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JUST PRICE AND LAESIO ENORMIS IN CIVIL LAW AND ISLAMIC LAW

Abstract

Purpose of this article is presenting a short comparative analysis of the concept of just price and the institute of the rescission of contract in the case of inequality of prestations, with special review to the contract of sale. We will start with the origins of the concept of just price in antiquity and his further history. Than, we will compare the analogous concepts and institutes in the modern Civil law (Roman law based) codifications. After that, we will try to identify parallel concepts and institutes in the Islamic (Sharia, or Mohammedan) law, both historical and contemporaneous. The purpose of this research is to identify correlative institutes in both legal systems (Civil law and Islamic law), to analyse some similarities and differences between them, and to indicate possible lines of further development.

Key words*:* Just price, laesio enormis, Civil law, Islamic law, Islamic Finance

1. ORIGIN OF THE CONCEPTS OF JUST PRICE AND *LAESIO ENORMIS* IN THE LEGAL SYSTEM OF CIVIL LAW[1]

The basic idea of the equality of prestations[2] in a contractual synallagmatic obligation can be found for the first time clearly expressed in the literature in the famous fragment of Aristoteles's Nicomachean Ethics, as an emanation of the principle of commutative justice[3]. The idea, adopted from greek philosophy or independently developed, was present in the roman legal texts quite early, at least from the classical period of roman jurisprudence. The term *iustum pretium* (*just price*) and the analogous terms like *iusta aestimatio* (*just estimation*) can be often found in the works of classical roman jurists. Their extensive use indicates that these terms have been elaborated carefully by roman jurisprudents into legal institutes with precise legal-technical meaning. But, modern scholars didn't find the

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[1] The system of „Civil law" indicates the countries, mostly in Continental Europe, Latin America, Northeast Africa and East Asia, whose law is based on Roman law. It is synonym for the system of Roman law or Continental (European) law.

[2] For many notions and categories of the Civil law (also known as Roman law and Continental-European law) there is no equivalent in the Common law (also known as Anglo-American or Anglo-Saxon law). Having that in mind, it is impossible to translate them accurately in English language. I decided to use in such cases anglicized form of a Latin word, rather than translation which might be misleading. For example, I believe that it is better to use the term „prestation" for the latin *praestatio* than to translate it as „consideration", that it is better to say „law of obligations" than „law of contracts and thorts" and cetera.

[3] Aristoteles, *Nicomachean Ethics*, 5.4.13-14

unanimous answer to the question, what that meaning actually is? More precisely, is the just price for Romans same as general market price of goods? Or, is it a price that could be considered fair in a concrete transaction, taken in consideration all the aspects of every single case instead? But whatever the answer is, it wouldn't disput what is said above: the classical roman jurisprudence knew for the concept of just price, gave it a great importance too, and elaborated it into a legal institute. As such, it was clearly distinguished from the concept of *pretium verum* (*real* or *serious price*). This other concept meant that the parties tried to negotiate the best possible price. If they didn't, there was no contract of sale, but a simulation of another contract. For example, a selling or buying for intentionally diminished or inflated price would be considered as a gift, not sale. But, in the classical roman law, the sole fact that the prestations in a synallagmatic contract where unequal, even if grossly, would not give a possibility to the party that got the worst end to ask rescission of the contract, diminution or increase of price, or indemnity for damages. The fact that the price was unjust was only a precondition for rescission of a contract, or for petition for indemnity, and would only have importance if in the process of conclusion of a contract has been present a defect of will: error, coercion or fraud. Inequality attained by mere skillful bargaining was considered normal to the extent that it was elevated to the legal maxim that there is nothing more normal for a seller than to sell at the highest and for a buyer to buy at the lowest possible price.

Because of economic crisis, influence of Christianity, or for some other reason, things would change at some moment during the last centuries of the Empire. In two famous decisions preserved in the Code of Justinian, at the end of the third century, Emperor Diocletian decided that vendors of land, which is sold for less than a half of the real value, could ask rescission of the contract of sale. The contracts would be upheld if the purchasers were ready to pay the difference[4] (C.4.44.2; C.4.44.8). Romanists paid much attention to the question, were these two decisions really intended by Diocletian to be precedents for the future, or mere exceptions from general rule? Were those solutions Diocletian's at all, or product of interpolation of the original text by the compilers of Justinian's Codification? Beside, there seems that, even in Justinian's law, the institute which later would became known as *laesio ultra dimidium* (*harm over a half*) had quiet limited application: it applied only on sale and not on other contracts; protection was given only to vendor, not to purchaser; in both cases the object of sale was the tract of land; and last but not least important, it seems that in both cases the sale was not concluded personally, but trough agency, or by intermediary[5].

