ČLANCI

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THEORIES OF PUNISHMENT AND THE PROTECTION OF SOCIAL ORDER BY THE CRIMINAL LAW

Abstract: The article deals with the issue of the processuality of punishment. The culturally integrated theory reveals criminal punishment as a social phenomenon which consists of successive and specific phases. During each of these phases punishment is implemented, not only in a different system of social conditions and phases which are appropriate for the legal regulations, but with the participation of other social institutions.

Key words: Punishment, judges, culturally integrated studies, criminal law, social order.

TEORIJE KAŽNJAVANJA I ZAŠTITA DRUŠTVENOG REDA KRIVIČNIM PRAVOM

APSTRAKT

U radu su prikazani rezultati pravnih i socioloških istraživanja na temu kažnjavanja, koja su sprovedena u periodu od 2012. do 2014. godine na Univerzitetu u Varšavi, pod rukovodstvom prof. G. Rejmana iz Evropskog centra za penološke studije. Osnov za istraživanje nalazi se u penološkim istraživanjima koja su Bronisław Wróblewski i Witold Świda obavili u Poljskoj u periodu od 1937. do 1939. godine. Istraživanjem je obuhvaćeno 160 sudija – krivičara, koji su davali odgovore na 81 pitanje iz oblasti kažnjavanja. Sudije su obrazlagale korišćene definicije kažnjavanja, ističući njene najvažnije osobine, ali su dali i svoje mišljenje o novim zakonodavnim rešenjima u Poljskoj. Cilj istraživanja je da se na osnovu dobijenih odgovora, sagleda penološko znanje savremenih sudija.

Polazna tačka istraživanja bila je definicija kažnjavanja koju je formulisao Jarosław Utrat-Milecki, koristeći teorije i metode integrisanih kulturoloških istraživanja koja su sprovedena u oblasti društvenih i pravnih nauka. Kritički je analizirana racionalizacija kojom su određeni specifični ciljevi i opravdanje postojanja kažnjavanja. Istraživanje je pokazalo da na percepciju kažnjavanja, njen smisao i ciljeve, ne utiče samo kriminalna politika države, već i veliki broj socioloških faktora, poput kulture društva i moralne osetljivosti perioda koji posmatramo.

Ključne reči: Kažnjavanje, sudije, kulturalno integrisane studije, krivično pravo, društveni poredak.

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BOSNA I HERCEGOVINA ZA VREME PRVOG SVETSKOG RATA

Apstrakt: Bosna i Hercegovina je ušla u Prvi svetski rat kao deo Austrougarske. Njeni građani su mobilisani i poslati na frontove u Srbiji, Rusiji i Italiji. Iz rata je izašla kao deo druge države. Taj „prelaz „ nije bio bezbolan. Bosna i Hercegovina nije bila poprište ratnih operacija ali je osetila svu težinu rata, naročito deo njenog stanovništva koji je živeo kao pod režimom najsurovije neprijateljske okupacije zbog bezobzirnog pljačkanja i uništavanja imovine, preko hapšenja, internacija i zlostavljanja do masovnih suđenja i ubijanja.

I pored toga veliki doprinos oslobođenju Bosne i Hercegovine su dali prosvetni i kulturni radnici, sveštenici i političari.

Ključne reči: Bosna i Hercegovina, Prvi svetski rat, Austrougarska, vanredno stanje, preki sudovi, veleizdajnički procesi.

Momir Milojević

BOSNIA AND HERZEGOVINA DURING THE FIRST WORLD WAR

SUMMARY

Bosnia and Herzegovina has entered in The First World War as the part od Austro-Hungary. Their citizens were mobilized and sent to the fronts in Serbia, Russia and Italy due to participate in the war. When the First World War has ended, Bosnia and Herzegovina became a part of completely different country. That kind of „transit“ wasn't easy. Bosnia and Herzegovina was not in the middle of the war operations, but felt all the weight of the war, especially a part of their civilian population that lived under the conditions of threating and hostile occupation starting from robbing and destroying another's property, over the unlawful depriving of freedom and detention, treatment, to the massive unfair trials and murders.

And beside all of that, a great and significantly contribute to the liberation of Bosnia and Herzegovina has been given by the teachers and cultural workers, priests and politicians.

Key words: Bosnia and Herzegovina, The First World War, Austro-Hungary, state of emergency, courts-martial, high treason proceedings.

