THE LEGAL INSTITUTION OF CITIZEN'S ARREST IN THE REPUBLIC OF SERBIA

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Group 484

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Author
Group 484

Translation
Dragana Pokrajac

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Jelena Pejić Nikić

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Introduction

There are few relevant domestic sources on the concept of citizen's arrest, which is why we have decided to highlight the importance of this institution of criminal law with the issues that may emerge in its application, touching briefly on specific comparative legal provisions and examples available from practice. Shedding more light on this legal institution is extremely important given the present-day circumstances and widespread efforts towards democratising society, where it is particularly demanding to ensure a normative presence, exercise and protection of human and civic rights and freedoms in accordance with constitutional guarantees, and to ensure respect for the principle of proportionality, i.e. to strike a balance between the interests of the government on the one hand, and the more and more broadly tailored interests of individuals, on the other.

The legal institute of citizen's arrest in the national legal framework

When it regulated *citizen's arrest*, the legislator opted for the term 'arrest in the act of committing a criminal offence' failing at the same time to provide that the arrest may be made by a 'citizen', and making a reference to 'anyone' instead. The main issues facing us when analysing the applicable legislation governing this legal institution are related to the type of criminal offence for which a person caught in the act of commiting a criminal offence may be arrested, the manner in which the arrest is made and the mental element of the person making the arrest.

The institution of *citizen's arrest* was first introduced in Serbian procedural legislation in 2001[1], in Article 230, which provided as follows:

> *'Any person caught in the act of committing a criminal offence prosecutable* ex officio *may be deprived of their liberty by anyone. Any person deprived of their liberty shall immediatelly be delivered to an investigative judge or an internal affairs authority, and where this is impracticable, any one of these two authorities must immediatelly be notified. The internal affairs authority shall act in accordance with Article 227 of this Code.'*

[1]Official Journal of the FRY, No. 70/2001

The current Serbian legislation, i.e. the applicable Criminal Procedure Code[2] (the CPC) provides for this institution in a very similar manner in Article 292, as follows:

> *'Anyone may arrest a person caught in the act of committing a criminal offence prosecutable* ex officio. *The arrested person shall immediately be delivered to a public prosecutor or the police, and where this is impracticable, a notification shall immediately be made to any one of these authorities, which will act in accordance with the provisions of this Code (Articles 291 and 293).'*

Both of these provisions are in accordance with the Constitution of the Republic of Serbia[3] which in its Article 27 provides that deprivation of liberty is only allowed for reasons and in a procedure laid down by law.

Through litteral interpretation of the related provisions, one may notice that the only difference between the formerly and currently applicable procedural legislation is that the former recognised this institution under a broader concept, 'deprivation of liberty', whereas the current legislation uses the term 'arrest', which is indeed more specific and accurate, especially in view of Article 2, item 23, of the CPC which provides a definition of 'deprivation of liberty'.[4]

If we look at how this issue is addressed in the region, we see that the procedural law of Montenegro (Article 265) and that of the Republic of North Macedonia (Article 158) still refer to 'deprivation of liberty' when referring to this instiutiton; however, given that neither the Criminal Procedure Code of Montenegro[5] nor the Criminal Procedure Law of the Republic of North Macedonia[6] define the concept of 'deprivation of liberty', we might also conclude that regulating this concept in such a way may not be considered inaccurate.

Furthermore, the legislation of neither the Republic of Slovenia, Bosnia and Herzegovina nor Republika Srpska contains provisions on the institution of citizen's arrest, i.e. arrest or deprivation of liberty in the act of committing a criminal offence.

Article 106 of the Criminal Procedure Act of the Republic of Croatia[7] provides that 'Any person may prevent the flight of a person who is caught in the act of committing a criminal offence prosecutable *ex officio* and must notify the police immediately thereof. The person prevented

[2]Official Gazette of RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - Const. Court decision and 62/2021 - Const. Court decision

[3] Official Gazette of RS, No 98/2006

[4] 'Deprivation of liberty' means arrest, custody, prohibition from leaving home, detention or stay in an institution counted, in accordance with this Code, as detention.