[4] *Codex Iustinianus,* C.4.44.2; C.4.44.8

[5] For more information about just price and *laesio enormis* in roman law see: T. Klami Hannu, (1987), „Laesio enormis in Roman Law", *LABEO - Rassegna di diritto romano* 33, 48-63; K.Visky, (1969), „Die Propotionalitaet von Wert und Preis in den romischen Rechtsquellen des 3 Jahrhunderts", *RIDA - Revue internationale des droits de l'antiquité*, 16, 355-389; A.J.B.Sirks, (1992), „Diocletian's Option for the Buyer in Case of rescission of a Sale", *Tijdschrift voor Rechtsgeschiedenis* 60, 39-47; K.Hackl, (1981), „Zu den Wurzeln der Anfechtung wegen laesio enormis", *Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte. Rom. Abt.* 111, 147-161; De Francisci, (1956), „Iustum pretium", Firenze: *Studi Paoli*, ed: Le Monnier; M.Horvat, (1961), „Prekomjerno ostećenje - laesio enormis", „*Rad*" 32, Zagreb: Jugoslavenska akademija znanosti i umjetnosti, 223-264; K.Visky,(1961), „Appunti sulla origine della lesione enorme", *IVRA* 12, 40-64; M.Horvat, (1967), *Sulla formazione del prezzo nella compravendita romana*, Bari: Cressat; A.Ehrman, (1980), „*Pretium iustum* and *laesio enormis* in Roman and Jewish Sources", *Jewish Law Annual* 3/, 63-71; A.J.B.Sirks, (1985), „La laesio enormis en droit romain et byzantine", *Tijdschrift voor Rechtsgeschiedenis* 53, 291-307; A.J.B.Sirks, (1983), „Quelques remarques sur la possibilité d'une règle Dioclétienne sur la rescission d'une vente à cause de lésion énorme (laesio enormis)", *Accademia Romanistica Costantiniana, Atti del V Convegno*, Perugia, 39-47; O.Stanojević, (1990), 'Laesio

But the idea of just price will have a great future in the Middle Ages. It fitted perfectly into Christian ethics. The renaissance of the Aristotelian in the works of Saint Thomas Aquinas and his followers gave it a new life. The doctrinal interest in the concept of equality of prestations had an impact on the development of legal theory and practice of the Canon law of the Catholic Church and on *ius commune* of medieval Europe, and, at the end, on the modern Civil law system of continental Europe and other, mostly South-American, Asian and African countries. Although the idea of just price was present for centuries in Anglo - Saxon legal and economic thought[6], it did not have much influence on legal practice in Common law countries.

The rudimentary roman institute of just price was reinterpreted in innumerous doctrinal tractates from High middle ages on. Also, up to the era of modern codifications, the application of *laesio enormis* was already extended far beyond the original limits: protection was granted to the buyer too; it was applicable to all cases of sale; and it was extended to other contracts and even other obligations too. Still, a total consensus was not reached at any of this extensions, and many other dissensions appeared in legal theory. Should the *laesio enormis* be measured mathematically as in Roman law? If so, what the percentage of just price should be taken in consideration as „excessive"? Or should it be measured by more flexible criteria? And what „just price" exactly means? Is it market price, or something else? At the end, should the institute of *laesio enormis* apply every time when the inequality of prestations exists („objectivist" view), or only when it is a consequence of deception, error, coercion or other similar situations („subjectivist" view)[7]?

2. JUST PRICE AND *LAESIO ENORMIS* IN THE CONTEMPORARY LEGISLATIONS

Consequently, the institute of *laesio enormis* had very different fortune in different legislations in the modern era. This time we will mention only the differences in the method of calculating just price, and the importance of will of the contractual party for the application of the institute of *laesio enormis*.

enormis' e contadini tardoromani, *Accademia Romanistica Costantiniana, Atti VIII Convegno*, Napoli, 217-226; М.Сич, (2006), „Правична цена (pretium iustum) и њена примена током историје", *Зборник Матице српске за друштвене науке* 120, 200-214; A.Grebieniow, (2014), „La laesio enormis e la stabilità contrattuale", *RIDA – Revue internationale des drotis de l'antiquité* 61, pp.196-199; B.Londrc, (2018), *Pretium (cijena) u klasičnom rimskom pravu*, doktorska disertacija, Zenica: Pravni fakultet Univerziteta u Zenici, 153-183.

