MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGICAL DEVELOPMENT OF THE REPUBLIC OF SERBIA

ARCHIBALD REISS DAYS

University of Criminal Investigation and Police Studies

INTERNATIONAL SCIENTIFIC CONFERENCE

"ARCHIBALD REISS DAYS"

Belgrade, 18-19 November 2020

THEMATIC CONFERENCE PROCEEDINGS OF INTERNATIONAL SIGNIFICANCE

University of Criminal Investigation and Police Studies
Belgrade, 2020

Publisher

UNIVERSITY OF CRIMINAL INVESTIGATION AND POLICE STUDIES

Belgrade, 196 Cara Dušana Street (Zemun)

THE CONFERENCE AND THE PUBLISHING OF PROCEEDINGS WERE SUPPORTED BY THE MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGICAL DEVELOPMENT OF THE REPUBLIC OF SERBIA

ISBN 978-86-7020-453-9
ISBN 978-86-7020-190-3

HONORARY COMMITTEE

Dane Subošić, PhD, Rector of the University of Criminal Investigation and Police Studies, Belgrade, **President**
Zoran Mirković, LLD, Dean of the Faculty of Law, University of Belgrade
Lieutenant General **Goran Radovanović**, PhD, Rector of the University of Defence, Belgrade
Commissioner **Cao Shiquan**, PhD, President of the People's Public Security University Of China, Beijing
Hao Hongkui, PhD, President of the National Police University of China, Shenyang
Lieutenant-General of Police **Igor Alexandrovich Kalinichenko**, PhD, Head of the Moscow University of the Ministry of Internal Affairs of the Russian Federation named after V. Y. Kikot
Lieutenant-General of Police **Alexander Viktorovich Simonenko**, PhD, Head of the Krasnodar University of the Ministry of Internal Affairs of the Russian Federation
Major-General **Alexander Vladimirovich Travnikov**, PhD, Head of the St. Petersburg University of the Ministry of Internal Affairs of the Russian Federation
Major-General **Vladimir Ivanovich Tretyakov**, PhD, Chief of the Volgograd Academy of the Ministry of Internal Affairs of the Russian Federation
Police Colonel **Roman Blahuta**, PhD, Rector of the Lviv State University of Internal Affairs, Ukraine
Major-general of the Militia **Sergey Doroshko**, PhD, Head of the Academy of the Ministry of Internal Affairs of the Republic of Belarus
Olivier Ribaux, PhD, Director of the School of Criminal Justice, Faculty of Law, Criminal Justice and Public Administration, University of Laussane, Switzerland
José García Molina, PhD, Director of the National Police Academy, Ávila, Spain
Iwona Klonowska, PhD, Commandant-Rector of the Police Academy, Szczytno, Poland
Lucia Kurilovská, PhD, Rector of the Academy of the Police Force, Bratislava, Slovakia
Yilmaz Çolak, PhD, President of the Turkish National Police Academy, Ankara
Stoica Veronica, PhD, Rector of the Police Academy "Alexandru Ioan Cuza", Bucharest, Romania
Dinu Ostavciuc, PhD, Rector of the Academy "Stefan cel Mare", Ministry of the Interior of the Republic of Moldova, Kishinev
Zoltán Rajnai, PhD, Dean of the Donát Bánki Faculty of Mechanical and Safety Engineering, Óbuda University, Budapest, Hungary
Andrej Sotlar, PhD, Dean of the Faculty of Criminal Justice and Security, Ljubljana, Slovenia

PROGRAMME COMMITTEE

Stevo Jaćimovski, PhD, University of Criminal Investigation and Police Studies, Belgrade, **President**
Goran Vučković, PhD, University of Criminal Investigation and Police Studies, Belgrade
Sreten Jugović, PhD, University of Criminal Investigation and Police Studies, Belgrade
Saša Mijalković, PhD, University of Criminal Investigation and Police Studies, Belgrade
Radovan Radovanović, PhD, University of Criminal Investigation and Police Studies, Belgrade
Dušan Joksimović, PhD, University of Criminal Investigation and Police Studies, Belgrade
Zoran Đurđević, PhD, University of Criminal Investigation and Police Studies, Belgrade
Norbert Leitner, PhD, Association of European Police Colleges
Predrag Ćeranić, PhD, Faculty of Security Science, University of Banja Luka, Republic of Srpska, BiH
Nikola Dujovski, PhD, Faculty of Security, Skopje, "St. Kliment Ohridski" University, Bitola, North Macedonia