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KRIVIČNO DELO OBLJUBE NAD NEMOĆNIM LICEM – NORMATIVNA KONSTRUKCIJA, NEKA SPORNA PITANJA I MOGUĆE BUDUĆE MODIFIKACIJE

Apstrakt: U radu se objašnjavaju pojam i osnovni elementi normativne konstrukcije krivičnog dela obljube nad nemoćnim licem, kao jednog od krivičnih dela protiv polne slobode u Krivičnom zakoniku Srbije. Detaljno se analiziraju osnovni oblik i teži oblici obljube nad nemoćnim licem, mogući oblik krivice kada se radi o ovom krivičnom delu, kao i sva druga bitna obeležja obljube nad nemoćnim licem u kontekstu pozitivnog krivičnopravnog rešenja. Autor posebnu pažnju poklanja objašnjenju odnosa silovanja kao osnovnog krivičnog dela protiv polne slobode i obljube nad nemoćnim licem. Posebno se analizira kada može postojati sticaj između silovanja i obljube nad nemoćnim licem. U tekstu se zaključuje da ako se silovanje u našem krivičnom zakonodavstvu nekim budućim novelama definiše tako da obuhvati ne samo prinudnu obljubu ili prinudni sa njom izjednačen čin, već svaku takvu radnju protivno volji pasivnog subjekta (što je zahtev sadržan u Istanbulskoj konvenciji) to će svakako dovesti i do potrebe za odgovarajućim redefinisanjem inkriminacije obljube nad nemoćnim licem, a ovaj zaključak je propraćen i konkretnim predlozima u *de lege ferenda* smislu.

Ključne reči: obljuba nad nemoćnim licem, krivična dela protiv polne slobode, silovanje, Krivični zakonik, Istanbulska konvencija.

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THE CRIMINAL OFFENSE OF A SEXUAL INTERCOURSE WITH A HELPLESS PERSON – NORMATIVE CONSTRUCTION, SOME DISCUTABLE QUESTIONS AND POSSIBLE FUTURE MODIFICATIONS

Summary

In the paper are explained the concept and basic elements of the normative construction of the criminal offense of Sexual intercourse with a helpless person, as one of the criminal offenses against sexual freedom in the Serbian Criminal Code. There are in the text analyzes in detail the basic form and the more severe forms of the sexual intercourse with a helpless Person, the possible form of guilt (mens rea), when it comes to this criminal act, as well as all other important features of the sexual intercourse with a helpless person in the context of a positive criminal justice solution.

The author explains especially the relationship between the two sexual crimes: the rape as the basic criminal offense against sexual freedom and the sexual intercourse with a helpless person. It is especially analyzed when there can be a joinder of criminal offenses, connected to the relations between the criminal offence of a rape and the sexual intercourse with a helpless person.

In the article there is a conclusion that if the criminal offence of a rape in the Serbian criminal legislation would be defined in some future novelties, so as to cover not only compulsory sexual actions, but any such (sexually) act, perpetrated a contrary to the will of the passive subject (which is the request contained in the Istanbul Convention), this

will certainly also leads to the need for a proper redefinition of the incrimination of the sexual intercourse with a helpless person, and this conclusion is accompanied by concrete proposals in *de lege ferenda* sense.

Key words: Sexual Intercourse with a Helpless Person, Criminal Offenses against Sexual Freedom, Rape, Criminal Code, Istanbul Convention.

PREGLEDNI ČLANCI
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KONCEPT PRITVORA U SUDSKOJ PRAKSI

Abstrakt: U ovom radu analiziran je ustavnopravni i krivičnopravni pojam pritvora, određivanje, trajanje i primena pritvora u praksi redovnih sudova, Ustavnog suda Republike Srbije i Evropskog suda za ljudska prava. Kao jedan od pojavnih oblika lišenja slobode, pored zadržavanja osumnjičenog u predistražnom postupku, osude na kaznu zatvora u krivičnom i prekršajnom postupku, ili izricanja mere bezbednosti obaveznog psihijatrijskog lečenja i čuvanja u zdravstvenoj ustanovi, pritvor je krajnje sredstvo za obezbeđenje prisustva okrivljenog i nesmetano vođenje krivičnog postupka. Njegovim određivanjem otvara se latentna opasnost od povrede pretpostavke nevinosti, što zahteva hitno i obazrivo postupanje nadležnih organa, poštovanje striktnih pravila o zaštiti prava pritvorenika i svođenje pritvora na najkraće vreme. Rad takođe sadrži elaboraciju tendencije učestalog određivanja pritvora, alternativne mere i pregled lica na koje se ne primenjuje opšti režim stavljanja u pritvor.