[6] See for example W.Boyd, (2018), „Just Price, Public Utility and the Long History of Economic Regulation in America", *Yale Journal on Regulation* 35, 2018

[7] About *laesio enormis* and just price in the Middle Ages and early Modern period see R.W.M. Dias, (1959), „Laesio enormis: The Roman-Dutch Story", *Studies in the Roman Law of Sale [Dedicated to the memory of Francis de Zulueta]*, 46-63; F.W.Soetermeer, (1983), „Recherches sur Franciscus Accursii", *Tijdschrift voor Rechtsgeschiedenis* 51, 46-50; A.J.B. Sirks, (1985), 291-307; Herbert, 1989; T.Mayer-Maly, (1991), „Pactum, Tausch und laesio enormis in den sog. Leges barbarorum", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Rom. Abt. 108, 213-233; G.F.Margadant, (1977), „La historia de la „laesio enormis" como fuente de sugerencias para la legislación moderna", *Boletín Mexicano de derecho comparado* 10, 31-48; H.Kalb, (1992), *Laesio enormis im gelehrten Recht – kanonistische Studien zur Läsionsanfechtung*, Wien: Verlag des wissenschaftlichen Gesellschaften Östterreichs; J.B.Murphy, (2002), „Equality of Exchange", *American Journal of Jurisprudence*, 47/1, 85-121; J.Gordley, (1981), „Equality of Exchange", *California Law Review* 69, 1587-1656; J.Gordley, (2001), „Contract Law in the Aristotelian Tradition", *The Theory of Contract Law: New Essay*, ed. Benson, Cambridge: Cambridge University Press, 265-334; М.Сич, 214-217.

Some codifications adopted mathematical method of establishing just price, although not always using the same formula. While Austrian Civil Code (§939) and Louisiana Civil Code (§2589) adopted the ancient roman model of *laesio ultra dimidium* (harm over a half), other legislations adopted different formulas. For example, French Civil Code (§1674) adopted formula 7/12, while Romanian law accepted even a margin of 1/20 as „unjust"[8]. German Civil Code (§138) adopted a flexible approach, allowing to the judge to determine just price in every particular case. The same solution is adopted in Serbian Law of obligations (§139).

As of importance of the will of the contractual parties, most of legislations, including French, German and Austrian, adopted subjectivist approach. Jugoslavian socialist law was a significant exception, but after the breakup of Jugoslavia there was a tendency to adopt objectivist approach, as did Serbia in 1993[9]. So, a possibility of the dissolution of a contract with extremely inequivalent prestations regardless any other aspects of the contract, practically does not exist in the Civil law legislations any more. It means that it is not disparity in values in itself, even if striking, that voids the contract, but exploitation of some enumerated weaknesses on the part of the disadvantaged party. Effectively, *laesio enormis* is abolished as an independent institute, according to Zimmermann (1995). Actually, it is better to say that modern legislations returned to the solutions of classical roman law. They kept only the names corresponding to *laesio enormis* or *laesio ultra dimidium*, but virtually nothing of the original meaning of the institute. So *laesio enormis* lost practical importance and got out of praxis. According to Zimmermann (1995), in the 19th century there where virtually no recorded cases of it's application. The difference between *laesio enormis*, from one side, and fraud, coercion, error and other legal requisites for protection of a contractual party from other side, is obscured in such measure, that the necessity of it's existence, as a separate institute, was disputed. Some countries formally abolished *laesio enormis*, like South Africa[10].

The tendency of slowly abolishing the institute of *laesio enormis* was a consequence of the general social climate in the era of the creations of great codifications of private law in the 19th century. The principle of autonomy of will, more in accordance with the bourgeois liberalism and free market, prevailed over the moralist principle of equality in exchange[11].