ORGANIZING COMMITTEE

Darko Simović, PhD, University of Criminal Investigation and Police Studies, Belgrade, **President**
Dragan Mlađan, PhD, University of Criminal Investigation and Police Studies, Belgrade
Nenad Radović, PhD, University of Criminal Investigation and Police Studies, Belgrade
Petar Čisar, PhD, University of Criminal Investigation and Police Studies, Belgrade
Nenad Koropanovski, PhD, University of Criminal Investigation and Police Studies, Belgrade
Ana Branković, PhD, University of Criminal Investigation and Police Studies, Belgrade
Zorica Vukašinović Radojičić, PhD, University of Criminal Investigation and Police Studies, Belgrade
Ivana Bodrožić, PhD, University of Criminal Investigation and Police Studies, Belgrade
Božidar Otašević, PhD, University of Criminal Investigation and Police Studies, Belgrade, **President**
Miladin Nešić. PhD, University of Criminal Investigation and Police Studies, Belgrade
Dragoslava Mićović, PhD, University of Criminal Investigation and Police Studies, Belgrade

TABLE OF CONTENTS

Topic I
CRIMINALISTIC AND CRIMINAL JUSTICE ASPECTS IN SOLVING AND PROVING OF CRIMINAL OFFENCES

Topic VII
INNOVATIVE TECHNIQUES AND EQUIPMENT IN FORENSIC ENGINEERING

Topic VIII
EFFECTS OF PHYSICAL ACTIVITY ON ANTHROPOLOGICAL STATUS IN SECURITY AGENCY PERSONNEL

TWO DECADES OF CRIMINAL JUSTICE REFORMS IN THE FIELD OF COMBATTING ILLEGAL DRUGS

Dragana Kolarić, PhD
University of Criminal Investigation and Police Studies, Belgrade, Serbia;
Constitutional Court of the Republic of Serbia

Saša Marković, PhD[1]
University of Criminal Investigation and Police Studies, Belgrade, Serbia

Abstract: Since the beginning of the 21st century more intensive efforts of the Serbian legislator have been observed which are directed at more efficient combatting illegal drugs abuse. The abuse of drugs and psychotropic substances is the problem which exists all around the world. Open borders allow easier movement of people and capital, but they also lead to appearance of new security threats. Legislative activities increase within the new environment, numerous international instruments are adopted, which among other things, imply progressive path of the EU legislation. When adopting and shaping a new legal text the legislators cannot anticipate all the future problems or foresee new manifesting forms of crime. When combatting illegal drug abuse, in principle, we are not talking about new manifesting forms of crime since they have been present since ancient times, but on the other hand the problems have originated in application of these provisions. Therefore, it is clear that we recognize the main reasons for amendments in difficulties in application of these norms in court practice. This, as the authors observe, brings into question normative shaping and drafting by the legislator. Chronologically observing the amendments to criminal legislation, we can see almost two decades of seeking for new adequate solutions in this field. The authors analyse these amendments and additions with special accent on the *Law on amendments and additions to the Criminal Code of 2019* and attempt to find the answer to the question if the present state of the provisions, primarily Articles 246 and 246a, is acceptable, if the problems identified in court practice have been overcome or at least reduced. In the corresponding parts of the paper the authors refer to the current directions of development of the fight against drug abuse in other countries. At the end of the paper, as expected, there are suggestions *de lege ferenda*, as well as the authors' observations related to difficulties and obstacles on the path to drug abuse suppression.

