

REVIEW SCIENTIFIC PAPER

A PROPERTY CLAIM IN A SUMMARY PENALTY ORDER

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***Abstract:** At the beginning of the 21st century, criminal procedure legislation in BiH was radically changed. One of the most important novelties is a penalty order proceeding accepted under various foreign influences. Although this is a new special criminal procedure, it has been well accepted and extensively applied. In approximately half of the indictments, the public prosecutor puts forward a motion for a penalty order. However, it has caused many dilemmas, both in theory and in practice. One of them is the possibility of accepting a property claim in a penalty order. The paper analyzes the views of our theory and practice in order to provide an answer to the question of whether they have a basis in the applicable legal provisions. In addition, it also points to the shortcomings in the provisions regulating the procedure for issuing a penalty order that clearly indicate the need for their amendments in order to better standardize a property claim in this proceeding.*

***Key words:** property claim, a penalty order proceeding, a penalty order decision, civil litigati*

1. INTRODUCTION

The end of XX - beginning of XXI century brought radical changes to criminal proceedings legislation in many countries. Traditional structure of criminal proceedings and its principles needed to be changed. In modern criminal proceedings the importance is given to institutes that enable its instant termination based on the defendant's guilty plea. Penalty order has distinguished itself as highly important. Through this institute the parties „handle“ the subject

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of criminal proceedings in a specific way. It is based on the adaptation of the proceedings as to include „a full criminal procedure“ in disputable cases only. Lately, many countries, including those created after the fall of former SFRY, have accepted the summary penalty order. It shares the popularity with a plea bargaining agreement (hereinafter agreement), contaminating modern legislations with a “plea bargaining infection”. Today we are faced with an alternative to conducting regular criminal proceedings, even when wanted. Thus, consensual criminal procedures have turned into a grave need.

New criminal procedure laws in Bosnia and Herzegovina (hereinafter BiH) have also brought significant changes, one being a summary penalty order. In this region it was introduced for the first time end of 2000 through *Criminal Procedure Code of the BiH Brčko District* (hereinafter CPC BD BiH),² and a new *Criminal Procedure Code of BiH* (hereinafter CPC BiH).³ A new *Criminal Procedure Code of Republic of Srpska* (hereinafter CPC RS) entered into force on 01. 07. 2003⁴, and a new *Criminal Procedure Code of BiH Federation* (hereinafter CPC BiH F) was enacted on 01. 08. 2003.⁵ All these Codes have accepted the summary penalty order. Although many believe that it has fully met the expectations, theory as well as practice show differently. One of the dilemmas refer to the possibility of accepting a property claim through a summary penalty order.

2. A PROPERTY CLAIM IN CRIMINAL PROCEEDINGS

Deciding a property claim in criminal proceedings (chapter XII CPC RS)⁶ represents a simultaneous deciding a criminal and civil case. Civil litigation is conducted under the rules of a criminal procedure, however, the claim is decided according to civil law rules (existence and extent of rights, type and extent of damage, liability, etc.). Thus, principles of cost-effectiveness and suitability are realised, and the position of the injured party, who has no need for a separate civil procedure, improved. Furthermore, contradictions between criminal law and

2 „Official Gazette of the Brčko District BiH“, no. 7/00; existing CPC BD BiH „Official Gazette of the Brčko District BiH“, no. 33/13 and 27/14“.

3 BiH High Representative’s Decision , no. 100/03; “Official Gazette of BiH“, no. 36/03, 25/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 12/09, 16/09 и 93/09 и 72/13”.

4 „Official Gazette of Republic of Srpska“, no. 50/03“; current CPC RS “ Official Gazette of Republic of Srpska“ no. 53/12 and 91/17”.

5 “Official Gazette of BiH Federation“, no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13 and 59/14”.

6 Identical solutions in reference to regulating property claims were accepted by other CPCs in BiH. This paper primarily deals with CPC RS provisions, and other BiH CPCs are mentioned only when certain legal issues are differently regulated.

property law claims, resulting from a crime committed, are avoided.⁷ By filing and representing a property claim in the criminal proceedings, the injured party often contributes to rightful and complete establishing of facts. Namely, evidence that proves a crime and criminal liability also serves as evidence of the merit of the property claim, while the extent of damage is often an important element of a crime. Criminal court decision ordering the defendant to compensate the injured party for the damage resulting from a crime committed has an undoubted criminal and political significance in the sense of the resocialisation of the offender as well as prevention of crime.⁸ The property claim procedure is also known as „adhesion“ or „consolidated“, although it is not a special procedure, since the court decides the claim along with the criminal matter. This claim is heard in the criminal procedure if it would not prolong the process. Its deciding actually prolongs it, but it is permissible, unless the prolongement is „excessive“, which is a factual matter. A party authorised to file it, chooses whether to resolve it in a criminal or in a civil procedure. In a criminal procedure deciding the claim is optional, thus provoking a lot of debate.⁹ The courts unjustifiably rarely accept this claim and refer the injured party along with it to the civil court. It may be a claim for damages, restitution or cancellation of a business agreement, and is limited only to these cases.¹⁰

A property claim in a criminal procedure can be filed only by a person in the capacity to realise it in a civil litigation. The claim is placed before the Public Prosecutor or the Court before closing of the main hearing, i.e. sentencing hearing. If the claim is not filed by then, and evidence presented in the criminal procedure clearly indicate its full or partial acceptance, the court shall in a convicting sentence order a confiscation of illegally obtained property gain. It must contain elements of a civil action in order for the court to know its type, scope and extent to be able to decide whether the claim is realisable in the criminal procedure.¹¹ The Public Prosecutor must collect evidence and look into other details necessary for deciding the claim. The Public Prosecutor and the Court hearing the case must examine the suspect, i.e. the defendant about the

⁷ Хајрија Сијерчић-Чолић, Малик Хаџиомерагић, Маринко Јурчевић, Дамјан Кауриновић и Миодраг Симвић, *Коментари закона о кривичном/казненом поступку у Босни и Херцеговини* (Сарајево: Вијеће Европе/Европска комисија, 2005), 543.

