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UDK 343.123.11 :343.226

Review scientific paper

Received: 16.10.2013.

Criminal Offence of Extortion of Confession in Serbian Legislation

Abstract: *Extortion of confession is one of the criminal offences calling for constant reviewing and critical evaluation. As regards its legal nature, this offence is - in its character - a specific coercion. The offence is aimed against the inviolability of integrity of personality and respect for human dignity in criminal and any other proceedings, both of which have been elevated to the rank of constitutional principles. Extortion of confession actually constitutes abuse of office, which means that it can be perpetrated only by an official and only in the discharge of official duty. An aggravated form of the offence comprises, among other things, extortion of confession from a defendant in criminal proceedings, an act committed typically by an authorized police officer. The introduction of prosecution-police investigation in criminal proceedings in the Republic of Serbia has additionally increased the risk of this type of extorting testimony. Basically, the same applies to the aggravated form of the offence of ill-treatment and torture, also committed through exceeding powers on the part of law enforcement officers using coercive means.*

Key words: *criminal law, criminal proceedings, police officer, exceeding powers, coercion, extortion of confession, ill-treatment and torture.*

Introduction

Extortion of confession is incriminated by Article 136 of the Criminal Code of the Republic of Serbia (CCRS) and classified as an offence against the freedoms and rights of man and citizen as defined in Chapter Fourteen of the CCRS. The offence used to be incriminated in a similar way within the legislation of the socialist Yugoslavia, where it was defined in Article 65 of the Criminal Code of the Socialist Republic of Serbia (CCSRS) of 1977 and Article 190 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) of 1976. There was no substantial difference between

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the two incriminations, except that the perpetrator of the offence in Article 65 of the CCSRS could be only an official employed by the republic authorities, whereas the perpetrator in Article 190 of the CCSFRY could be only an official employed in the federal organs or federal organization which performs certain administrative, professional and other tasks within the rights and duties of the Federation.

According to the provisions Article 136 of the CCRS, the offence of extortion of confession has its basic form, provided for in paragraph 1, and two aggravated forms, provided for in paragraph 2. The basic form of the offence is punishable by imprisonment of three months to five years, and both forms of aggravated offence are punishable by imprisonment of two to ten years. In any case, the offence comprises deliberate extortion of confession or another statement, which means that the perpetrator uses coercion against a passive subject in order to obtain a confession or statement of specified or unspecified contents. Such conduct is contrary to the provision of Article 28 of the Constitution of the Republic of Serbia and provisions of other legal acts, and in particular the provisions of the Criminal Procedure Code of the Republic of Serbia (CPCRS). Thus, for instance, facts contained in a defendant's testimony (extorted confession) cannot form the basis for court decisions and in case they are used, it will be deemed to be an absolute infraction of the provisions pertaining to criminal proceedings in terms of Article 438 paragraph 2 item 1 of the current CPCRS.

Subjects, objects and guilt in extortion of confession

Extortion of confession constitutes, in fact, a criminal offence involving abuse of office, which means that only a public official can be the perpetrator and that the offence can occur only in the performance of official duty. According to Article 112 paragraph 3 of the CCRS, an official is: 1) a person discharging official duties in a government authority; 2) elected, appointed or assigned person in a government authority, local self-government body or a person permanently or periodically discharging official duty or office of such bodies; 3) a public notary, executor or arbitrator, or a person in an institution, enterprise or other entity who is assigned periodical discharge of public authority, who rules on rights, obligations or interests of natural or legal persons or on public interest; 4) a person assigned the discharge of official duty or tasks; 5) a member of the military.

Since, according to the explicit position of the legislator, the perpetrators can be only officials who commit the offence in the discharge of their duty, the conclusion is that they are in fact the officials authorized to question persons obliged to give a testimony or another statement in keeping with criminal, civil

or any other proceedings. Therefore the perpetrator of this criminal offence can be any officer who takes part in the official examination regarding a legal matter.

As regards defining the active subject of this offence, the question is whether the provision of Article 136 of the CCRS refers to an official who is not specifically in charge of taking the given official action. There are two different views of this question. Some are of an opinion that the official should be generally authorized and responsible for interrogation, i.e. the perpetrator of the criminal offence can be only the official who is in charge of taking the official action under dispute (Tahović, 1961:135).

According to another view, the provision of Article 136 of the CCRS refers to any official who uses force or threat or other inadmissible means or inadmissible manner, in order to extort a confession or another statement from the passive subject. It therefore follows that the perpetrator can be an official who is not charge of the specific case, but is otherwise authorized to conduct hearings in similar proceedings. This view is justified by the fact that otherwise numerous cases would go unpunished, as, for instance, in the case of disputed jurisdiction. This view is supported by the decision of the Federal Supreme Court No. 8/58 of 1958 and has been accepted in comparative legal doctrine (Jakovljevic, 1982:129).