Key words: Criminal Code, suppression, drugs, manufacturing and putting into circulation, unlawful possession, small quantity, personal use, big quantity

1 sasa.markovic@kpu.edu.rs

INTRODUCTORY REMARKS

The subject of the paper is general review of numerous reforms in the field of substantive criminal law which have occurred within our legislation in the last two decades and in particular criminal offences related to drug abuse. It is our goal to determine if there have been reasons which suggest that it is necessary to re-examine drug related criminal offences, as well as in which direction this should go? Were the provisions which had existed prior to 2009 amendments simpler to apply? Namely, there had been a form of summary offence according to Art. 246, which included the possession of drugs even when not intended for sale, which incriminated possession for personal use as well.

That paragraph 3 of Article 246 has not changed by adoption of the new Criminal Code in 2006, i.e. it was kept in the identical form as in the Law on Amendments and Additions to the Criminal Code (LAACC) of 2003 (whoever has in their possession for their own personal use a smaller quantity of a substance or preparation which has been declared a narcotic drug). In the Law on Amendments and Additions to the Criminal Code of 2009, the introduction of the elements "a smaller quantity and for their own personal use" into the subject matter of offence (Article 246a) only created certain dilemmas and resulted in uneven conduct in court practice. Today when we have a new paragraph 2 of Article 246a, which refers to illegal possession of a big quantity of a substance or preparation which has been declared a narcotic drug, has the problem been overcome or, on the contrary, a number of questions has arisen? The suggestions could be heard in court practice that it would be best to return to the period prior to 2003, when the form of summary offence from paragraph 3 of Article 246 had not yet been introduced. For such a step a political willingness should exist as well as the awareness of the members of social community that fight against illegal use and abuse of narcotic drugs cannot be achieved in a way in which the legislator acted with almost the entire Law on Amendments and Additions to the Criminal Code of 2009, considering the citizens as "the enemy that should be neutralized" (Kolarić, 2016: 32).

In this part of the paper the authors point to some negative tendencies which refer to the criminal law science as a whole. In the next part we give the review of numerous amendments and additions which cover the narcotic drugs related offences in the last two decades. Finally, in the concluding remarks the attitude is taken on individual solutions and the concrete suggestions *de lege ferenda* are given.

Some negative tendencies in criminal law science which we recognize in the last period include using criminal law for populist purposes (it is relatively easy to manipulate the public, since it is sensitive to serious crimes and therefore always ready to accept the strictest penalties) and accordingly the strengthening of criminal-law repression. Strengthening of criminal-law repression reflects in both tightening of penal policy as well as in criminal-law expansionism (numerous new incriminations, new criminal offences). All these eventually result in certain derogations from the basic principles of the criminal law.

The amendments in the General Part most often are not the expression of a necessity since in the contemporary criminal legislation we seldom come across justified reasons for its amendments except when it comes to quite a small number of provisions (system of criminal sanctions). Amendments in the Special Part are much more frequent even in the countries that are known for their stable criminal legislation. Except for the amendments in manifesting forms of crime, the additional reason for them is also harmonization with international sources. What is the least desirable are the amendments related to the reasons of socio-political character, when social climate leads to penal populism.

These are the main reasons for amendments, and the main shortcomings of the frequent amendments, which we observe in the majority of criminal legislations, will be presented further in the text.

First of all, this is duplication of incriminations which is the result of uncritical ratification of international treaties which are approached, most often, without any reserves (Kolarić, 2019: 15).

Second, the next shortcoming of frequent amendments is setting of criminal zone too wide using general formulations, such as, for instance, the criminal offence of stalking (Kolarić, 2019: 15).

Third, tightening of penal policy by the legislator is particularly emphasized (the reasons most often are not founded on criminal policy). In Serbia in the last several amendments and additions there is expressed and intensified criminal-law repression. According to one comparative-law analysis, the Criminal Code of Serbia according to the prescribed penalties is classified into criminal codes which exceed the usual degree of repression characteristic for any criminal legislation (Stojanović, 2020: 5).

These are the reasons why it is important who shapes legal norms, i.e. who participates in the commission working on amendments and additions to the Criminal Code, since derogations from the basic principles of criminal law will be minimal if the most eminent representatives of criminal-law theory and practice participate in it.

We shall agree that it is legitimate for all stakeholders to send their proposals for amendments, however there should be a triage, i.e. those proposals which are purposeful and correspond to social reality the commission will take into account with appropriate explanation, of course.