But things changed in the second half of the 20th century. In some countries, like in Germany, judges tended to extend the application of the rule of article 138 of BGB. In cases of extreme inequality of prestations, they tended to accept even the smallest vice of will as acceptable for application of the article 138. In Austria, the institute of *laesio enormis* was formally reinforced by abolishment of possibility of his renunciation by

[8] Д.Марић, (2015), Начело еквивалентности и прекомерно оштећење у уговорном праву, *Зборник радова Правног факултета у Новом Саду* 49/2, 889-908, 897

[9] Д.Марић, 901-902

[10] About *laesio enormis* in modern law see Ch.Becker, (1993), *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik. Ausgewogenheit als Vertragsinhalt und 138 BGB*, Köln: Heymanns Verlag; A. Grebieniow, (2014), 199-216; A.Grebieniow, (2019), „Remedies for Inequality in Exchange. Comparative Perspectives for the Evolution of the Law in the 21st Century", *European review of Private Law* 1/2019, 2-26; М.Сич, 217-220; Д.Николић, (1989), „Прекомерно оштећење (laesio enormis) у правној пракси", *Гласник Адвокатске коморе Војводине* 9, 30-33; Д.Марић, 889-908; Ј.Салма, (1976), *Прекомерно оштећење у облигационоправним уговорима*, Нови Сад; С.Царић, (1962), „Оштећење преко половине", *Гласник Адвокатске коморе Војводине* 1.

[11] For a newer critic of institute of *laesio enormis* see K.Grechenig, (2006), „Die laesio enormis als enorme Läsion der sozialen Wohlfart? – Ein rechtsökonomischer Beitrag zur HGB-Reform", *Journal für Rechtspolitik* 1, 1-12.

the parties[12]. These tendencies are part of a generally popular trend known as „consumer protection". For example, *UNIDROIT Principles of International Commercial Contracts* in §3.2.7 and Section 6.2 seem to allow possibility of rescission of contracts in the case of inequality of prestations without subjective criteria[13].

Also, it is interesting to notice that European Parliament adopted two amendments to the proposed *CESL*[14]. They could render inadequate (unfair) prices not binding for the consumer in *B2C*[15] contracts, even if the price was individually negotiated and irrespective of other considerations. These amendments would allowed courts to mark as unfair prices that did not come even close to the 100% of threshold of Roman *laesio enormis*. As it seems, *laesio enormis* is about making a great comeback in European law. So, this question becomes more and more interesting: when an agreed price creates a „significant disbalance"[16]? So, problem of definition of „just price" becomes actual again.

3. JUST PRICE IN ISLAMIC LAW[17]

Islamic legal scholars always dedicated great attention to the concept of price trough history. Various aspects of definition of price, it's formation and structure were carefully examined and regulated. That attention dedicated to the concept of price was predominantly a consequence of a need to prevent forbidden types of contracts. Probably the most striking characteristic of Sharia law of contracts is explicit prohibition of so called *ribā*[18] (sometimes translated as „usury", although the field of application of this institute is much wider)[19], and *gharar* („risk", a notion comparable to aleatory contracts in Civil law legal system)[20]. So, Arab legal terminology is probably richer than in most of European languages. *Si'r* (price in narrow sense), *tsaman* or *thaman* (anything that may be a barter tool), *quimah* (value), *naqd* (money), *'dayn* (debt or payment) are some of the terms that can be loosely translated as „price"[21].

Difficulties don't stop here: Islamic law differentiates few types of contracts which according to the categories of Civil law would be all considered as forms of the contract of sale[22].

[12] T.Mayer-Maly, (1983), „Renaissance der laesio enormis?", *Festschrift K. Larenz*, München: Beck, 395-409

[13] A.Grebieniow, (2019), 17-18; М.Сич, 220-223

[14] Common European Sales Law.

[15] Business to Consumer

[16] H.Eidenmüller, (2015), „Justifying Fair Price in Contract Law". *SSRN Electronic Journal* , 2

[17] The term „Islamic law" we will use as a synonym for „Sharia law", also called, especially in the older literature, „Mohammedan law".

[18] There are many systems of transcription of Arabic script to Latin letters, none of which is universally accepted. The Arabic words in this article are given in the form(s) contained in the literature cited.