[5] Official Gazette of Montenegro, No. 57/2009, 49/2010, 47/2014 - Const. Court decision, 2/2015 - Const. Court decision, 35/2015, 58/2015 - other law, 28/2018 - Const. Court decision and 116/2020 - Const. Court decision

[6] Official Gazette of RM, No. 150/10

[7] Official Gazette of the Republic of Croatia, Nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19

from fleeing may be detained until the arrival of the police to which such person shall be delivered.' Paragraph 2 of the above article defines the concept of *person caught in the act of committing a criminal offence* as follows: 'A person is considered to be caught in the act of committing a criminal offence where he/she is observed by somebody in the act of committing a criminal offence or where he/she is caught immediately after the commission of a criminal offence under circumstances indicating that he/she has just committed a criminal offence'.

We can therefore conclude that none of the ex-Yugoslav countries' legislations recognises the term *citizen's arrest*, and a possible reason for this may be that the term *citizen* is an insufficiently defined legal concept in procedural legislation. And if we add to this that different pieces of Serbian legislation define the concept of *citizen* differently, the above conclusion seems to be even more probable. More speifically, Article 4, item 1, of the Law on Permanent and Temporary Residence of Citizens[8] provides that *citizen* means a citizen of the Republic of Serbia; however, the introductory provisions of the Law on the Ombudsman *(Serb.: Protector of Citzens)*[9] that lay down the subject-matter, purpose and scope of this law with respect to the status, competences and procedures of the Institution of Ombudsman, provide in Article 1, para 3, when explaining the main concepts, as follows: 'For the purpose of this law, the term 'citizen' means not only any natural person who is a Serbian national but also any foreign national or stateless person, as well as any domestic or foreign legal entity whose rights and responsibilities are decided on by the administrative authorities referred to in paragraph 1 of this Article'.

On the other hand, pursuant to the current Law on the Police[10], the detection and apprehension of perpetrators of criminal offences and misdemeanors or other persons wanted by the police and bringing them before the competent authorities constitute police duties, which are part of the internal affairs performed by the police through the application of police powers, measures and activities, with the aim of and in such a manner to ensure equal protection of security, rights and freedoms for everyone, while applying the law and abiding by the constitutional principle of rule of law. In accordance with Article 32 of the above law, policing is based on the principles of professionalism, depoliticization, cooperation, cost-effectiveness and efficiency, legality of work and proportionality in the use of police powers. It is also based on other principles governing the conduct of public administration authorities and civil servants, and the procedure in administrative matters. In the performance of police duties, only those coercive measures and means may be applied that are laid down by law and that achieve the outcome without any or with the minimum of harmful effects on the persons subjected to such measures.

[8] Official Gazette of RS, No. 87/2011
[9] Official Gazette of RS, No. 105/2021
[10] Official Gazette of RS, Nos. 6/2016, 24/2018 and 87/2018

Conditions for civil arest

Setting out the conditions under which a citizen's arrest may be made has always caused issues. The performance of police duties that involves the arrest of perpetrators of criminal offences and their further delivery to the competent authorities, are very precisely defined and specified in a special law and in a regulation passed by the minister of the interior. In contrast, the underdeveloped definition of *citizen's arrest*, which is generally made by persons who as a general rule have not even had the most basic appropriate training, challenges the main purpose of this power, which is to ensure and protect the rights and freedoms of citizens, protect property and support the rule of law. Here we should single out three specific questions which should in particular be considered when analysing this phenomenon:

1) May a person be arrested only if he/she is caught in the act of committing a criminal offence, or may it also occur in the course of his/her leaving the place of commission of the criminal offence?
2) Does the person making the arrest need to be aware that the arrested person is committing a criminal offence prosecutable *ex officio*?
3) What are the limitations, if any, on the use of force by the person making the arrest in the course of commission of a criminal offence? Is he/she allowed to use physical force and is he/she allowed to do so without any restrictions? Is he/she allowed to use weapons with the aim of preventing the flight of the person he/she intends to arrest?

First of all, when analysing the applicable legal norms, our attention is immediately caught by the provision that a person may only be arrested if he/she has been caught in the act of committing a criminal offence.

