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Jurisprudence

CONSIDERATION OF LEGAL CHANGES TO CERTAIN NORMS OF SUBSTANTIVE CRIMINAL LAW IN THE REPUBLIC OF SERBIA

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RAZMATRANJE ZAKONSKIH IZMENA POJEDINIHM NORMI MATERIJALNOG KRIVIČNOG PRAVA U REPUBLICI SRBIJI

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Abstract

In this paper, the Proposal of the Law on Amendments and Supplements to the Criminal Code of the Republic of Serbia from 2024, which is under public discussion, will be pointed out and discussed. Just mentioned is the hypothesis of this work. This research is essentially conceived in two parts. The first part refers to the development of criminal legislation in Serbia, from the first codifications until today, and the second part refers to current issues that are perceived precisely through the proposed amendments. The reason why the work is divided as already indicated in the mentioned way is to point out the infrequency of changes in the criminal substantive law, thus opening up the possibility of considering this obvious "necessity". From a formal point of view, the paper shows the development of criminal law from the Middle Ages, through the period under foreign legislation, up to the relatively modern history and political conversions of the state. So of course this hypothesis came up. The goal is exclusively focused on changes in material provisions through a comparative indication of the existing legal solution with the proposals, through a concise consideration even though amendments and additions to many criminal offenses have been proposed. The secondary goal of this paper is to participate in the public debate on this current topic through a scientific aspect.

Apstrakt

U ovom radu biće ukazano i razmotren Predlog Zakona o izmeni i dopuni Krivičnog zakonika Republike Srbije iz 2024. godine, koji se nalazi na javnoj raspravi. Upravo pomenito i predstavlja hipotezu ovog rada. Ovo istraživanje je suštinski koncipirano na dva dela. Prvi deo se odnosi na razvoj krivičnog zakonodavstva u Srbiji, od prvih kodifikacija pa do danas, a drugi odnosi na aktuelnu problematiku koja se percipira upravo kroz predložene izmene i dopune. Razlog zbog čega je rad podeljen kako je već naznačeno na pomenuti način je da su ukaže na neučestalost promene krivičnog materijalnog prava, pa samim tim se otvara mogućnost razmatranja ove očigledne „nužnosti“. Formalno posmatrano u radu je ukazano na razvoj krivičnog prava od srednjeg veka, preko perioda pod stranim zakonodavstvom, pa sve do relativno savremene istorije i političkih konverzija države. Pa sa naravno došlo i do ove hipoteze. Cilj je isključivo fokusiran na promenama materijalnih odredbi kroz uporedno ukazivanje postojećeg zakonskog rešenja sa predlozima, kroz koncizno razmatranje iako su predložene izmene i dopune mnogih krivičnih dela. Sekundarni cilj ovog rada je učestvovanje u javnoj raspravi na ovu aktuelnu temu kroz naučni aspekt.

Keywords: Criminal substantive law, legal norms, amendments to the Criminal Code, development of criminal law.

Ključne reči: Krivično materijalno pravo, pravne norme, izmena i dopuna Krivičnog zakonika, razvoj krivičnog prava.

Introductory considerations through historical facts

At the very beginning, several important historical facts will be pointed out. The development of Serbian criminal legislation began in the Middle Ages, before Dušan's Code, as a private prosecution under the name of "vražde".[1] Immediately after the legislation is grouped under the so-called Dušan's Code from 1349 and the Novella from 1354, where provisions from state, criminal and procedural law are most represented.[2] It should be pointed out that in the field of criminal law, Dušan's legislation applied the harsh Byzantine system of corporal and death punishments.[3] From the 15th to the 19th century, Turkish legislation was applied in the territories of Serbia at the time, with what could be said to be admixtures of customary Serbian law, which were not codified but had a more local character.[4]