⁸ *Ibid*; 544.

⁹ Наташа Мрвић-Петровић, „Недостаци законског регулисања остваривања имовинско-правног захтева у кривичном поступку“, *Гласник правде*, бр. 6 (2000), 131. she, inter alia, states that it is being decided only in the context of property crimes, while claim for non-material damage is completely excluded.

¹⁰ For example, the property claim cannot be used in a criminal procedure, contrary to a civil procedure, to order eviction due to illegal occupation of a residential facility or annulment of marriage due to a criminal act of bigamy.

¹¹ The Supreme Court of Serbia decision no. Кж-1842/72 of 17. 12. 1972, according to Сијерчић-Чолић et al, *Коментари закона о кривичном/казненом поступку у Босни и Херцеговини*, 553.

facts of the claim, and if necessary, to present evidence from the claim. When passing a convicting sentence the court shall, in full or only partially, accept the property claim. If evidence presented in the criminal procedure are not sufficient to accept claim, the Court shall refer the claimant to civil litigation. The claim cannot be overruled or rejected in the criminal procedure. Many court decisions take the stand that a serious breach of criminal procedure is made if the exact amount of criminal damage is established in the disposition of the sentence, instead the claimant is referred to civil litigation. In spite of such a stand, undisputed in legal theory as well as practice, we come across decisions that take the wrong stand, in spite of the fact that all conditions were met for the acceptance of the claim. It is usually rationalised with „the fact that initiated civil litigation makes deciding about the property claim unnecessary“. Quite the contrary, deciding the property claim in the criminal procedure will make the civil litigation unnecessary.¹²

3. SOLUTIONS IN COMPARATIVE LEGISLATION

The question of the acceptance of a property claim in the criminal procedure of passing a penalty order is differently resolved in comparative legislation. Certain legislations are prone to accept property claims. Thus, Polish penalty order (*postępowania nakazowego*)¹³ generally accepts a property claim if collecting evidence is sufficient to pass such a decision. It is a dominant stand, although there are contrary opinions, insisting on referring the claimant to a civil litigation.¹⁴ Croatian penalty order also accepts a property claim if the claimant placed it before the Criminal Court and the Public Prosecutor has strictly suggested it in a motion for penalty order. If the Court does not accept the claim, it will order the confiscation of illegally obtained property gain.¹⁵ This is a new solution in comparison to the one presented in CPC of 1998, making the rights of the injured party even “more protected”.¹⁶ Macedonian judicial practice shows that in the disposition of the decision next to the penalty order,

¹² District Court in Banja Luka decision no. 71 0 K 012283 09 Кж of 08. 04. 2009. In the suspended sentence, it is stated that the sentence shall not be revoked if the probation period the defendant „pays the damage caused“. Previously, a property claim must be accepted.

¹³ *Kodeks postępowania karnego* (CPC Poland).

¹⁴ Kazimierz Marszał, „W sprawie merytorycznego wurokowania przez sąd I instancji poza rozprawą w sprawach karnych“, *Prokuratura i Prawo*, br. 1-2 (2010), 143.

¹⁵ Art. 540. par. 4. Criminal Proceedings Code of Croatia (“Official Gazette Of Republic Croatia“, no. 152/08, 76/09, 80/11, 121/11, 91/12 и 143/12, 56/13, 145/13, 152/14 and 70/17“).

¹⁶ Берислав Павишић, „Нови хрватски Закон о казненом поступку“, *Хрватски љетопис за казнено право и праксу*, бр. 2 (2008), 585. states that through a property order the rights of the claimant are more precisely regulated.

the Court also decides a property claim, if any.¹⁷ Such a provision exclusively anticipates the possibility of accepting the claim through a penalty order. There are other legislations that expressly regulate the acceptance of a property claim through a penalty order.¹⁸ The defendant is here well protected from the property claim decision with the right to complain against the penalty order automatically accepted by the Court not considering its merit.

Other legislations accept the contrary solution of referring the claimant to civil litigation, without considering the property claim in the criminal procedure, the aim being a greater application of this procedure to which the claim must not represent an obstacle. Accordingly, due to its nature and lack of main hearing the penalty order procedure is not adequate for the acceptance of the property claim. In Germany, for example, a property claim cannot be accepted in the penalty order procedure,¹⁹ although there is a possibility for the court settlement.²⁰ In Italy a penalty order does not even produce any legal effects in a civil litigation.²¹ As a rule, Swiss judicial practice shows that a property claim cannot be accepted in a penalty order,²² exception being the claimant's filing a civil action prior to its passing. Only then, can a property claim be accepted, and, if not contested, enforceable.²³ In France, penalty order cannot represent an accepted property claim,²⁴ since it is not treated as *res judicata* in relation to a property claim placed in a civil litigation. This is well accepted since the penalty order is not preceded by a hearing. Slovenian judicial practice does not explicitly envisage the acceptance of a property claim in a penalty order.²⁵ This can be concluded from the fact that the decision is not being served to the claimant.