The capacity of the active subject influences, to a certain extent, the guilt of the offender. There is absolutely no doubt that the perpetrator takes positive action in order to unlawfully obtain a confession or a statement from a passive subject, and this definitely rules out the possibility of his acting negligently. There is no doubt therefore that the offence defined in Article 136 CCRS can be perpetrated only deliberately which, in addition to awareness of the action and its consequences, should encompass the awareness of the personal capacity of the perpetrator. The perpetrator has to be aware that he/she is an official who is authorized to interrogate in the given case or at least that he/she is an official who is otherwise authorized to conduct hearings in such a procedure.

The passive subject must have some procedural capacity based on which he/she gives the testimony or statement. This is, for example, the case with a citizen 'interviewed' or requested to give necessary information in the preliminary (pre-trial) proceedings. It includes participants in any other proceedings in which testimony is given before an official, such as civil lawsuits, misdemeanours, white-collar crimes, administrative or disciplinary proceedings, etc. The passive subject will typically have the capacity of the accused in the criminal proceedings or dealing with cases of misdemeanours or white-collar crime, and only exceptionally the capacity of another procedural party (a witness, an expert witness, etc.).

According to the provisions of the CPCRS, the defendant is a person against whom there is an investigation or an indictment because of a reasonable doubt that he/she is the perpetrator of the criminal act with which he is charged. A witness is a natural person who knows important facts about the offence and its perpetrator and who is summoned before to court to speak of the facts known to him. An expert witness is a person capable of taking part in the proceedings and ethically eligible to assist the court and the involved parties with using professional knowledge in certain areas to establish some facts relevant for the procedure.

Based on the definition of the passive subject of this criminal offence, such as outlined in Art. 136 CCRS, it can be concluded that what is protected in extortion of confession, most generally speaking, are human rights. More specifically, it is the rights to inviolability of integrity of person and respect for human dignity in criminal and all other proceedings, both of which have been raised to the rank of constitutional principles. Extortion of confession violates the inviolable right of all persons to freely and without coercion, i.e. without the use of force or threat, or using any other inadmissible means or inadmissible manner, give a testimony or a statement in a criminal or any other official proceedings during an interrogation aimed at establishing the truth. In this way the object of the act of extorting a confession is determined.

The Act and the Means of Perpetration

In order for the criminal offence under Article 136 CCRS to be accomplished, it is not necessary that the extortion of a confession or another statement is successful. On the contrary, the offence is deemed to have been committed by the very use of a certain means in order to extort a confession or another statement, which means that this criminal offence will be perpetrated even if the specific contents of the testimony or another statement (e.g. the defendant's confession) has not been extorted in fact, but where the use of force, threat or any other inadmissible means or inadmissible manner have taken place with the intent of extorting a confession or another statement. Also if the confession or the statement have been given, it is irrelevant whether they are true or false (Lazarević, 2011:527).

There is no doubt, therefore, that the act of committing extortion of confession comprises a positive action (the use of certain coercive means), aimed at extortion of testimony or another statement from the passive subject. It can be debated whether this includes all inadmissible means or illicit methods of obtaining testimony or other statements, but there is no doubt that these primarily involve the use of force and threat which eliminates or significantly restricts the ability for independent decision-making.

The concept of coercion in relation to this criminal offence implies the use of physical force, hypnosis or appropriate intoxicating substances. Hence it follows that coercion here presents physical force which either annihilates the will of the passive subject of the offence or at least subdues it, preventing its realization (Sržentić Stajić Lazarević, 1978:177). It follows that the means of committing the criminal act from Article 136 of the CCRS shall be compulsive force that results in the absence of free decision-making, but not a total removal of the ability to make decision, for example, a suspect is beaten until he/she signs a confession.

The question is whether force has to be used directly against the person who is being forced to give a confession or another statement or this includes the force used against another person. Some are of the opinion that this concept should include the force used against another person. This would be the case, for instance, when a blind person is coerced into giving a confession or another statement by use of physical force against his/her guide, for example, by binding them. It is understood that the other person is in a certain specifically defined relation to the passive subject of the criminal offence, which would be likely to make the latter make a decision in terms of the offence under Article 136 of the CCRS (Jakovljević, 1982:125; Tahović, 1961:134).