This begs the question of whether this also applies to a person departing from the crime scene? Some authors claim that being 'caught in the act of committing a criminal offence' should cover both the situations where a person was spotted in the commission of the act and situations where the person is attempting to depart from the scene with any items taken or attempting to flee after the commission of the criminal offence while the citizens present are attempting to stop him/her'.[11] Also, according to some views, being 'caught' also includes situation where 'eyewitnesses of the act pursue and catch the perpetrator immediately after the commission of the act'.[12]

[11] Commentary on the Criminal Procedure Code; Goran P. Ilić, Miodrag Majić, Slobodan Beljanski, Aleksandar Trešnjev, Commentary on the Criminal Procedure Code, Službeni Glasnik, Belgrade, 2014, p. 707.
[12] Commentary on the Criminal Procedure Code; Momčilo Grubač, Tihomir Vasiljević, Commentary on the Criminal Procedure Code, Projuris, Belgrade, 2014, p. 535.

In teleological interpretation of the above legal norm, we could certainly agree with the above-quoted authors, adding our own view that, given that these are procedural norms, such concepts should be defined in an unambiguous manner, by wording them as follows: 'Anyone may arrest a person caught in the act of committing a criminal offence or immediately after the act of committing a criminal offence...'

Furthermore, this necessarily raises the question of whether the average citizen knows which criminal offences are prosecutable *ex officio* and which are prosecuted upon a private complaint or upon a motion of the victim, and whether an average citizen even knows how to differentiate between a criminal offence and a misdemeanour (a minor offence). Having said that, this also leaves some room for the misuse of such powers by individuals.

Naturally, we do not speak here about serious criminal offences in which we would have to assume that every person knows that such offences are prosecutable *ex officio*; rather, we are speaking here, for instance, about the criminal offence of light bodily harm set out in Article 122 paragraph 1 of the Criminal Code or the criminal offence of petty theft, embezzlement or fraud referred to in Article 210, paragraph 1, of the Criminal Code for which the legislator has stipulated that they will be prosecuted upon private complaint. In case of the latter, the legislator has even specified the property threshold which divides this criminal offence from that of theft.

On the other hand, the question arises of whether in the above case the one who makes an arrest of a person in the act of committing a criminal offence prosecutable upon private complaint would at the same time be considered a perpetrator of the criminal offence of *unlawful deprivation of liberty* laid down in Article 132, para 1, of the current Criminal Code, given that he/she has '*unlawfully detained another person, kept that person in custody or otherwise unlawfully deprived him or her of or restricted his or her freedom of movement'*? The issues around the existence of the perpetrator's requisite *mens rea* for the commission of the criminal offence of *unlawful deprivation of liberty* laid down in Article 132, paragraph 1, of the Criminal Code, which includes both the awareness that he/she is depriving someone of their freedom of movement and awareness that this is being done in an unlawful manner, that must be present at the moment of depriving or restricting the freedom of movement, bring in additional complexity to the effort of delimiting and proving the existence of this criminal offence in a given criminal-law situation.

However, leaving out entirely the requirement that this should be a criminal offence prosecutable *ex officio* would lead to a different problem, which would manifest itself in the citizen's authority to arrest even for an insult or for unauthorised taking of photographs etc., which would bring about another kind of legal confusion.

A potential solution to this kind of problem could be to decriminalise criminal offences prosecutable upon private complaint or to classify them as misdemeanours (minor offences), in which case the above dilemmas could be disregarded altogether. But this is no easy solution, as it would open additional questions related to the protection of human rights in the Republic of Serbia mainly in the context of effectiveness, efficiency and attainability of justice, and the right to a fair trial within a reasonable time.