Our penalty order procedure shares a likeness with Serbian and Montenegrin legislations, hence the need to analyse their legal solutions. Those are exclusive legislations wherein, the defendant pleads to the Public Prosecutor's request at the arraignment. In the earlier Serbian sentencing proceedings before the main

17 Art. 499. par. 2 Законот за кривичната постапка Македоније („Службен весник на Република Македонија бр. 150/10“).

18 See, for example, art.354. par.1. it.ф Trestny poriadok (CPC Slovakia) or art.314e. par.7. it.e Trestni rizeni (CPC Czech Republic).

19 & 407-412 Strafprozessordnung – StPO (CPC Germany).

20 Снежана Бркић, *Рационализација кривичног поступка и упрошћене процесне форме* (Нови Сад: Правни факултет, 2004), 393.

21 Art. 460. par. 5 Codice di Procedura Penale (CPC Italy); Translated text, see: Берислав Павишић, *Талијански казнени поступак* (Ријека: Правни факултет, 2002).

22 & 352-356 Strafprozessordnung – StPO (CPC Switzerland).

23 Christof Riedo, *Einführung in das schweizerische Strafprozessrecht* (Фрајбург: Унивезитет, 2008), 173.

24 *Code de procédure pénale* (CPC France).

25 Art. 445. a-445. e Zakona o kazenskem postopku (“Uradni list Republike Slovenije br. 32/12, 47/13 и 87/14“).

hearing²⁶, the acceptance of the property claim was strictly forbidden. Instead, the claimant was referred to a civil litigation. Certain legal theorists believed that a placed property claim could be the reason for the judge not to agree with the Public Prosecutor's motion for penalty order.²⁷ A provision that refers the claimant at the sentencing hearing to a civil litigation is removed from the current Serbian CPC²⁸. Earlier solution clearly stated that such a procedure should be applied whenever conditions were fulfilled regardless of the claimant's interests. It was believed that a legal interest for the expeditious court decision making aiming at reducing the judicial caseload must not hold back before the claimant's interest for the acceptance of a property claim in a criminal procedure. The claimant has nothing to lose, having a civil litigation to be referred to,²⁹ wherein his position is significantly better, after it was established that the defendant has committed a crime. It is believed that a property claim cannot be accepted at the sentencing hearing, since the rights of the defendant could not be well protected if an unjust or incorrect decision is made. The defendant cannot appeal such a decision. Furthermore, the defendant is to agree with the Public Prosecutor's claim, who is not authorised to place such a property claim, hence no need for the defendant to agree with it.³⁰ In Montenegrin summarised procedure a property claim cannot be accepted in the form of a decision passing criminal sanctions. The claimant must be referred to a civil litigation.³¹ Hence, in the proceedings that are similar to our penalty order proceedings, a property claim cannot be accepted.

4. DOMINANT VIEWPOINT IN OUR LEGAL THEORY AND PRACTICE

Penalty order decision can contain a referral of the claimant to a civil litigation. However, the question is whether it can contain a decision of its full or partial acceptance. Neither CPC RS, nor other CPCs in BiH, unlike comparative legislations, strictly regulated this matter. Provisions that regulate

26 Criminal Proceedings Code of Serbia ("Official Gazzette of SR Yugoslavia", no. 70/01, 68/02 and „Official Gazzette of Serbia“, no. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10“).

27 Тихомир Васиљевић и Момчило Грубач, *Коментар Законика о кривичном поступку* (Београд: Савремена администрација, 2010), 956.

28 Criminal Proceedings Code of Serbia „Official Gazzette of Serbia“, no. 72/11, 101/11, 121/12, 32/13, 45/13 and 55/14“).

29 Снежана Бркић, „Поводом деценије постојања мандатног кривичног поступка у Србији“, у *Зборнику радова* (Нови Сад: Правни факултет, 2011), 415.

30 *Ibid*; 415.

31 Art. 461. Par. 3 Criminal Proceedings Code of Monte Negro „Official Gazzette of Monte Negro“, no. 57/09, 49/10, 47/14 and 27/15“).

penalty order procedure do not even mention a property claim. This issue has been insufficiently discussed in our legal theory. A predominant stand insists on accepting a property claim in a penalty order procedure, without an in-depth elaboration.³² However, its proponents also notice non-existence of a property claim and a claimant in the penalty order provisions, creating a feeling of their legal sufficiency.³³

Case law of the District Court Banja Luka and its Basic Courts shows a unique stand that a property claim can be accepted in penalty order decision.³⁴ This legal stand is often justified by practitioners, who state that „in criminal proceedings what is not expressly forbidden is allowed“.

Acceptance of a property claim stated in DPP Banja Luka criminal charges in a penalty order procedure³⁵

year	No. of persons against whom penalty order is passed	No. of persons obliged to settle a property claim	Percentage of persons obliged to settle a property claim
2011	584	4	0,68%
2012	703	10	1,42%
2013	408	15	3,68%
2014	488	25	5,12%
2015	528	55	10,42%
2016	182	19	10,44%

Research conducted at the District Prosecutor's Office (hereinafter DPO) in Banja Luka shows an increasing trend of accepting property claims in penalty orders. There is no simple explanation for the phenomenon of increased acceptance of a property claim in penalty order proceedings rather than in regular criminal proceedings, which offers incomparably better conditions.