[19] It covers various modes of unjustified enrichment, and exact definition is a matter of dispute among Islamic scholars. See about riba for example: R.Bhala, (2016), *Understanding Islamic Law (Shari'a)*, Durham, North Carolina: Carolina Academic Press, 601-632

[20] For more details about *ribā* and *gharar* see for example: R.Bhala, 587-599; N.C.Dau-Schmidt, (2012), „Forward Contracts – Prohibition on Risk and Speculation Under Islamic Law" *Indiana Journal of Global Legal Studies*, 19/2, 533-553; J.Schacht, (1982), *An Introduction to Islamic Law*, Oxford: Oxford University Press, 151-154; A.K.Muhammad, (2003), „The Legal Effects of Unfair Contracts of Sale in Islamic Law" *Al-Adwa* 49/33, 19-44; I.Milenković, D.Milenković, (2016), „Kamata i garar u islamskom bankarstvu", *Bankarstvo* 45/1, 54-69.

[21] M.Zahraa, S.M.Mahmor, (2001), „Definition and Scope of the Islamic Concept of Sale of Goods" *Arab Law Quarterly* 16/3, 237-238; A.K.Muhammad, (2003), 22-23

[22] R.Bhala, 495 and further; N.Choudhury, (2011), „Obligations in the contract of sale: Islamic law and common law perspective" *International Islamic university Malaysia*; M.Zahraa, S.M.Mahmor, 215-238; Md. H.Rahman, M.Amanullah,

And there is more: various meanings of „just" exist in Islamic law. There are three words used in Quran to indicate justice: *'adl*, *quisth* (or *quist*) and *mizan*[23]. The terms *quisth* (*al-quisth*) and *'adl* (*al-adl*) are usually used in the sense of „being just", or regulate or rule justly, for example, when Quran talks about Allah's just nature[24]. The term *mizan* means „scales" and also means „balance" in wider sense[25]. It is best translated as „equity"[26].

So, identifying the possible equivalents for Civil law concepts of just price and *laesio enormis* is not an easy task, and the result may be always subject to criticism.

At the first sight, the most obvious candidate for the just price in Islamic legal terminology would be *quimah al'adl*, which means, literally, „just value". It was used both by Mohammad and the Caliphs, it was carefully elaborated by the scholars, and it always had application in legal practice. Various synonyms were proposed, including *si'r al-mitsl* and *tsaman al-mitsl* (both best translated as „equal price"), just as terms with similar meaning, such as *'iwad al-mitsl* (equal compensation). Still, it could be misleading to translate them literally. When they talk about just price, as it was said above, the western jurists usually think on a price whose value is roughly equivalent to the value of the object of sale. For Islamic scholars, it is a price formed by a free accord of contractual parties on a free market. Islamic jurists consider „just" any price that is formed in the conditions of free market, without fraud, monopoly, artificial shortage, and similar artificial means of inflating prices[27]. There are some doubts are the market forces of supply and demand the only one to influence the price, or other social forces and personal preferences and circumstances should be taken in consideration too? But there is no doubt that just price is formed by free accord of contractual parties, without fraud and other reasons for invalidation of a contract, such as *ribā* and *gharar*[28].

Among the Islamic thinkers, the medieval Sunni scholar Ibn Taymiyyah (1263-1338 AD) seem to be the closest to the western conception of just price as equivalent of the value of the thing sold. Although his theological and political positions have been often labeled by mainstream Muslim scholars as ultraconservative and because of that controversial[29], his economic thought seems strikingly modern. He was a fiery advocate of free market, and he believed that prices should be formed by market forces operating freely and without fraud. But also, he insisted that prestations in a contract should, in principle, be more or less equal in value. The idea of equality has been carefully elaborated by Ibn Taymiyyah into concepts of *iwad al mitsl* (equal compensation) and *tsaman al mitsl* (equal or just price)[30]. This concepts evolved into legal protection of the people not aware

(2016), „Sale Subject to a Condition in Islamic Law: a Juristic Analysis", *Shariah Journal* 24/3, 423-444; A.K.Muhammad, (2003), 22-23

[23] K.K.Adji, (2019), „The Concept of Just Price in Islam: the Phylosophy of Pricing and Reason for Applying It in Islamic Market Operation", *Advances in Economics, Business and Management Research* 102, 120 and further

[24] K.K.Adji, *ibid*.

[25] For example, the economic term *mizan almadfueat* means „balance of payments" (in export and import of a country).

[26] For more information on the topic see for example M.Khadduri, (1984), *The Islamic Conception of Justice*, Foreword by R. K. Ramazani, The John Hopkins University Press: Baltimore and London.

[27] This is the reason why they are often reserved toward price-fixing by the State, see: M.L.A.Bashar, (1997), „Price Control in an Islamic Economy", *Islamic Economy* 9, 29-52.

[28] K.K.Adji, *ibid*.

