffirm the role of the injured party's motion to prosecute. As compared to the former criminal legislation in this field, the Criminal Code of Serbia has envisaged a number of criminal offences whose offenders are subject to prosecution upon the injured party's motion to prosecute. For example, this criminal prosecution regime applies to the following criminal offences: illicit sexual offences (Article 182 of the Criminal Code); coercive sexual intercourse with a spouse (Article 178); copyright infringement of authorship rights of an author or a performer (Article 198, para.2); embezzlement (Article 2007, para. 1 and 5); usury or loan-sharking (Article 217, para1).

The criminal prosecution based on the injured party's motion to prosecute is also allowed in a number of other comparative law systems, including the legislations of Germany, Austria, Holland, Belgium, Denmark, Portugal, Hungary, Poland, Finland, and many other countries. The vital role of the injured party in initiating the criminal procedure for criminal offences which are subject to an *ex officio* prosecution is justified both by the protection of the interest of the injured party as well as by the increasing efficiency of criminal justice (due to a reduced court caseload) (Cigler, 1994).

The French legislation envisages the possibility of instituting criminal prosecution upon the motion of the injured party for the following criminal offences: defamation; insults (Article 48 of the French Criminal Code); defamatory (libelous) statements in the press/media; unauthorized publication of private conversations or photographs (Articles 368-373 of the CC).

In the criminal legislation of Greece, the injured party may not have the status of an authorized (private) prosecutor; however, the injured party may submit a proposal to the public prosecutor to initiate a criminal prosecution. If the public prosecutor considers the proposal to be inconsistent with the law or vague, the injured party is entitled to refer the case to a public prosecutor of a superior rank asking him/her to initiate a criminal proceeding (Article 46 of the Criminal Code of Greece).

In Finland, the Criminal Procedure Code envisages the possibility of initiating a criminal prosecution upon the request (motion) of the injured party (Chapter 1,

Articles 1 and 16 of the CPC). The Criminal Procedure Code of Finland (Article 2, para.2) provides for a criminal prosecution upon the injured party's request, or the order or consent of a competent authority, in special circumstances, as stipulated by the law. Article 3 (para.1) envisages that the public prosecutor may also extend the prosecution charges by including the suspected accomplices who have not been included in the injured person's request to prosecute. Paragraph 2 of this Article contains a provision in favour of a minor or a person who does not have full legal capacity, stating that the public prosecutor has the authority to take over the criminal prosecution and bring charges even in cases where he/she otherwise would not be eligible to act (Article 3, para. 1) providing that the custodian/guardian or other legal representative has failed to file a prosecution request. A minor over the age of 15 has a right (parallel to that of his/her custodian or other legal representative) to file a criminal prosecution request for a criminal offence committed against his/her person. Yet, it is only the custodian or guardian who is entitled to file a prosecution request for and on behalf of a person who is completely deprived of legal capacity. Article 16 stipulates that, in case the injured party withdraws a prosecution request, the injured party shall no longer have the right to file such a request for the same criminal offence. If the injured party has withdrawn the prosecution request before the public prosecutor has raised public charges on the basis of the request, the public prosecutor no longer has the right to raise charges. However, it still does not prevent the prosecutor to raise charges against the accomplices who have not been included in the injured party's request for prosecution.

In the Republic of Serbia, the Criminal Code prescribes a number of criminal offences whose perpetrators may be prosecuted on the basis of the injured party's motion to prosecute. In addition, this form of criminal prosecution is also regulated in the Criminal Procedure Code of Serbia. Pursuant to the Serbian Criminal Procedure Code, the injured party is required to file this motion no later than 3 months from the date when the person authorized to file this motion has learnt about the commission of the criminal offence (Article 53, para.1 of the CPC). Under the legal norm, a submitted criminal report or a motion to institute a property claim shall be regarded as a submitted motion for criminal prosecution (Article 54, para. 2 of the CPC). The force of the legal provision also protects the interests of the injured party in cases where the injured party has (mistakenly) filed a private criminal complaint instead of filing a motion to prosecute, and vice-versa (Article 54, para.3 of the CPC).

Under the Serbian Criminal Procedure Code, a juvenile offender over the age of 16 also has a procedural legitimacy to file a motion to prosecute (Article 55, para.2 of the CPC). Moreover, the legal provisions envisage the possibility of *succession* in initiating the activity of the public prosecutor by filing a motion to prosecute. Namely, if the injured person dies within the period of time prescribed for submitting the motion to prosecute, the surviving spouse or a permanent extramarital partner and a next of kin (children, parents, adopted children, adoptive parents, brothers and sisters) may within a period of 3 months from the death of the injured

party endorse a motion to prosecute or continue the criminal proceedings (Article 56 of the CPC).