It could be said that from the First Serbian Uprising until the codification of the national criminal legislation in 1860, a large number of regulations were adopted that regulated this matter, first in areas liberated from the Ottoman Empire, and since 1938 they have been valid on the territory of the Principality of Serbia.[5] During this period, the efforts of the state to find an answer to non-compliance with existing rules, drawing *ius puniendi* from different sources, are particularly visible.[6] The first modern Criminal Code in the Kingdom of Serbia was adopted in 1860. This law was inspired by European legal systems and represented a turning point in the development of criminal law.[7] It should also be noted that the Criminal Code from 1884 was significantly amended and reformed with an emphasis on the protection of individual rights.[8]

It could be said that the uniform criminal law was adopted in 1929. It is actually the Criminal Code of the Kingdom of Yugoslavia, which retained many principles from the previous laws, but was adapted to the new state.[9]

Short review of the Serbian criminal legislation during SFR. Yugoslavia

The criminal legislation of Yugoslavia extends through the period of the last year of World War II until the breakup of the country in nineties of the twentieth century. It was created as a discontinuity of criminal legislation (and other) after the capitulation of the Kingdom of Yugoslavia during the aforementioned period.[10]

During the war, in early 1942, construction began on a new legal system, especially the criminal system by the Supreme Headquarters of the People's Liberation Army and Yugoslav partisans when they adopted the first regulations on the organization and operation of the National Liberation Committee known as Focanski regulations.[11] With this regulations arose the first codification of the discontinuity in the liberated territories.[12]

From of above mentioned it can be seen that the beginnings of the formation and criminal legislation of Yugoslavia in the period from 1976 consisted of Federal Criminal Code, six criminal laws of central government and two provincial criminal codes.

Significant decentralization was carried out in the former SFR. Yugoslavia with the Constitution of 1974. This was also reflected in the distribution of legislative competence in criminal law. Criminal law, which was previously solely in federal competence up to that time, was divided between the federal legislature, the republics, and the provinces. General criminal law and small segments of the Special Part remained under the jurisdiction of the federation, while the rest was transferred to the republics and provinces.[13]

In the period from 1976 until 1990, ten amendments were made to the Federal Criminal Code. When it comes to criminal sanctions, the Federal Criminal Code foresaw four criminal sanctions and they are: a) punishment, b) suspended sentence and a court reprimand, v) security measures and g) educational measures. Due to the expediency of research, it is necessary to indicate that the said federal law stipulated four penalties and they are: a) the death penalty, b) constipation, v) a fine and g) property confiscation. It was mentioned that it was necessary to indicate, because during this period, the Criminal Code of the Socialist Republic of Serbia does not specifically regulate the issue of penalties because of their predictability in federal law or the Constitution of 1974, many predicted that criminal issues are contained in the Federal Criminal Code, and that certain general and specific issues that do not fall within the jurisdiction of the federal criminal Code are decorated national and provincial criminal laws.[10]

Serbian criminal legislation during the FR. Yugoslavia and the state union of Serbia and Montenegro

The criminal legislation of the Federal Republic of Yugoslavia - FRY (and the Republic of Serbia) from the 1992 and from the breakup of Yugoslavia until 2002, and to the creation of the State Union of Serbia and Montenegro.

The development of the criminal legislation of the Republic of Serbia characterized by relatively frequent changes and additions, as well as many social and state changes.

After the breakup of SFR. Yugoslavia, the Criminal Code of former SFRY is fully retained by the FRY. By the same principle the Criminal Code of the Socialist Republic of Serbia is also retained, who was a part

of the criminal law system. Although not of particular importance to the issue of sanctions, it should be noted that the Law on amendments to the Criminal Code of the Socialist Republic of Serbia in 1992 changed the name from the existing to the Criminal Code of the Republic of Serbia. [14] It is clear that this is just one of the consequences of socio-political changes in the country.

In the Federal Criminal Code (referring to the FRY), it is necessary to point out that all criminal sanctions that were prescribed in the Criminal Code of the SFRY the detained.