In this regard, we find it more realistic that in the case of extorting confessions force is used only against the passive subject, whereas another person can be subject to threat – assuming that the other person is in a specific relation to the passive subject (e.g. a child, a loved one, etc.). The threat viewed as means of perpetrating this specific crime implies any psychological coercion committed by making the passive subject aware of an imminent or prospective harm. However, simple threat is not sufficient for the existence of this offence; it has to be calculated and effective enough to result in the extortion of a confession or another statement.

As regards threat, in terms of this criminal offence, it is deemed that it need not be serious, subjectively speaking, but has to be sufficient in terms of time and manner of its perpetration, to extort a confession or another statement from the victim. Therefore a threat to cause any harm, the realization of which would result in an injury of a lower intensity, can lead to the extortion of a confession or another statement. The fact is that such a threat generally causes fear and other psychological feelings stemming from the instinct of self-preservation, and that in such a mental state the voluntary reactions of a passive subject are either completely absent or restricted so that the victim shall be compelled to give a confession or other statements under coercion.

In addition to the use of force or threat, the action of perpetration may involve the use of other inadmissible means or other inadmissible manners, although theory does not show consensus as regards the means of perpetration.

Namely, given the fact that the provisions of the CPC in principle prohibit the use of capricious and leading questions (i.e. questions suggesting expected answers) when taking testimony from certain procedural subjects, the question arises whether their use would constitute the use of ‘inadmissible manners’ in terms of the means of perpetration of this criminal offence.

According to one view, although this would be a manner of questioning that, as a rule, is not allowed, it could not be deemed that the criminal act is thereby accomplished. According to this view, asking capricious or leading questions is more in the nature of deception in the taking of testimony or other statements and can produce certain effects only with respect to validity of such testimony or other statement, raising the issue of lawfulness of the decision that would be based on such testimony or statements (Lazarević, 2011:526; Petrović Jovašević, 2005:179). On the other hand, there are views according to which the use of deception is explicitly indicated as the means of extorting testimony (Stojanović, 2012: 456; Krivokapić, 1997: 28).

In any event, we believe that inadmissible means should also comprise the use of narcoanalysis i.e. the use of narcotics and similar agents in order to extort a confession or another statement from the passive subject. Inadmissible manners of obtaining a confession or another statement should imply the use of methods explicitly prohibited in a procedure (e.g. lobotomy).

Aggravated Forms of Extorting Testimony

It has already been pointed out that in addition to the basic manifestation there are two aggravated (qualified) forms of the criminal offence of extortion of confession under Article 136 para. 1 of CCRS, both defined in the provisions of paragraph 2 of the said article.

The first form of the aggravated offence of extorting a confession will be found in a situation when the means used for extortion of a confession or a statement is “extreme violence”, i.e. when the use of force or other inadmissible means or manners (aimed at obtaining testimony) is accompanied by additional violence – inflicting or attempting to inflict bodily injury, ill-treatment, using coercion or threat of force to coerce a person into various acts or suffering and the like. This form is possible in criminal cases, but also in misdemeanours, white-collar crime proceedings or any other proceedings, and the passive subject can be a person in any appropriate capacity (the accused, witness, expert witness, citizen, etc.).

The concept of violence is variously understood in theory and in practice. Moreover, it is interpreted depending on the offence to which violence is related. It seems that in relation to the extortion of confession the notion of violence is to encompass the infliction or attempting to inflict bodily harm,

harassment, coercing by force or threat to various acts or suffering, but not giving the testimony, because it already exists in the basic form of the offence (Đorđević, 2011:39). These acts of violence should be extreme, which means that elements of violence are to be present to a greater extent.

It is deemed that extreme violence, as an aggravating circumstance in this case, must include the intent of the perpetrator, whereas negligence would be sufficient in case of particularly serious consequences, although the intent may also be present, since in some cases these particularly serious consequences need not constitute a criminal offence per se (Stojanović Delić, 2013:48). On the other hand, there are theoretic opinions that extreme violence in relation to this form of extorting testimony should also include causing grave bodily harm (Petrovic Jovašević, 2005:180). It is, however, certain, that if the death of the passive subject should occur due to the use of extreme violence, this criminal offence would concur with that of homicide.

Another form of aggravated extortion of confession will exist if extortion of confession results in particularly serious consequences for the accused in criminal proceedings. In this regard it should be noted that in accordance with paragraph 2 of Article 65 CCSRS the aggravated form of the offence of extorting confession exists if due to the extorted testimony “extremely grave consequences” have occurred for the accused in criminal proceedings. In any case, it is obvious that this aggravated form of extorting testimony can be perpetrated only in the course of criminal (and preliminary) proceedings.