However, the public prosecutor's acceptance of the injured party's motion for criminal prosecution does not end the injured party's option to *de facto* dispose of his/her private criminal complaint. The injured party may abandon this motion by the end of the main court hearing. However, such an action of the injured party will eliminate the key procedural assumption for carrying on the criminal proceeding. The former as well as the contemporary criminal procedure literature calls for imposing limitations on the injured party's option to abandon the motion to prosecute and, thus, counteract or cancel the effectiveness of the public charges. In line with that idea, it is necessary to impose a restriction that the injured party is entitled to abandon this motion only until the beginning of the main court hearing or, possibly, until the termination of the investigation (Čubinski, 1933; Radulović, 1999). This standpoint was upheld in the legal provision contained in the Judicial Criminal Procedure Code of the Kingdom of Yugoslavia (Article 89). It may be justifiable to impose a restriction on the injured party's autonomous disposal of the state's penal request to punish the offender. Despite the fact that the injured party's motion to prosecute has a decisive role in the criminal prosecution of some criminal offences, such an action of the injured party cannot be allowed to counteract the intensive procedural activity of the public prosecutor acting as an official exponent of the state. The beginning of the main court hearing (as the central stage in the criminal procedure) implies a significant degree of certainty about the committed criminal act and its perpetrator; it is, therefore, an optimal moment for limiting the actual disposition of the injured party to freely dispose of the state's penal request to punish the accused.

2. *Actio Popularis* as a Limitation to the State Monopoly on Criminal Prosecution

The opportunity to initiate proceedings for a judicial dispute resolution in a court of law has been legally acknowledged to citizens ever since the Ancient times. For a long while, this option was reflected in initiating proceedings for resolving civil disputes. The establishment of the first permanent criminal courts (*quaestiones perpetuae*) in the Roman law (as a result of Sulla's criminal law reform) did not, however, set a clear demarcation line between the criminal and the civil proceeding. Nor did it end the process of differentiating between the public misdemeanours (*delicta publica*) and private misdemeanours (*delicta privatae*). For example, at the time of the Principate (27 BC – 284 AD), theft was considered to be a private misdemeanour and the victim of this wrongful act was entitled to initiate a civil action. Yet, the victim of a bodily injury (as a private misdemeanour) was the only one who was entitled to initiate a criminal proceeding. In contrast, every citizen was entitled to prosecute a perpetrator of a public misdemeanour and initiate a criminal

proceeding by filing a popular (class) action claim (*actio popularis*). It marked an official recognition *accusatio publica*, as a new legal regime for prosecuting the perpetrators of public misdemeanours.

Historically speaking, the popular/class action (*actio popularis*) was a result of transforming the private law features underlying the criminal proceeding in murder cases into a public proceeding. In the period of the Republic, the Roman law prescribed that the family members and friends were eligible (first and foremost) to instigate proceedings against murderers. Later, the scope of *actio popularis* was officially extended to include a circle of people who were entitled to act as private claimants (Kunkel, 1963). In the opinion of some theoreticians, the popular/class action has its origin in the law of Ancient Greece (Calhoun, 1927).

In Roman law, every citizen and Roman subject (with several exceptions) was entitled to become a private claimant. However, in order to be eligible to bring private criminal charges, the private claimant had to obtain the permission of a praetor (*delationem nominis postulare*). If an *actio popularis* had been filed by several claimants, there was a debate (*divinatio*) before a magistrate who designated the principal claimant (i.e. the title holder of the popular/class action). Upon the expiry of the stipulated time limit, the private claimant presented the *delatio nominis* (formal accusation) in the presence of the magistrate judge and the accused person. Then, the private claimant initiated the first adversarial interrogation (*legibus interrogare*) and formulated the charging instrument, which was signed by the private claimant and the persons corroborating the claim (*subscriptio*). After that, the charging document was entered into the protocol of cases pending trial. Subsequently, the private claimant was given a period (from 10 to 110 days) to collect evidence. The private claimant had to be continuously involved in the proceedings because the private prosecutor's default (failure to appear in court) would result in the magistrate's decision to discard the cases. In the criminal trial, the private claimant had the full authority to represent the charges in court. In case the private claimant was successful in proving the culpability of the accused person, he/she was entitled to receive an adequate monetary compensation (Vilemsa, 1898).