As a third issue, we need to look at appropriate ways of arresting a person, and what the lack of regulation tells us about the balance that must be made between the value protected by an arrest and the manner in which the arrest is made. More specifically, the legislator clearly stipulates that the arrested person must immediately be handed over to the public prosecutor or police or, where this is impracticable, these authorities must immediately be notified about the arrest. However, there are absolutely no provisions requiring that the application of this legal institution must be commensurate to the need for which it is being undertaken, which could prevent a potential violation of the rights and freedoms that the constitution guarantees to the perpetrators of criminal offences, to persons making a citizen's arrest, and to any third parties in a given case. Especially delicate is the issue of severe violation of the principle of humannenes, i.e. degrading treatment or punishment of arrested persons, especially when it comes to certain forms of criminal offence that due to their severe nature cause a public disturbance. There exists no less complex a risk in such situations in relation to the inhuman treatment of certain socially-stigmatised categories of persons. Even though, in our view, the legislator should definitely also stipulate requirements in relation to the use of force in the course of citizen's arrest, there remains the question of whether a lack of knowledge of such requirements in an average citizen would produce some sort of liability in case of excessive use of force, whether it would be considered error of law, or excess force.

Finally, given that the Ministry of the Interior officially informed us that it did not have any documents or records in relation to the criminal law institution of citizen's arrest[13], we can only mention here the few cases that have been very briefly reported by the media, and in a very questionable manner from the point of view of professional and ethical media standards, such as: 'CITIZEN'S ARREST IN NOVI SAD: Youngsters subdue car thief and keep him until the police arrive'[14], 'Hate, lies and patrols: Serbian anti-migrant brigade is playing with fire'[15], 'Citizens catch paedophile!'.[16] In this regard, and in addition to the challenges mentioned above, we should also note here a lack of public knowledge about the application of the legal institution of so-called 'citizen's arrest' in Serbia.

[13] Ministry of the Interior, General Police Directorate, Criminal Investigation Police Directorate 0.2.9.3.2. No. 4442/21 of 18 January 2022, by email.

[14] https://www.espreso.co.rs/vesti/drustvo/298255/gradjansko-hapsenje-u-novom-sadu-mladici-savladali-kradljivca-automobila-pa-ga-drzali-do-dolaska-policije-video

[15] https://birn.rs/mrznja-lazi-i-patrole-srpska-antimigrantska-brigada-se-igra-vatrom/

[16] http://arhiva.alo.rs/vesti/hronika/gradani-uhvatili-pedofila/27588

Conclusion

Ever since there have been perpetrators, there has also been a need for the community to respond appropriately and protect endangered values. From the outset, the deprivation of liberty has been preventive in nature, it has served as a measure of confinement of an individual so that they may be brought to justice. In other words, it has been an instrument of preventive detention, rather than criminal sanction.[17] Ever since the legal institution of so-called 'citizen's arrest' was incorporated in the applicable criminal procedural legislation of the Republic of Serbia, it appears that the main challenge has been how to strike a balance between the pursuit of the legitimate interest of fighting crime on the one hand, and the potential misuse of the powers conferred on individuals in this manner, on the other.

More specifically, clear boundaries must be set when it comes to the direct participation of civil society in solving crime and arresting perpetrators, so that the main purpose of the criminal-law concept of *deprivation of liberty* would not be undermined and so that we do not arrive at a point where such situations open up space for certain individuals or groups to pursue different objectives. Indeed, the legislator's under-regulation of the conditions for arrest for a criminal offence may have far-reaching and long-term ramifications for the rights of both the citizens using this sort of power, and perpetrators, which may lead to immense damage to the rule of law in society.

For this reason, it is highly advisable to press strongly, through improved legal provisions and effective monitoring of such situations in practice, for this legal institution to preserve its main purpose, which is to detain individuals and make them available to state authorities in the shortest time possible. The efficiency of the Serbian criminal-law system would thereby be improved without putting the life and limb of individuals or other legally protected values at (disproportionate) risk.

[17] Cornil P. „La peine de prison", *Revue Internationale de Criminologie et de Police technique* No. 3, Geneve, 1955, p. 175-187

About prEUgovor

Coalition prEUgovor is a network of civil society organisations formed in order to monitor the implementation of policies relating to the accession negotiations between Serbia and the EU, with an emphasis on Chapters 23 and 24 of the Acquis. In doing so, the coalition aims to use the EU integration process to help accomplish substantial progress in the further democratisation of the Serbian society.

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