32 Such stand is advocated by, for example, Бркић, „Поводом деценије постојања мандатног кривичног поступка у Србији“, 415; Зекерија Мујкановић, „Оштећени као субјект кривичног поступка“, *Право и правда*, бр. 1 (2005), 282.

33 *Ibid*; 281.

34 The author is not familiar with the practice of other courts in BiH addressing this issue.

35 Data refer to penalty orders based on the indictments of DPP Banja Luka, except Field Offices Prijedor and Mrkonjić Grad, collected by the author's direct inquiry into cases.

5. CRITICAL APPROACH TO A DOMINANT VIEW

The author is not particularly inclined toward accepting a property claim in penalty order proceedings. This legal solution does not have a solid ground in the provisions regulating a property claim and penalty order proceedings. The following statements work in favour of such argumentation:

1. In comparative legislation this issue has been differently interpreted. Numerous legislations simply ignore such a possibility considering penalty order proceedings unsuitable for the shortage of the main hearing and specific nature. Legislations in favour of such proceedings have established strict regulations. Usually, those are legislations which have accepted a traditional penalty order procedure without a court hearing and guilty plea of the defendant. A complaint can be filed against such a penalty order. It protects the defendant against the penalty order, and even against unfavourable decision in a property claim. It is automatically accepted without considering its merit. In our legislation a complaint cannot offer such level of protection to the defendant, which is best illustrated in case law. Legislations that show similarities with our penalty order procedure with a special court hearing, namely Serbian and Montenegrin, do not allow acceptance of a property claim. Henceforth, comparative legislations do not speak in favour of accepting a property claim in a penalty order procedure.

2. Provisions regulating a penalty order procedure strictly determine the participants in the proceedings wherein the defendant enters a plea on a penalty order (art.360. par.2 CPC RS). Those are the public prosecutor, the defendant and his counsel. Calling of the injured party or his attorney-at-law is not envisaged, nor are they called according to our case law. This explication goes in favour of the stand that a property claim cannot be accepted in a penalty order. If BiH law-makers had had such pretensions they would have prescribed calling of the injured party, i.e. his attorney-at-law, who are solely empowered to advocate for such a claim.

3. The concept of non-acceptance of a property claim in a penalty order is additionally supported in a provision regulating a service of a court decision containing a penalty order. Except CPC RS,³⁶ no other Criminal Procedure Code in BiH does provide for serving the penalty order to the injured party (art.339. par.1 CPC BiH, art.355. par.1 CPC BiH F and art.339. par.1 CPC B D BiH). If a penalty order accepts a property claim, then, without a doubt, it must also be served to the injured party. If BiH legislators had opted for the acceptance of a property claim in a property order they would have avoided such a specificity.

³⁶ Art. 363. par. 1. CPC RS provides for serving the court decision to the injured party as of 2012.

It is in direct contradiction to the concept of accepting a property claim in a penalty order.

4. Provisions regulating a penalty order procedure do not, however, prescribe the defendant's right to be introduced to a property claim at the hearing, nor his entering a plea. Article 360 paragraph 3 items a and b CPC RS provided an itemised list of duties of the judge at the hearing. The judge is to establish whether the right of the defendant to a counsel is respected, whether the defendant has understood the charges and a motion for a penalty order. The judge, however, does not establish whether the defendant has understood a property claim. Article 360 paragraph 3. item c CPC RS prescribes the defendant's right to be introduced to evidence collected by the public prosecutor, and not to a property claim. Article 360 paragraph 3 items c, d and e CPC RS itemises the defendant's plea. He enters a plea on evidence presented, on guilt and proposed criminal sanction or measure.

5. A property claim will be accepted in a regular criminal procedure if, next to certain basic, two additional procedural conditions are fulfilled: a) the defendant is introduced to the claim and b) the defendant has entered a plea based on the facts and allegations of the claim. If the claim is accepted, without above conditions being fulfilled, there is a serious breach of criminal procedure provisions.³⁷ A civil proceedings rule stating that facts stated by the plaintiff, and not contested by the defendant are not to be established, is well accepted in a criminal procedure only under the condition that the defendant was examined on the facts and he did not question them.³⁸ The public prosecutor and the judge are obliged to question the defendant on the facts related to a property claim. It is explicitly prescribed in art.107. par.2 CPC RS. Conditions for the acceptance of the claim in a regular criminal proceeding, with a doubt, must also be realised in a penalty order proceeding. A property claim can be accepted in any form of a criminal proceeding, provided the defendant was introduced to the claim and entered a plea.

6. A rule stating that „in a criminal proceeding everything that is not forbidden is allowed“, often cited by our practitioners as a valid argumentation for the acceptance of a property claim in a penalty order, is not sustainable. It is not to be found in theory dealing with the problem of interpretation of criminal procedure norms. If it were accepted no one would be sure of the true nature of a criminal proceeding. Every legal interpretation must start from norms. Otherwise, it

37 The Supreme Court of Croatia decision no. Кж-774/72 of 09. 01. 1973 and Supreme court of Vojvodina decision no. Кж 294/60, cited according to Васиљевић и Грубач, *Коментар Закона о кривичном поступку*, 155.