[29] Actually, to the point that he is sometimes accused of being forerunner of modern jihadism

[30] S.Sudiarti, (2017), „Market Mechanism As Price Determinant (Analysis Thinking of Ibnu Taimiyah)" *IOSR Journal of Humanities and Social Sciences* 22/5, 93-97; K.K.Adji, 121; A.A.Islahi, (1988), *Economic Concepts of Ibn Taimīyah*, The Islamic Foundation & Quran House: Leicaster-Nairobi-Kano, 75 and further

of the conditions of market (*mustersil; mustarsil*), at least in some cases, and at least in some Islamic countries, like Saudi Arabia[31].

4. *LAESIO ENORMIS* IN ISLAMIC LAW

Although the idea of equality exists in Islamic law, there hasn't ever been consensus (*ijmā*) that it is an instrument of invalidation of a contract in itself. The lesion or *ghabn* is a condition for the annulation of the contract if it is accompanied by fraud, or in other words „for an act to be annulled on the account of fraud, the fraud must have caused *ghabn*, and for an act to be annulled on account of *ghabn*, the *ghabn* must have been caused by fraud"[32]. What does exactly make excessive profit (*ghabn*) is an object of contention. The Malikites prefere mathematical method: they take the opinion that profit should be limited to one third of the price. Hanbalites and Shafiites took a more flexible approach. Of course, some profit is expected because otherwise a sale contract would serve no purpose[33].

So is there any equivalent to the roman institute for *laesio enormis* in the Islamic law? The most serious candidate seems to be the institute of *ghabn fāhish*. This term, which could be loosely translated as *laesio enormis* (abnormal harm) may be found in the legal treatises of Abu Hanifa's disciples already. The best literal translation of this term would be „evident disantvantage". At least since 12th century A.D. there has been stabilized a proportion (although it may be known since the times of Abu Hanifa) according to which a loss is considered excessive when the disproportion of the prestations among the parties amounts to at least 5 % in case of merchandise (*'urūd*), 10% in case of animals, and 20 % in case of real property. The differences are explained by the fact that a sale of the first kind of goods is common, the second less common, and the third rare. The same percentages we encounter in *Mejelle* (or *Mecelle*), a late Ottoman codification[34].

Although known for a long time, the institute of *ghabn fāhish* has a limited application. First of all, it isn't a general institute of Islamic law of obligations. It is applicable only on the contracts of sale and lease. Even in those cases, the sole fact that a party has got the worst of a bargain doesn't entitle her automatically on the rescission of a contract or to the change of it's conditions. It may be possible only if financial loss (*ghabn fāhish*) is a consequence of *taghrīr* (deceit), coercion or some other type of *mala fide* behavior of the other party. So, *ghabn fāhish,* in itself, is generally not a sufficient cause for the recision of a contract[35].

But there is one case when it is sufficient: if contract is concluded by a representative of the contractual party. It might be an agency based on law, in the cases of persons and institutions which are incapable to express their will, like minors or lunatics, but also juridical persons like *waqf* (pious endowment), *Bait-al-Mal* (state treasury) and ctr. It may be

[31] See for example S.Imamović, (2008), *Propisi kupoprodaje – priručnik za muslimanskog trgovca*, Riyadh: Pomoćni ured za Dawu, pregledao Ebu Usama el Džeziri, 21-22; S.A.Aljloud, (2016), *The Law of Market Manipulation in Saudi Arabia: a Case for Reform*, Doctoral Thesis: School of Law, University of Brunei, 97-98.

[32] N.Comair-Obeid, (1996), *The Law of Bussiness Contracts in the Arab Middle East*, London: Kluwer Law International, 102, see also B.Khaled, Islamic Contract Law, *IALS*, University of London, electronic version available at: *http://ssrn.com/abstract=2019550*, 20 and further

[33] N.Choudhury, 28-29; B.Khaled, 24-25; S.Imamović, 20 and further.

[34] W.Mansbach, (1942), *Laesio enormis* in Muhammadan Law, Bulletin of the School of Oriental and African Studies, University of London 4, 877-878, see articles 165 and 356-360 of the *Mejelle*

[35] W.Mansbach, *ibid*

also a contract concluded by an agent for selling or buying on behalf of explicit mandate of an adult and able person too. If an agent buy or sell at an excessively high or low price, the contract is revocable[36], Mansbach, W, 1942, *Laesio enormis* in Muhammadan Law, Bulletin of the School of Oriental and African Studies, University of London 4, 877-885.