The first significant change retained Criminal Code of Yugoslavia from 1976 were followed by the Law on Amendments to the Criminal Code of the FRY in 2001. Article 34 lays down only two sentences, and they are: a) prison and b) a fine, unlike Criminal Code of Yugoslavia from 1976 which provided four penalties. The penalties that can no longer prescribe are a) the death penalty, and b) confiscation of property. The death penalty in this period was prescribed only for a Republic Criminal Law.[15]

Especially significant changes to the penal legislation referred to the amended Criminal Code of the Republic of Serbia, which was followed in 2002 when the Law on Amendments and Additions foreseen the deletion of Article 2a. Criminal Code of the Republic of Serbia on the death penalty. Even though the professional public then expected, the prison sentence is still not prescribed by the Republican criminal law, is still regulated by the Criminal Code of the FRY.[16]

The State Union of Serbia and Montenegro existed only a few years. More precisely since the beginning of 2003, although the agreement between representatives of the FRY, Serbia and Montenegro, in the presence of the High Representative of the European Union was signed in early 2002, until mid 2006. The highest legal act of the state was the Constitutional Charter of Serbia and Montenegro.

As with the previous government changes, here is also retained the existing criminal legislation which was applied in the FRY, with the proviso that followed certain changes.

Amendments to the substantive norms of the Criminal Code in 2024.

In the case of a very small number of provisions of the General part of the Criminal Code, there is a need to change them, which is foreseen by this amendment, unlike the special part that is not the focus of this paper. Changes in the area of the General part are not frequent, except when dealing with parts that regulate the issue of criminal sanctions, while changes in other general institutes are very rare.

The changes that are foreseen refer to the offense of minor importance, conditional discharge and fine.

1. In the case of crimes of minor importance, the circumstances are recognized to restore the solution that was foreseen before the amendments to the Criminal Code from 2009. There, the idea was to allow the application of this ground for the exclusion of illegality only for offenses for which a prison sentence of up to three years or a fine is prescribed.

The proponents of the name of the law point out that the existing solution is also in contradiction with the impossibility of mitigating the punishment by type for criminal offenses for which a prison sentence of five years is threatened, given that a special minimum is always prescribed for them. The purpose of this institute is to relieve the criminal justice system. Apart from the principle of opportunity on the procedural level, there are arguments that this issue is also resolved on the level of substantive criminal law, but even with a broad understanding of the concept of petty criminality, it cannot include those criminal acts that are threatened with a prison sentence of five years.[17] It should also be borne in mind that the institute of acts of minor importance, which is set too broadly, can call into question the full realization of the principle of legality in criminal law. In relation to light crimes, there are justifications for the wider application of this institute, which is now relatively rarely used in our judicial practice. Therefore, instead of the condition that the degree of guilt of the perpetrator is low, it is suggested that it is sufficient that there are no circumstances that indicate a high degree of guilt of the perpetrator. [18]

2. When it comes to parole, it has been observed in practice that courts rarely use parole. Amendments to the Criminal Code from 2012, which aimed to introduce mandatory parole for most crimes, did not change anything in this regard.[19] This was mostly contributed by the existing provision that requires the fulfillment of conditions that are difficult to determine for parole. It is difficult to determine whether the purpose of punishment has been achieved in relation to a person sentenced to probation. That is why the draft law waives that condition and starts from the fact that for parole, in addition to two-thirds of the sentence served, it is sufficient that during the serving of the sentence the person behaved in such a way that it can be reasonably expected that during the period of the conditional release no new a criminal act. Also, it is necessary to specify what obligations the court can impose on a parolee.[17]

3. In cases where it is about a fine, there is a low percentage of the participation of the fine in the total imposed criminal sanctions. For the drafters of the law, this is a worryingly low level. When it comes to fines in daily amounts, there is a reluctance of our judicial practice in imposing them, even though that system has become a European standard. Certain studies have shown that this system is a better system than the traditional

one. [17] Courts are known to avoid what is more difficult and complex for them, so in this case they opt for the old system, which is much simpler (but not better).[20] For now, it would be too radical a step to foresee only a fine in daily amounts, which could be expected in one of the next reforms of the Criminal Code, which would lead to the abolition of the old system. This should be preceded in order to make it easier for the courts to apply this penalty.[21]

The substantive norms of the Criminal Code before proposal of amendments in 2024.

In the continuation of this research, the previous legal provisions of these three legal norms will be pointed out in a concise presentation.