38 The Supreme Court of Croatia decision no. КЖ I 1748/73 of 25. 10. 1973, cited according to Васиљевић и Грубач, *Коментар Закона о кривичном поступку*, 155.

would turn into a free interpretation. Interpretation not limited by a very norm, becomes creating of law.³⁹ Proponents of the acceptance of a property claim in a penalty order concept should ask themselves why it has not been accepted in Serbian legislation? Truth be told, there is no norm that proscribes it either. The answer to this question rests on considering the basic concepts of interpretation of criminal procedure provisions. Certainly, extensive interpretation and legal analogy shall be applied, but under certain rules and limitations. According to the opinion of the European Court for Human Rights, analogy is allowed only if it goes in favour of the defendant.⁴⁰ It is clear that accepting a property claim in a penalty order analogy does not go in favour of the defendant. In certain cases, analogy is forbidden. It cannot be applied to norms containing so-called itemised numbering, in situations when a legislation has accepted a clearly defined solution, be it right or wrong, justified or unjustified, and when its application limits the rights of the participants to the proceedings, especially the right to counsel.⁴¹ Provisions regulating a penalty order proceeding explicitly list duties of the judge at the hearing and the defendant's pleas. It cannot be expanded by way of analogy. To that end, its application would certainly limit the right of the defendant to a counsel. There is no need to elaborate on the things which are not forbidden, but cannot be applied in this proceeding e.g. hearing witnesses, presenting the defence strategy by the prosecutor, postponing a hearing for reasons of collecting evidence, proposing new evidence, passing an acquiting sentence, or extending appeal deadlines.

7. When considering the defendant's guilty plea, the Court must establish whether the defendant was introduced to the consequences of his plea, including those related to a property claim, whether the injured party could answer to a property claim before the Prosecutor, and to inform the injured party about the results of a plea-bargain. (art.246. par.6. items a and d and par.9 CPC RS). When considering the defendant's guilty plea before the preliminary hearing judge, the Court must clarify whether the defendant is introduced to the consequences of guilty plea, explicitly paying attention to those related to a property claim (art.245. par.1. item g CPC RS). The fact that a property claim is expressly mentioned in the context of plea-bargaining and the arraignment, but not in a penalty order procedure, leads to a conclusion that it is not a part of such a proceeding.

39 Бранислав Ристивојевић, „Тумачење кривичноправне норме“, *Правни живот*, бр. 9 (2009), 784.
40 ECHR decision no. A.260-A of 25. 05. 1993 in the case of *Kokkinakis*, cited according to Миодраг Симовић, *Кривично процесно право – Увод и општи дио* (Бихаћ: Правни факултет, 2005), 54.

41 Хајрија Сијерчић-Чолић, *Кривично процесно право, Књига I – Ток редовног кривичног поступка и посебни поступци* (Сарајево: 2008), 56.

8. While trying to resolve such a dilemma, and other dilemmas, a penalty order proceeding needs to be explained first.⁴² Its consensual nature must not be ignored. A penalty order is issued only when the parties have reached a consensus over significant issues, including a property claim. Furthermore, it is a special criminal proceeding regulated by special provisions that do not mention a property claim. Other provisions are also applied, which are related to a regular criminal proceeding, but not all of them and not automatically, only if in compliance with its nature.

9. Case law wherein a property claim was accepted in a penalty order clearly shows that statutory conditions were not fulfilled. Namely, a property claim was not presented to the defendant, not did he plead to it. In addition, he was not even warned of the consequences of the acceptance of a penalty order, such as a property claim.

6. CASE STUDY

Analysis of multiple cases from our case law wherein a property claim was accepted in a penalty order or by a second instance court on appeal, clearly shows that the defendant was not presented with the claim, nor did he enter a plea. The way this claim is contrary to legal provisions. Although the court decision often states that evidence was presented to the defendant when served with the charges, which he did not contest, it is not sufficient. Pieces of evidence are usually listed without any mention of a property claim. In cases in which the second instance court reversed the penalty order decision and accepted a property claim on appeal of the prosecutor, but the defendant never answered the appeal, nor did he attend the court session. Actually, he never answered to the claim upon appeal. By accepting a property claim the defendant was misled. He accepts a proposed criminal sanction unaware that he would have to meet the claim. Furthermore, only in around 3% of the cases the defendant had a counsel when accepting a penalty order. In many cases the defendant would not have accepted it if he had known that a property claim would also be accepted.

As a rule, a decision on the acceptance of a property claim is not explained. In explanations of first and second instance decisions there is usually no mention of the movant of the claim, time and form. Without these facts it is not possible to establish the validity of the claim. In some cases a property claim was accepted in a penalty order, without the knowledge of the injured party, which is not acceptable.

⁴² See, Radenko Janković, „Поступак за издавање казненог налога у кривичнопроцесном законодавству Босне и Херцеговине“ *докторска дисертација*, Правни факултет у Бањалуци, 2016, 16-18.