5. „REAL PRICE" IN ISLAMIC FINANCE

In the search for *laesio enormis* in Islamic law we can follow one more different direction. As it is said above, Islamic law knows different types of contracts which could be classified as sale by a civil law lawyer. One of the most important such contracts is *murabaha* contract (or *murâbahah*), which has certain similarities with rent-to-own contracts of Common law. It is a type of sale where the buyer and seller agree about the profit margin for the seller, or „cost-plus" price. With the recent rise of importance of Islamic banking, *murabaha* became increasingly important as the main legal instrument of Islamic financing: the buyer/borrower agrees to pay a higher price in exchange to being allowed to pay over time (for example with monthly payments). Still, such contract is considered as a type of sale, not lease, because seller must actually own the thing that he sells. Of course, *murabaha* is always on the edge of being marked as *ribā* (usury) and thus forbidden (*haram*; *harām*). To avoid this, the Islamic jurists developed very sophisticated theories about the structure of price in this contract. However, their opinions differ in that case - what constitutes that price?[37].

According to Moghul & Ahmed[38], Arshad Ibn Rushid, a classical jurist of Malikite school of jurisprudence, differenced three categories of costs that may be considered price in such a contract: „1) that which can be included by the seller as part of its Principal Cost and which may be factored into the calculation of the profit; 2) that which can be included by the seller as part of its Principal cost but not factored into the calculation of profit; 3) that which cannot be included as part of the seller's principal cost nor used in the calculation of profit… Expenses of the first category are those relating to the essence of the goods (*ta'thir fi ayn*), such as dying or tailoring a piece of material which is to be sold. In other words, all costs customarily associated with the object of sale and which result is an increase in its value may be appended to the Principal Cost. Expenses of the second category do not affect the essence of the good and are those incurred for services that the seller requires but cannot itself provide, such as transportation or storage. Expenses of the third category are those that do not affect the essence of the good and which are incurred for services the seller himself is able to provide, such as commissions of wages to its employees. The Hanbali school of jurisprudence holds that all actual expenses incurred by the seller may be added to the principal cost provided that the buyer is made aware of the nature and amount of such expenses. For the Hanafi school, all amounts normally accepted by commercial practice and actually incurred by the seller may be added to the Principal cost. It must also be noted that the seller must make certain disclosures with regard to the amounts constituting and characteristics of the price."

[36] W.Mansbach, , 877-885.

[37] About *murabaha* contract see for example: R.Bhala, 655-659, Md. H.Rahman, M.Amanullah, 439-440, U. F. Esq Moghul, A. A. Esq. Ahmed, (2003), „Contractual Forms in Islamic Finace Law and Islamic Inv. Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N. V. & Ors.: A First Impression of Islamic Finance", *Fordham International Law Journal* 27/1, 149-194.

[38] U. F. Esq Moghul, A. A. Esq. Ahmed, 149-194

Whatever the „added value", or provision of the seller, might be, one thing is sure: the base value (capital value) of the object of sale is the base and on it is constructed the final price. The capital (basic) value must be known by the purchaser. For example, in the article 506 of the Civil Code of the United Arab Emirates we find the following provisions:

2) If it appears that the seller has exaggerated in declaring the amount of capital value, the purchaser may reduce (the amount) by the amount of excess.

3) If the capital value of the thing sold is not known when the contract is made, the purchaser may rescind the contract when he learns of it…

So, if seller (intentionally) exaggerated the price, the purchaser has the right to ask the price be reduced. If both parties didn't know the real value of the sold thing, the purchaser has the right to rescind the contract. On the first look, it might seem like *laesio enormis* of Roman law. Effectively, protection is granted whenever the base (capital) value of the sold thing is smaller than declared. But there are significant differences, too.

First, the protection is granted to the purchaser only, not to the seller.

Second, only the capital value of the sold thing matters, not and the provision (profit) of the seller, because purchaser agreed about it.

Third, it is not the inequality of prestations, or the fact that price is not „just" (in roman sense), that entitles the purchaser to the legal protection. The purchaser actually agreed to pay more than what actual value of thing sold is. Only fact, that the actual value is not known at the moment of the conclusion of contract, matters here. „Actual value" is, without doubt, the market value. So protection is not granted regarding additional costs and profit of the seller, because they depend on agreement only.