The popular/class action system was also present in the early German law until the late 16th century. The statutes of a number of medieval towns located on the coast of the Adriatic Sea (Venice, Split, Trogir, Dubrovnik, Budva, etc) contained provisions on *actio popularis*. Citizens were entitled to file popular claims for public misdemeanours; the sanctions included a fine and (in exceptional cases) the confiscation of property. Therefore, the citizens had a status of *legitimus accusator* and, as such, they received half of the court-awarded fine. Some of these medieval town statutes included provisions on the citizens (so-called "officials") who had the authority to file private criminal complaints against the perpetrators of public misdemeanours (Danilović, 1968).

In the contemporary law, the institute of the popular/class action was preserved in the English legislation. Under *the law of England*, each citizen or subject to the Crown has the right to initiate a criminal proceeding. Yet, it does not

imply that the criminal proceeding does not have a public character. Quite the reverse, the citizens' engagement in criminal procedure implies a protection of the public law interests. Ever since the early developments of the English criminal law, the criminal proceeding has been a kind of a lawsuit between the Crown and the accused (defendant). The very fact that the citizen has initiated the criminal proceeding does not mean that he/she has the procedural claim (penal request) to punish the accused at his/her full and free disposal. Namely, the citizen who has submitted a popular/class claim is not eligible to make a plea bargaining agreement with the accused, nor is he allowed to abandon the prosecution altogether of his own free will. The citizen must communicate his intention to abandon the prosecution to the competent state authority which takes over the criminal prosecution, and this competent authority may procure a dismissal of the criminal proceeding by giving a statement before a competent court (Krapac, 1995).

Yet, the popular/class action (as a form of *demonopolizing* the right of a state to instigate criminal proceedings) must not turn into a "*legalization*" of the citizens' right to arbitrary prosecution. For this reason, the English law has envisaged the popular/class action control mechanisms, which are aimed at preventing malevolent (*vexatious*) prosecutions. Malevolent initiation of criminal proceedings is sanctioned pursuant to the civil law rules governing the liability for damage caused by unjustifiable prosecution. Moreover, a citizen who files a popular/class action claim "without cause" thus initiating "vexatious prosecutions", or a citizen who files such claims "regularly and persistently" for frivolous purposes (*querulant*), may temporarily or permanently be denied the right to file popular/class action claims. This decision is rendered by the High Court of Justice, in compliance with the Supreme Court Act of 1981.

In the English law, the process of "*demonopolizing*" the public prosecution charges by making provisions for the popular/class action is gradually being relaxed. First of all, in order to be able to prosecute the perpetrators of certain criminal offences, citizens are required to obtain the consent of competent state authorities, primarily the Director of Public Prosecutions. The growing interference of the state into the field of criminal prosecution is a result of establishing the Crown Prosecution Service on the basis of the 1985 Prosecution of Offences Act. As opposed to the public prosecutors' office in the European-continental legal system, the Crown Prosecution Service does not instigate criminal proceedings against the accused; given the fact that the criminal procedure has already been instigated by the police, this Service is responsible for further proceedings. In English legislation, the prevailing orientation of the state towards the public criminal prosecution is clearly reflected in the roles of other state authorities in initiating criminal prosecution, such as: the Law Officers of the Crown, the Attorney-General and the Solicitor-General (Krapac, 1995). All these facts point to a tendency of diminishing the role of the popular/class action in initiating the criminal proceeding in the English law and,

concurrently, strengthening the role of the state in the criminal prosecution of perpetrators of criminal offences.

Conclusion

The conception of a criminal offence as an illegal act which primarily violates or endangers the general public values resulted in establishing the monopoly of the state in criminal prosecution. The role of the state in this field is reflected in the activity of a special public authority entitled to initiate criminal proceedings, which provides an institutional framework for exercising the criminal law protection of the society at large. In the contemporary legislations, the role of the state in the criminal prosecution of criminal offenders is exercised in the activity of the public prosecutor as the official exponent of the state.

The basis postulates of procedural economy impose the need for limiting the state monopoly in initiating criminal prosecution in specific circumstances. The freedom of choice (volition) of the injured party has to be taken into account and shall not be frustrated or counteracted by the exclusive right of the state to initiate criminal proceedings. In many legislations, this concept has been put into effect by enacting legal provisions on criminal offences whose perpetrators are subject to criminal prosecution either upon the injured party's motion to prosecute or upon a private criminal complaint. This intervention does not challenge or contravene the nature of criminal offences as illegal acts which primarily violate public interests but, as a matter of fact, takes into consideration the legitimacy of the freedom of choice (volition) of the party injured by the illicit conduct of the accused.