District Court Banja Luka case law shows certain discrepancies in terms of accepting a property claim in a penalty order. For partial or full acceptance of a claim it is important to find the grounds in the criminal procedure details. This condition is always met when the defendant plead guilty to a crime for which the exact amount of damage caused is stated in the stipulated facts of the crime. Such a rightful stand was taken in multiple second instance decisions.⁴³ However, there are examples wherein a precise amount of damage was stated in the stipulated facts of a crime, however, the second instance court still concluded that this condition for a property claim had not been met, since, for example, a true value of stolen things could not be established without witnesses being questioned,⁴⁴ or because the defendant disputed the amount of debt believing it excessive,⁴⁵ or the defendant contested the quantity of felled trees, and the amount of damage stated in forest damage claim is not a solid piece of evidence.⁴⁶ If the amount of damage is precisely stated in the disposition of the convicting sentence, or a penalty order decision, then the criminal proceedings details represent a solid ground for accepting a property claim, in full or partially. In the stated examples the explanation of the sentence is in contradiction to the disposition, since it follows that the amount of damages is, at the same time, established and not established. By pleading guilty in a penalty order proceeding the defendant admits to having committed a crime exactly the way it is presented in the criminal charges. If such a description contains the amount of criminal damage caused he also admits it. If it does not stand ground in evidence presented in the criminal charges then the judge has no reason to accept a motion for a penalty order. If there is no admissible evidence on the amount of damage, the prosecutor should not use precision when stating it in the criminal charges.⁴⁷ The judge should ascertain that the defendant does not accept a motion for a penalty order, and not pass a penalty order.⁴⁸

43 E.g. the District Court Banja Luka decisions no. 71 0 K 206802 15 Кж of 18. 12. 2015, no. 72 0 K 051895 15 Кж of 09. 02. 2016, no. 71 0 K 208527 16 Кж of 19. 07. 2016.

44 E.g. the District Court Banja Luka no. 73 0 K 012743 13 Кж of 19. 03. 2013.

45 E.g. the District Court Banja Luka decision no. 71 0 K 206663 15 Кж of 15. 03. 2016.

46 E.g. the District Court Banja Luka decision no. 78 0 K 015293 14 Кж of 25. 03. 2014.

47 About pleading guilty in this proceeding, see: Јанковић, „Поступак за издавање казненог налога у кривичнопроцесном законодавству Босне и Херцеговине“, 241-242.

48 E.g. the Basic Court Banja Luka decision no. 71 0 K 209349 15 Кж the defendant admitted at the hearing held on 18. 05. 2015. to having illegally gained 1.300,00 KM, although he was charged with illegally gaining 3.652,92 KM, as a result the judge issued a wrong penalty order.

7. NECESSARY CHANGES TO LEGAL PROVISIONS

A property claim in a penalty order proceeding should be strictly regulated. The only possibility is to exclude it from this proceeding, by following the example of some legislations and referring the injured party to a civil litigation. Another possibility, believed better and having more supporters, is to allow it through a strict regulation of the proceeding. These solutions also exist in other legislations. Hence, all dilemmas would be resolved. Foremost, legal provisions should provide for compulsory invitation of the injured party to the hearing, i.e. his attorney-at-law. In this proceeding, the injured party is completely „ignored“, „forgotten“ and „completely marginalised“.⁴⁹ His procedural rights have also been marginalised and narrowed in a regular criminal proceeding.⁵⁰ He has lost a series of procedural rights such as, the right to examine witnesses and expert witnesses at the main hearing, including witnesses of the prosecution. It is not easy to determine the position of the injured party in this proceeding. If he is given an important role practical values of consensual justice could easily be annulled.⁵¹ He should not be allowed to blackmail the defendant with unreal property or other claims, not letting the case be ended with a penalty order, although the conditions have been met. On the other hand, it is not recommendable to deprive him of any role. It should be stated that international documents guarantee the injured party the right to be informed about his rights, and about the course of the criminal proceedings.⁵² The presence of the injured party at this hearing represents an element of control of the Prosecutor's legality of work, who, inter alia, represents the injured party. It would allow the injured party to file a property claim. Calling the injured party, i.e. his attorney-at-law, to the hearing, would not affect the efficacy and efficiency of this proceeding, nor would it produce other negative effects.

Criminal Procedure Codes in BiH should provide for serving a penalty order to the injured party. It seems pointless not to serve a penalty order to the injured party.⁵³ If other decisions are served to the injured party, there is no justified

49 Мујкановић, „Оштећени као субјект кривичног поступка“, 274. in reference to the defendant's plea, and to a penalty order proceeding.

50 Љиљана Филиповић, „Положај оштећеног у кривичном поступку“, *Право и правда*, бр. 1 (2009), 297. stating that the last rather voluminous changes to Criminal Procedure Codes in BiH, although containing certain improvements, do not represent essential dealing with the position of the injured party in a criminal proceeding.

51 Мирјан Дамашка, „Напомене о споразумима у казненом поступку“, *Хрватски љетопис за казнено право и праксу*, бр. 1 (2004), 19. in reference to the plea, but also to a penalty order.

52 E.g. *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of 1985 stipulates that victims must be informed about dates, the proceeding and results of their cases.

53 OSCE, „Приказ предложених измјена и допуна закона о кривичном поступку који се примјењују у Босни и Херцеговини“, *Право и правда*, бр. 1 (2005), 116. stating that the question was raised by the

reason not to serve this one. Such a decision seems particularly pointless if a property claim is accepted in a penalty order. Only CPC RS⁵⁴ stipulates serving a penalty order decision to the injured party. Hence, an earlier omission is thus removed and at the same time accorded with the general provision that the injured party is also to be served.⁵⁵ He has a right to know the outcome of the criminal proceedings, regardless of the existence of a property claim. The injured party must be informed about the decision to a property claim in this proceeding, if he is referred to a civil litigation or the claim is partially or fully accepted. He has a right to represent the claim in a civil litigation. Since the court decision, a penalty order decision, becomes legally binding, the time for filing a claim before the civil court start running.