The passive subject in the latter aggravated form of extorting testimony can be only a person accused in criminal proceedings or a suspect in a preliminary inquiry. As a rule, the perpetrator shall be the competent criminal investigator or another police officer (“authorized police officer”), competent public prosecutors or their deputies, and possibly a judge. However, the offence can also be perpetrated by empowered/authorized security agencies (BIA, VBA)¹, as well as an authorised member of the military police. Finally, the perpetrator might be a tax police inspector questioning the suspect in connection with a fiscal infraction or a criminal offence that he/she is charged with (Vuković, 2009:45).

The occurrence of particularly serious consequences for the accused in criminal proceedings or the suspect in preliminary proceedings is deemed to include the following: ordering or extending detention measures; conviction of an innocent person or pronouncing a sentence more severe than the one adequate in view of the facts; mental illness of the passive subject; the suffering of a child who is left uncared for following the conviction of the innocent

¹ The acronym BIA stands for Bezbednosno-informativna agencija (Security Information Agency), the national intelligence agency of Serbia, whereas VBA denotes the Serbian Military Intelligence Agency (Vojnobezbednosna agencija).

individual, etc.

Both forms of the aggravated criminal offence are perpetrated intentionally, but in the extortion of testimony using extreme violence it is necessary to prove the intent of the perpetrator, as well as awareness of the fact that the extortion of testimony is achieved by extreme violence, because it is the aggravating circumstance of the offence.

The second aggravated form of extorting testimony, which involves especially grave consequences to the accused in criminal proceedings, generally requires establishing the intent of the offender with respect to the basic criminal act in order to impose criminal liability of the offender, negligence being sufficient with respect to the occurrence of such grave consequences. However, this form will also be present when the offender acts with the intent to cause the said grave consequences, which may be of relevance for sentencing (Lazarević, 2011: 527).

Delineation with Coercion, Ill-Treatment and Torture

Extortion of confession in fact constitutes abuse of official capacity wherein a criminal act is perpetrated by the use of coercion towards a specific goal. Hence the problem of distinguishing it from aggravated forms of offences of ill-treatment and torture under Article 137 par. 3 CCRS i.e. when it is done by an official in the execution of official duty in order to obtain a confession, testimony or information from the victim or a third person. On the other hand, the prevalent means in the perpetration of the criminal act of extorting confession is the use of force or threat, which gives rise to the problem of its delineation with the basic form of the criminal offence of coercion under Article 135 para. 1 CCRS. It is far easier to examine the relationship between extorting testimony and coercion. It is, namely, obvious that the extortion of testimony is a separate criminal act of coercion, so that the offence under Article 136 CCRS represents a *lex specialis* in relation to the offence in Article 135 CCRS.

Ill-treatment and torture have two basic forms of manifestation. It is rightly believed that the Criminal Code has defined these two offences as a single offence with two forms for nomotechnical reasons. The first basic form of manifestation is ill-treatment (Art. 137 para. 1 CCRS) and the other is torture (Art. 137, para. 2 CCRS). Ill-treatment represents causing physical pain or suffering of a slightly lower intensity and can be either physical or mental (e.g. slapping, exposure to high or low temperatures, causing fear, mental abuse, etc.). Ill-treatment within the scope of this offence is deemed to encompass humiliation, as well as any other act that offends human dignity.

The second basic manifestation of this criminal offence is in fact

torture, referred to as “anguish” in the CCRS, which is not quite appropriate. Torture is an act of cruelty (consisting of inflicting severe pain or great suffering to another person) which is not an end in itself but an instrument to achieve another goal. It is therefore committed using force, threat or other inadmissible means (e.g. a lobotomy), with a view to obtaining a confession, testimony or another information from a passive subject, to intimidate the passive subject, or to punish the passive subject in an unlawful way.

The criminal offence under Article 137 CCRS shall be perpetrated by anyone “who by use of force, threat or another inadmissible way inflict severe pain or suffering to another person aiming to obtain a confession, testimony or another information from this person or a third person” (para. 2) in which case the perpetrator is punishable by imprisonment of six months to five years. However, if the said act is performed by an official in the discharge of duty, it will constitute the most aggravated form of abuse and torture (para. 3), which is punishable by imprisonment of one to seven years. Therefore this form of ill-treatment and torture is also perpetrated by exceeding the powers on the part police officers in the use of force, which really makes it hard to differentiate it from the appropriate form of extorting confession.