In the Criminal Code, a minor offense is defined as follows: A minor offense is not an offense that, although it contains features of a criminal offense, is an offense of minor importance. An offense is of minor importance if the degree of culpability is not high, if harmful consequences are absent or insignificant and if the general purpose of criminal sanctions does not require the imposition of a criminal sanction. These provisions may be applied to criminal offenses punishable by imprisonment for up to three years or a fine. (Article 18 of the Criminal Code).[22]

Conditional sentencing is provided for in Article 65 as follows: With a conditional sentence, the court determines the punishment for the perpetrator of the criminal act and at the same time determines that it will not be carried out, if the person sentenced for the time determined by the court, which cannot be shorter than one nor longer than five years - probationary period - do not commit a new crime. The court can determine in a suspended sentence that the sentence will be carried out even if the convicted person does not return the property benefit obtained by committing the criminal offense, does not compensate the damage caused by the criminal offense or does not fulfill other obligations provided for in the criminal law provisions within a certain period. The deadline for the fulfillment of those obligations is determined by the court within a certain period of verification. Security measures, imposed with a conditional sentence, are carried out. Article 66 of the Criminal Code stipulates the conditions for the imposition of a suspended sentence in such a way that: A suspended sentence can be imposed when the offender has been sentenced to imprisonment for less than two years. A suspended sentence cannot be imposed for criminal offenses punishable by imprisonment for eight years or a heavier sentence. A conditional sentence may not be imposed if no more than five years have passed since the finality of the conviction, which imposed a prison sentence on the perpetrator or a conditional sentence for an intentional crime. When deciding whether to impose a suspended sentence, the court, taking into account the purpose of the suspended sentence, will take into account the personality of the perpetrator, his previous life, his behavior after the crime, the degree of guilt and other circumstances under which the crime was committed. If the perpetrator is sentenced to both imprisonment and a fine, a suspended sentence may be imposed only for the imprisonment.[22]

When it comes to fines, Article 48 of the Criminal Code stipulates that fines can be assessed and imposed either in daily amounts or in a specific amount. For criminal acts committed out of self-interest, a fine can be imposed as a secondary punishment even when it is not prescribed by law or when the law prescribes that the perpetrator will be punished with a prison sentence or a fine, and the court imposes a prison sentence as the main punishment.

Bearing in mind that in the amendment proposal, the greater focus was on fines in daily amounts, the following will present the still current legislative solution.

Fines in daily amounts are provided for in Article 49 of the Criminal Code as follows: fines in daily amounts are measured by first determining the number of daily amounts, and then the amount of one daily amount. The court will arrive at the amount of the fine by multiplying the determined number of daily amounts with the determined value of one daily amount. The number of daily amounts cannot be less than ten, nor more than three hundred and sixty. The number of daily fines for a committed criminal offense is calculated on the basis of the general rules for determining the penalty. The amount of a daily fine is determined by dividing the difference between the income and the necessary expenses of the offender in the past calendar year by the number of days in the year. One daily amount cannot be less than five hundred dinars, nor more than fifty thousand dinars. In order to determine the amount of the daily fine, the court may request information from banks or other financial institutions, state authorities and legal entities, which are obliged to provide the requested information and cannot rely on the protection of business or other secrets. If it is not possible to obtain reliable data on the income and expenses of the perpetrator of the criminal offense, or if he does not generate any income, the court will, based on the available data, determine the amount of a daily fine at its discretion. The number of daily amounts of fines is determined within the following ranges: 1) up to sixty daily amounts for criminal offenses for which a prison sentence of up to three months can be imposed; 2) from thirty to one hundred and twenty daily amounts for criminal acts for which a prison sentence of up to six months can be imposed; 3) from sixty to one hundred and eighty daily amounts for criminal acts punishable by

imprisonment of up to one year; 4) from one hundred and twenty to two hundred and forty daily amounts for criminal acts for which a prison sentence of up to two years can be imposed; 5) at least one hundred and eighty daily amounts for criminal offenses punishable by up to three years in prison; 6) within the prescribed number of daily amounts for criminal acts for which a fine is prescribed as the only punishment.[22]

The reaction and answers of the proponents of the new changes

Amendments to the Criminal Code in certain circles of the population, both professional and non-professional, caused certain polemics.