If a legal option is to accept a property claim in a penalty order, then the defendant must be introduced to the claim and have a right to plead to it at the hearing. Introducing the defendant to the property claim and his pleading are also conditions in a regular criminal proceeding without which the claim cannot be accepted.

It should be strictly prescribed that the judge must warn the defendant before his pleading, to all the consequences of pleading guilty and accepting a penalty order.⁵⁶ Consensual guilty plea before the preliminary hearing judge includes awareness of the consequences related to a property claim, costs of the criminal proceeding and confiscation of illegally obtained property gain.⁵⁷ There is no valid reason why the defendant should be warned of the consequences of his guilty plea in these two cases, and not in a penalty order proceeding, wherein the decision is also based on the defendant's consensual pleading. Omission of this obligation in a penalty order proceeding is a serious error of BiH legislators. It is assumed that the stated consequences of a guilty plea are important and frequent for the defendant, but it is not always the case. There are other consequences, some being mandatory e.g. recording sentence in criminal records. Before entering a plea, the defendant in the proceedings should be warned of the consequences of a guilty plea and of accepting a penalty order that affect him in a concrete case.⁵⁸

participants of LIG meeting in Orašje.

54 This solution was introduced through amendments to CPC RS of 2012.

55 Миодраг Симовић и Владимир Симовић, „Савремени развој кривичног процесног права у Републици Српској с посебним освртом на праксу Уставног суда Босне и Херцеговине“, *Правна ријеч*, бр. 9 (2012), 882.

56 See, Јанковић, „Поступак за издавање казненог налога у кривичнопроцесном законодавству Босне и Херцеговине“, 242-244.

57 Consequences of confiscation of illegally obtained property gain are explicitly mentioned in all CPCs in BiH, except in CPC RS.

58 See, Јанковић, „Поступак за издавање казненог налога у кривичнопроцесном законодавству Босне и Херцеговине“, 242-244.

Regarding consequences related to a property claim, several situations come to attention. First, due to the nature of crime a property claim does not exist, hence consequences are void. Second situation encompasses conditions necessary for the acceptance of a property claim. The judge should warn the defendant that in case he pleads guilty and accepts a motion for a penalty order, he is also accepting a property claim. The third situation does not know any conditions for the acceptance of a property claim. The judge should warn the defendant that in case he pleads guilty and accepts a motion for a property order, the injured party can be referred to a civil litigation to realise his claim heavily supported by a convicting sentence. The defendant is equally warned in the fourth situation, wherein a property claim is not filed. Our case law shows that the defendant in a penalty order proceeding is not presented either with the consequences related to a property claim or any other consequences. One of the reasons for such wrongful practice is a lack of regulation of such obligation. A property claim can be accepted in a penalty order only when the defendant is previously warned, but in spite of warning accepts a motion for a penalty order.

8. APPEAL AGAINST A PROPERTY CLAIM DECISION

According to art.314. par.3 CPC RS a property claim decision can be contested when a court decision is contrary to legal provisions. Apart from the defendant, it can be appealed under art. 307. par.4 CPC RS by the injured party. Henceforth, case law has shown appeals of the injured party stated against a property claim decision in a penalty order proceeding.⁵⁹ Our case law repeats the question of whether the Prosecutor can appeal the decision related to a property claim. In theory, it is generally believed that such a possibility does not exist.⁶⁰ Furthermore, a direct legal interest in submitting such an appeal is seen in the injured party, whereto adhesion is not a criminal proceeding *stricto sensu*, but rather a civil proceeding in the framework of a criminal proceeding. It is believed that the Prosecutor's contesting of such a decision represents exceeding the limits of his authorities as a party and as a state body.⁶¹ Since the Public Prosecutor cannot appeal a property claim decision in a civil proceeding,

59 E.g. appeals against the Basic Court Kotor Varoš decisions no. 73 0 K 013495 12 Кпс of 19. 07. 2012 and 73 0 K 012743 12 Кпс of 12. 04. 2012 rejected as unfounded by the District Court Banja Luka decisions no. 73 0 K 013495 12 Кж of 26. 02. 2013 and 73 0 K 012743 13 Кж of 19. 03. 2013.

60 Such a perspective is advocated by, e.g. Недељко Јованчевић, *Правни лек – жалба на кривичну пресуду првостепеног суда* (Београд: Правно истраживачки центар, 1997), 145; Тихомир Васиљевић и Момчило Грубач, *Коментар закона о кривичном поступку* (Београд: Савремена администрација, 1990), 461.

61 Младен Грубиша, *Кривични поступак – Поступак о правним лијековима* (Загреб: Информатор, 1987), 9.

he cannot be given such a right in a criminal proceeding.⁶² This is explained with the statement that he does not have a power to represent a property claim in a criminal proceeding, which also applies to an appellate proceeding.⁶³ Such conception has long been accepted in legal practice.⁶⁴ It was dominant at the time of CPC SFR Yugoslavia Оно⁶⁵ according to which neither the injured party could appeal a property claim decision, although one could sporadically come across contrary examples.⁶⁶ Certain theorists advocated for giving the opportunity to Public Prosecutors to attack a property claim decision.⁶⁷ If such a right was denied to the Public Prosecutor at the time when it was also denied to the injured party, now when it is given to the injured party, the Public Prosecutor is strictly denied such a right.