And the fourth, the loss inflicted to the purchaser needn't even to be „enormous". Even a small difference between declared and actual value of the sold thing entitles the purchaser in the *murabaha* contract on protection.

6. CONCLUSION

The concept of just price exists in both, western and Islamic legal theory, but not always with the same meaning. While in roman civilian legal tradition it means price roughly equivalent to the value of the sold thing, in Islamic thought it is usually any price formed by free accord of parties, without fraud or artificial price inflating by monopoly or other artificial means. Still, the theories of equality of prestations exist in the works of some Islamic scholars.

Civil law legal system has a great tradition regarding the institute of *laesio enormis*, but in most of contemporary legislations the institute is practically abolished. In Islamic law it exists in the form of institute known as *ghabn fahish*, but whose application is limited. Similar, but not identical, institute exists in *murabaha* contract, the most important instrument of Islamic finance.

But there is growing interest for the institutes of just price and *laesio enormis,* in both Islamic and western laws, because of growing concern about consumer protection[39],

[39] Although until now more attention seems to be dedicated to the quality of products, the question of pricing of commercial goods is slowly coming in focus of legislation in the laws on consumer protection in the Middle East. see for example Federal Law No 24 of 2006 of United Arab Emirates on Consumer protection, §§ 3, 4, 8 and 14. Consumer protection

and increasing importance of Islamic banking. The mutual knowledge of institutes of the other legal system becomes more and more important for lawyers in both Roman law and Islamic law countries in a globalised world for purely practical reasons. But the experience from other legal systems might also help jurisprudents to resolve many existing disputes regarding various aspects of the institutes of just price and *laesio enormis*, and bring fresh ideas how to redefine them.

Laesio enormis exist in Islamic law, and the theories of just price exist in Islamic legal theory, too. They became increasingly important, not only because of increased importance of Islamic banking. Both western and Islamic jurists will have a task to develop new solutions. They both have millennial legal tradition, and there are plenty of legal institutes and theories where they could be used as basis for new solutions. A dialogue between civil law and sharia jurists and sharing of experiences could be in mutual interest. Islamic jurists could learn from European experience to re-evaluate equality-in-exchange based theories. One of them is Ibn Tamiyya's theory of just price, for example. They could also to wide the application of institute *ghabn fahish*. At the other hand, European jurists, which still struggle to define the notion of just price, could find interesting ideas in the Islamic law. For example, the establishment of different rates for prices to be considered just for various types of goods; structural analysis of price and its division in capital price, expenses made by seller, and agreed profit of the seller: making difference between different types of contract of sale, and different situations, for example sale concluded by agency.

The knowledge of institutes of both legal systems seems to be useful not only for practitioner jurists, because of importance that it necessarily has in the globalised world economy, where the contracts concluded between entities from different countries become more and more common. It is also important for jurisprudence, because knowledge of the other legal systems might be source for reception of institutes and concepts whose long application in other legal systems proves their usefulness.

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is still a young branch of law in Muslim countries, just as in the rest of the world, and is still developing. And just as in western world, it might bring up the question of regulation of just pricing in the focus of legislators. See A.K.Muhammad, (2000), „Consumer Protection in Islamic Law (Sharia): An Overview", *Al-Adwa* 45/31, 86.

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PRAVIČNA CENA I *LAESIO ENORMIS* U EVROPSKO-KONTINENTALNOM I ISLAMSKOM PRAVU

Rezime

Cilj ovog članka je da pruži kratku uporednopravnu analizu koncepta pravične cene i instituta prekomernog oštećenja, sa akcentom na ugovor o kupoprodaji. Počećemo sa poreklo koncepta pravične cene u antici i njenom daljom istorijom. Zatim, uporedićemo analogne koncepte i institute u modernim kodifikacijama evropskokontinentalnog (rimskog) prava. Nakon toga, pokušaćemo da identifikujemo odgovarajuće koncepte i institute u islamskom (šerijatskom, ili muhamedanskom) pravu, kako istorijske tako i savremene. Cilj istraživanja je da se identifikuju korelativni , institute u oba pravna sistema (evropskokontinentalnom i šerijatskom), da se analiziraju sličnosti i razlike među njima, i da se ukaže na moguće pravce njihovog budućeg razvoja.

Ključne reči: pravična cena, *laesio enormis*, rimsko pravo, islamsko pravo, islamsko bankarstvo

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