In this sense, the position of the Ministry of Justice will be indicated. The upcoming amendments are not intended to limit human rights and freedoms guaranteed by the Constitution and international treaties, such as freedom of assembly, freedom of thought and expression, freedom of movement, etc. On the contrary, as it was emphasized in the explanation of the amendments, due to the increase in crime in certain areas, as well as the development of new technologies, new criminal acts have been prescribed, which send a clear message about the need to more effectively suppress such forms of behavior. At the end of the position of the mentioned ministry, it is especially emphasized that the European Commission, to which the Draft Law on Amendments to the Criminal Code was submitted for opinion, as well as experts and all interested public during the public hearing, will express their opinion on the amendments.[23]

Discussion and conclusion

This research aims to indicate the development of criminal law through the legal history of Serbia in a concise sense, with special reference to the actual circumstances that can be seen through the Proposal of the Law on Amendments to the Criminal Code of the Republic of Serbia.

The development of criminal legislation was accompanied by the development, creation and disappearance of states starting from the Middle Ages and up to the present day. With that in mind, there was a complex process marked by changes, adjustments and challenges that arose due to social and political developments. Each change and amendment, or the adoption of a new criminal code, was intended to show the efforts of the authorities to ensure legal stability. In recent decades, there has been a visible trend towards modernization and harmonization with European standards.

The proposed changes and additions that were processed in the paper were created with the aim of improving the system of criminal sanctions because challenges such as the rare application of suspended sentences and the small share of fines in the total sanctions are present. The idea is to enable a more efficient and adequate response to modern criminal challenges.

When it comes to an act of minor importance, although at first glance it seems that this institute is applied to a greater degree due to the indication that "the degree of guilt is not high" in contrast to the previous wording, "the degree of guilt of the perpetrator is low", bearing in mind that mentioned can be applied according to the proposal only for acts for which a fine or a prison sentence of up to three years is threatened, we come to a situation where instead of affirming this institution, it becomes more rigorous, and the position that when a penalty of five years is threatened cannot be considered that the act is of minor importance, through this perception, the question can be raised as to whether the act of minor importance is the act for which the prison sentence is prescribed.

When it comes to parole, certain terminological phrases have been replaced, such as the circumstances surrounding disciplinary punishment have been simplified. The text of the amendment which now "shows that the purpose of punishment has been achieved" and the proposed text "indicate that the convicted person will not commit a new crime while on parole" opens the question of the scope and interpretation. The purpose of criminal sanctions is precisely in general and special prevention, and from this point of view, and especially through special prevention, parole is enabled precisely as a specific type of reward. In the proposal of the new text, one gets the impression that it is not important for the legislator whether this prevention has been achieved, but it is enough that only during the period of conditional release the perpetrator does not commit a new criminal offense. Although the second follows from the first formulation and is unnecessarily narrowed, it is not clear what the goal of changing this legal norm is.

When it comes to fines, the proposed changes are not explained in a clear way, so it remains unclear what the purpose and point of changing certain legal norms related to fines is.

At the very end, we will allow us to comment on one term and that is: "gender identity". Although we did not take this part of the amendment proposal into consideration in this research, we believe it is crucial to comment on it. The proposed amendment to Article 128 is as follows: "Who, because of national or ethnic affiliation, race or religion or because of the absence of such affiliation or because of differences in terms of political or other convictions, sex, sexual orientation, gender identity, language, education, social position, social origin, property status or some other personal characteristic, denies or restricts the rights of a person and a citizen established by the Constitution, laws or other regulations or general acts or confirmed international

treaties, or gives him privileges or benefits based on this difference, shall be punished by imprisonment for up to three years. If the offense is committed by an official in the performance of his duties, he shall be punished by imprisonment from three months to five years." There is no clear need to indicate the mentioned and underlined topic because it is still about physical and biological people who have guaranteed rights. The perception of personal "gender identity" as a personal matter should by no means be viewed in opposition to the principles of criminal legislation as such in the broadest sense.

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