The DPP Banja Luka case law shows dozens of appeals against decisions denying acceptance of a property claim in a penalty order.⁶⁸ The District Court Banja Luka did not reject them as submitted by an unauthorised person, but as unfounded⁶⁹ or accepted and reversed first instance decisions by accepting a property claim.⁷⁰ Such opinion of the second instance court is wrong, in contradiction to a generally accepted stand in our judicial practice, but also to a generally accepted stand of our acclaimed theorists.

9. CONCLUSIONS

Although provisions regulating a penalty order proceeding have been amended already after a few years, certain dilemmas are still unresolved. One of them is the possibility of accepting a property claim in a penalty order. Our

62 Горан Илић, *Границе испитивања првостепене кривичне пресуде* (Београд: Службени гласник, 2004), 122.

63 Such a conception is advocated by e.g. Мато Јемрић, *Закон о кривичном поступку* (Загреб: Народне новине, 1981), 413; Горан Илић, Миодраг Мајић, Слободан Бељански и Александар Трешњев, *Коментар Законика о кривичном поступку* (Београд: Службени гласник, 2014), 964.

64 The Supreme Court of Serbia decision no. Кж-3164/64 of 15. 01. 1965, stated in *Збирка судских одлука из области кривичног права* (Београд: Републички завод за јавну управу, 1972), 179; the SC of Serbia decision no. 299/89 of 26. 05. 1989, stated by Илић, *Границе испитивања првостепене пресуде*, 123.

65 CPC SFR Yugoslavia („Official Gazette of SFRY“, no. 26/86“).

66 Such a conception is accepted in e.g. SC Croatia decision no. И Кж-60/82 of 28. 04. 1982, stated by Јованчевић, *Правни лек – жалба на кривичну пресуду првостепеног суда*, 130; It stated that the Public Prosecutor has a right to protect legality, no provision can limit.

67 Иво Јосиповић, „Жалба на одлуку о имовинскоправном захтјеву у кривичном поступку“, *Наша законитост*, бр. 9-10 (1990), 1269.

68 E.g. appeals of DPP Banja Luka against property claim decisions in cases no. T13 0 КТ 0024860 15, T13 0 КТ 0018733 13, T13 0 КТ 0025533 15, T13 0 КТ 0012583 14.

69 E.g. DC Banja Luka decisions no. 78 0 К 015293 14 Кж of 25. 03. 2014 and no. 71 0 К 206663 15 Кж of 15. 03. 2016.

70 E.g. DC Banja Luka decisions no. 71 0 К 206802 15 Кж of 18. 12. 2015, no. 72 0 К 051895 15 Кж of 09. 02. 2016 or no. 71 0 К 208527 16 Кж of 19. 07. 2016.

theory, basically accepting this possibility, has not given proper attention to this issue, nor has it given argumentation for such a stand. However, the concept has been, without any reserve, accepted by the judiciary and prosecution under jurisdiction of the District Court Banja Luka, but without a proper argumentation. Namely, they see no contradictions in this concept, nor do they feel the need for its defence. If the surface is scratched, however, many contradictions come to light. This paper shows a stand, contrary to a generally accepted one, that there is no legal ground for accepting a property claim in a penalty order. Such an argumentation is heavily supported in this paper. Such a practice should be accepted, but it requires amending provisions regulating this proceeding, which do not even mention a property claim. It should be strictly regulated based on the model of some like-minded legislations. There is an alternative for its exclusion. Our judicial practice shows many examples of the Public Prosecutor's appeals against a property claim decisions. The District Court Banja Luka allows them. The author believes that such a conception is wrong and contradictory to a legal stand that has existed for decades in our legal theory and practice. There is no explanation for a new conception.

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ИМОВИНСКОПРАВНИ ЗАХТЈЕВ У КАЗНЕНОМ НАЛОГУ

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***Апстракт:** Почетком XXI вијека радикално су измијењена кривично-процесна законодавства у БиХ. Једна од најзначајних новина је поступак за издавање казненог налога који је прихваћен под различитим страним утицајима. Иако се ради о новом посебном кривичном поступку веома добро и брзо је прихваћен и масовно се примијењује. Отприлике у половини оптужница јавни тужилац ставља захтјев за издавање казненог налога. Међутим, он је изазвао и бројне дилеме, како у теорији, тако и у пракси. Једна од њих је могућност усвајања имовинскоправног захтјева пресудом којом се издаје казнени налог. У раду се анализирају ставови наше теорије и праксе ради давања одговора на питање да ли они имају основ у важећим законским одредбама. Осим тога, у њему се указује и на недостатке у одредбама које регулишу поступак за издавање казненог налога који јасно указују на потребу њихових измјена и допуна како би се имовинскоправни захтјев у овом поступку још боље, потпуније и прецизније нормирао.*

***Кључне ријечи:** имовинскоправни захтјев, поступак за издавање казненог налога, пресуда којом се издаје казнени налог, приједлог за остваривање имовинскоправног захтјева.*

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