Ključne reči: pritvor, lišenje slobode, pritvorenik, alternativne mere, imunitet

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THE CONCEPT OF DETENTION IN PRACTICE OF COURTS

SUMMARY

The detention is very important measure to secure the presence of the defendant and for untroubledly conduct of criminal proseedings. It is also the most difficult mechanism which can be undertaken against a defendant for whom there exists grounded suspicion that has committed a criminal offence and also special reasons for ordering detention, which are proscribed by Criminal Procedure Code. They are refering to risk of escaping, circumstances indicating that he will destroy or conceal the evidences or obstruct the trial by exerting influence on witnesses and other suspects, risk of repeating the criminal offence and finally when the criminal offence with which he is charged is punishable by a term of imprisonment of more than ten years or more than five years for a criminal offence with elements of violence, or he has been sentenced by a court of first instance to a term of imprisonment of five years or more, and the way of commiting or the seriousness of consequenses of the criminal offence have disturbed the public to such an extent that this may threaten the fair conduct of criminal proceedings. While ordering the detention is the way of deprivation of liberty, this mattery is also regulated by Constitutional Act.

Regarding to the emforcement of the detention in practice of courts in the Republic of Serbia, there are a lot of different cases and in every particular case the reasons for ordering or extending the detention have to be the object of examination of competent courts. They

have to give relevant arguments for not revoking the detention. This arguments will not be sufficient if they are the same and stereotyped as in the previous rulings, and that includes the arbitrary deprivation of liberty and the violation of right to freedom and security. Bearing that in mind, it is the duty of all authorities which are participating in criminal proceedings, especially the Courts and the Public Prosecutor's Offices, to take care of the duration of detention as short as possible and to suggest the alternative measures that can substitute the detention.

Key words: detention, deprivation of liberty, detainee, alternative measures, immunity

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ISPITIVANJE SVEDOKA KAO DOKAZNA RADNJA I ZAŠTITA SVEDOKA U KRIVIČNOM POSTUPKU

Apstrakt: Svedok je svako ono lice koje može da pruži obaveštenje u pogledu krivičnog dela i njegovog učinioca, bitno za utvrđivanje istine. Važnost iskaza svedoka je nesumnjiv, posebno u domenu borbe protiv organizovanog kriminala, imajući u vidu činjenicu da dovodi do lakšeg otkrivanja, dokazivanja i suzbijanja takve pojave. Značaj je utoliko veći ukoliko se ima na umu da je, iako nepouzdano, svedok i dalje najznačajnije sredstvo dokazivanja, te da iskaz svedoka predstavlja dokaznu osnovu na kojoj se zasniva presuda. Primenom adekvatnih mera zaštite svedoka u krivičnom postupku može se ostvariti jači dokazni kredibilitet i to širenjem obima prava svedoka, pre svega, prava na zaštitu, a sve u smislu poboljšanja njegovog položaja u krivičnom postupku. Zaštita svedoka predstavlja jedan od najvažnijih načina borbe protiv organizovanog kriminala.

Ključne reči: svedok, svedočenje, ispitivanje svedoka, dokaz, organizovani kriminalitet, zaštita svedoka, mere zaštite svedoka

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QUESTIONING OF WITNESSES IN ORDER TO COLLECT EVIDENCE AND WITNESS PROTECTION IN CRIMINAL PROCEDURE

SUMMARY

A witness is any person who can provide information on a crime committed or a person who committed it which is relevant to establishing the truth. The importance of the testimony of the witness is undoubted, especially in the domain of the fight against organized crime, bearing in mind the fact that it leads to easier detection, proving and suppressing such a

phenomenon. The significance is even greater if it is noted that, although unreliable, the witness remains the most important means of proof, and that the testimony of the witness is the evidentiary basis upon which the judgment is based. The evidence credibility can increase by implementing adequate witness protection measures. It can be done by expanding the rights of witnesses, the right to protection first and foremost, with the aim to improve their position in criminal procedure.

Expanding the rights of witnesses during criminal procedure, first of all rights to protection, undoubtedly leads to humanization of the criminal law, which will reflect on the improvement of his/her position in the criminal procedure. A witness with a wider scope of protection will provide testimony crucial to solving the criminal case, especially in the prosecution of organized crime. As such, a suspicion is being raised whether the expanding of witness's rights is a consequence of the rise of organized crime in a society which forced the judiciary to react in their struggle against this type of crime. In order for a society to be successful in their struggle against rising organized crime, they must agree to more radical measures which are based on respecting the fundamental legal rules.

Key words: witness, testimony, witness interrogation, evidence, organized crime, witness protection, witness protection measures