References:

- Bajer, V. (1972). *Jugoslovensko krivično procesno pravo (Yugoslav Criminal Procedure Law)* (Vol. 2), Školska knjiga, Zagreb
- Bajer, V. (1988). *Jugoslovensko krivično procesno pravo (Yugoslav Criminal Procedure Law)* (Vol. 1), Narodne novine: Pravni fakultet, Zagreb
- Bejatović, S. (1994). Institut gonjenja po predlogu oštećenog i prestojeće izmene jugoslovenskog krivičnog zakonodavstva (*The Institute of Criminal Prosecution upon the Injured Party's Motion to Prosecute and the Forthcoming Changes in Yugoslav Criminal Legislation*). *Anali (Annals)*, (1–2), Beograd, 28-36
- Calhoun, G. (1927). *The Growth of Criminal Law in Ancient Greece*. University of California Press, Berkley

- Cigler, S. (1994). Odnos načela legaliteta i oportuniteta krivičnog gonjenja prema drugim pravnim načelima (*The Relationship Between the Principles of Legality and Opportunity in Criminal Prosecution and Other Legal Principles*). *Glasnik Advokatske komore Vojvodine (Journal of the Vojvodina Bar Association)* (4), Novi Sad, 3-16
- Cigler, S. (1995). O predlogu oštećenog za gonjenje (*On the Injured Party's Motion to Prosecute*). In *Postsocijalistički modeli uspostavljanja moderne pravne države i jugoslovenska iskustva (Post-Socialist Models for Establishing a Modern Rule of Law and the Yugoslav Experience)*, Novi Sad, 161-166
- Čubinski, M. (1933). *Naučni i praktični komentar Zakonika o sudskom krivičnom postupku Kraljevine Jugoslavije (Scientific and Practical Commentary on the Judicial Criminal Procedure Code of the Kingdom of Yugoslavia)*, Beograd
- Danilović, J. (1968). *Popularne tužbe od rimskog do savremenog prava (Popular Actions: From Roman to Contemporary Law)*, Beograd
- Grubač, M. (2006). *Krivično procesno pravo (Criminal Procedure Law)*, Službeni glasnik Beograd
- Grubač, M. (2008). *Krivično procesno pravo (Criminal Procedure Law)*, Službeni glasnik, Beograd
- Ilić, M. (1968). *Krivično procesno pravo (Criminal Procedure Law)*, Studentska štamparija Univerziteta Sarajevo
- Jescheck, H. (1978). *Lehrbuch des Strafrechts*, Duncker & Humblot Berlin
- Krapac, D. (1995). *Engleski kazneni postupak (English Criminal Procedure)*, Pravni fakultet Sveučilišta u Zagrebu Zagreb
- Kunkel, W. (1963). *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens*, Verlag der Bayerischen Akademie der Wissenschaften, Munich
- Ogorelica, N. (1899). *Kazneno procesualno pravo (Criminal Procedure Law)*, Kraljevska hrvatsko-slavonsko-dalmatinska zemaljska vlada Zagreb
- Pfeiffer, G. (Ed.). (2003). *Karlsruher Kommentar zur Strafprozessordnung*. C. H. Beck
- Platzgummer, W. (1984). *Grundzüge des österreichischen Strafverfahrens*. Wien–New York.
- Radulović, D. (1999). Predlog za krivično gonjenje (*Motion for Criminal Prosecution*). *Jugoslovenska revija za kriminologiju i krivično pravo (Yugoslav Review of Criminology and Criminal Law)*, (2),
- Radulović, D. *Krivično procesno pravo (Criminal Procedure Law)*
- Škulić, M. (2009). *Krivično procesno pravo (Criminal Procedure Law)*, Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, Beograd
- Vasiljević, T. (1964) *Sistem krivičnog procesnog prava SFRJ (The Criminal Procedure Law System of the SFRY)*, Savremena administracija, Beograd

Vilemsa, P. (1898). *Rimsko javno pravo (Roman Public Law)*, Knjižarnica Gece Kona Beograd

Zakonik o krivičnom postupku (*Criminal Procedure Code*). (2005). *Službeni glasnik Republike Srbije (Official Gazette of the Republic of Serbia)*, No. 85/2005