The criterion for delineation of criminal offences under Articles 136 and 137 CCRS involves primarily *mens rea*, i.e. the intent of the perpetrator. Namely, we consider that in the extortion of confession the use of force and threat (also manifested in the form of ill-treatment or torture) is strictly instrumental, i.e. it is completely in the function of obtaining confession or another testimony or a statement, whereas with ill-treatment and torture the actions aimed at humiliation human dignity and torturing the passive subject are the goals in themselves, and possible obtaining of the testimony or another statement may be only an occasion for their perpetration. In this sense, aggravated forms of exceeding powers by police officers regarding the use of force (physical force, batons, binders, etc.) should be more accurately qualified as ill-treatment and torture rather than extortion of confession. In addition to this, the explicit position of our legislators is that torture will be present even if the offence is committed from other motives, based on discrimination of any kind (e.g. ethnic, racial, religious, ideological etc.).

Finally, an opinion has been expressed that there may be concurrence of the criminal offences under Art. 136 and 137 CCRS (Lazarević, 2011:529). We believe, however, that, given the aforementioned concept of ‘serious violence’ in the aggravated form of extorting testimony, such concurrence would be only apparent.

Conclusion

Extortion of confession is a crime against freedom of choice. It consists in the use of force or threat or other inadmissible means or inadmissible manner of questioning in order to thereby extort a confession or another statement from an accused person or a suspect, a witness, an expert or a person in any other appropriate procedural capacity, by an official in the execution of his duty.

The characteristic features of the criminal offence of extorting confession comprise not only the action itself, which consists of the use of force or threat or another inadmissible means or inadmissible manner by the official in the discharge of his duty, but also in the subjective element, which includes the intent of the official to extort the confession or another statement by means of such an act.

It is rightly believed that the aforesaid characteristics indicate the fact that this criminal offence has the nature of a specific coercion. Namely, extortion of confession differs from the general criminal act of coercion under Art. 135 CCRS inasmuch as the use of force within this offence is aimed at coercing a person into giving a confession or another statement, which represents a specific coercion or, in this case, a separate criminal offence (Jakovljević, 1982:122).

The fact is that abuse of power by police officers in the use of coercive means (physical force, batons, binder, etc.) can qualify as ill-treatment or torture as well as extortion of confession. Ill-treatment and torture are objectively easier to prove and they are more leniently punished, which certainly contributed to the incidence of these two crimes in our judicial practice. The number of persons legally convicted of ill-treatment and torture persistently tends to be greater than that of extorting confession. Thus, for instance, according to the official statistics for 2011, 172 persons were convicted of ill-treatment and torture in the Republic of Serbia outside Kosovo and Metohija, whereas only 10 were convicted of extorting confessions.

Such a situation is to be expected because similar incidence is noted in other criminal offences that *mutatis mutandis* are in the same relation with one another, for example unlawful arrest and kidnapping. Notably, in the period of time when the abuse of service was incriminated under Article 66 of the CCRS, its relation with extortion of confession was almost identical.

Thus according to a study from 1998 in the period from 1991 and 1995 as many as 164 officials of law enforcement agencies were convicted of the criminal act of abuse authority whereas only 19 officials were convicted of extorting testimony (Vujović D. i dr., 1998:118).

Finally, we should be reminded that extortion of confession is contrary to the essential principle of our Code on Criminal Procedure whose aim is that no

innocent person should be convicted, and that the offender is to be sanctioned under conditions prescribed by criminal law, on the basis of a lawful and fair trial. This is the reason why facts contained in the extorted testimony of the accused, witness or other appropriate procedural subject cannot be a basis for judicial decisions and their use shall be deemed to be an essential violation of provisions on the criminal procedure.

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Кривично дело изнуђивања исказа у српском законодавству

***Апстракт:** Изнуђивања исказа је једно од оних кривичних дела којима се треба увек изнова враћати и критички их вредновати. По својој правој природи, ово кривично дело има карактер специјалне принуде. Дело је усмерено против неприкосновеност интегритета људске личности и поштовања људског достојанства у кривичном и сваком другом поступку, које је подигнуто у ранг уставних начела. Изнуђивање исказа*

је и право службено кривично дело, што значи да извршилац може бити само службено лице и да се дело може остварити само у вршењу службене дужности. Тежи облик дела састоји се, између осталог, у изнуђивања исказа окривљеног у кривичном поступку, при чему је извршилац по правилу овлашћени полицијски службеник. Увођењем тужилачко-полицијске истраге у општи кривични поступак Републике Србије, додатно је увећан и ризик од извршења овог вида изнуђивања исказа. У основи исто важи и за тежи облик кривичног дела злостављање и мучење, које се такође остварује прекорачењем овлашћења службеника полиције у примени средстава принуде.

Кључне речи: кривично право, кривични поступак, службеник полиције, прекорачење овлашћења, принуда, изнуђивање исказа, злостављање и мучење.