Abuse of narcotic drugs and psychotropic substances is the problem which exists all over the world. On our continent the problem assumes new dimensions with establishing and development of the EU integration processes. Open borders allow easier movement of people and capital, but lead to emergence of new security threats. The globalization process at European soil has had double negative effects. The first are objective in nature and are linked with the fact that one currency and open borders result in increasingly bigger possibilities of abuse, including the area of narcotic drugs abuse. On the other hand, there is often the use of criminal law which ceases to be subsidiary in character and is returned to be *prima ratio* of social policy, a kind of illusory panacea which wants to oppose and with which quite versatile problems are to be solved (Moccia, 2013, cited according to Stojanović, Kolarić 2015: 116).

In the new environment legislative activity is increasing, many international instruments are adopted which, among other things, imply progressive path of the EU law. The most important convention in this field is the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, adopted in Vienna in 1988 (Law on Ratification of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Gazette of the SFRY – international agreements, 1990). Article 3 of the Convention is particularly significant, that provides for certain activities which should be incriminated. The *Single Convention on Narcotic Drugs* of 1961 is also important for this field, which was ratified in 1964 (Law on Ratification of the Single Convention on Narcotic Drugs, Official Gazette of the SFRY, 1964), as well as the *Convention on Psychotropic Substances* of 1971 (Law on Ratification of the Convention on Psychotropic Substances, Official Gazette of the SFRY, 1973).

It is important here to mention the *Council Framework Decision 2004/757/JHA* of October 25, 2004, the provisions of which influenced the amendments and additions to the Criminal Code of 2019. It is interesting to us since it does not provide for the obligation or recommendation to incriminate possession of narcotic drugs for one's personal use, which has not changed the attitude of our legislator, but influenced the law-maker, as we shall see later on in the part of provisions prescribing new serious forms of crime.

There is no doubt that these sources influenced the national criminal legislation. Let us see at what point in time and in which way.

AMENDMENTS AND ADDITIONS TO CRIMINAL LEGISLATION IN THE FIELD OF SUPPRESSION OF NARCOTIC DRUGS

When adopting and shaping a new legal text, the legislation cannot anticipate all future problems and predict new manifesting forms of crime. When suppressing the abuse of narcotic drugs, in principle, there are no new manifesting forms of crime as they have been known since ancient times, but there are new problems in application of these provisions. Therefore, the main reasons for amendments can be recognized in difficulties related to the application of the norms in court practice. This brings into question normative shaping and nomothetic of the legislator.

In brief, the Criminal Code of the SFRY of 1976 systematized these crimes into two articles: unauthorized production and sale of narcotics (Article 245) and enabling someone to enjoy intoxicating drugs (Article 246). The basic form of the criminal offence of unauthorized production and sale of narcotics is committed by whoever without authority manufactures, processes, sells or offers for sale, or purchases, keeps or transfers for sale, or intercedes in a sale or purchase, or otherwise puts into circulation substances or preparations which are declared intoxicating drugs or psychotropic substances (paragraph 1). More serious form exists if any offence described under paragraph 1 of this article is committed by several persons who joined for the purpose of committing the offence, or if the perpetrator of the act organized a network of middlemen or re-sellers (paragraph 2). The Law on Amendments and Additions to the Criminal Code of the SFRY of 1990, prescribed a new form which was committed by "whoever without authority manufactures, buys, possesses or lends for use the equipment, material or substances for which he is aware that they are intended for manufacturing of narcotics" (Law on Amendments and Additions to the Criminal Code of the SFRY, Official Gazette of the SFRY, 1990).

Since 2003 we have observed more intensified efforts of the legislator through frequent amendments directed at more efficient suppression of abuse of narcotic drugs. But has it been achieved? Namely, the Law on Amendments and Additions to the Criminal Code of the FRY of 2003 (Law on Amendments and Additions to the Criminal Code of the FRY of 2003, Official Gazette of the Republic of Serbia, 2003) for the first time incriminates possession of a narcotic drug even when it is not intended for selling, or putting into circulation in some other way, which incriminates the possession for one's personal use (whoever possesses substances or preparations declared as narcotic drugs – paragraph 3, Article 245).[2] These are the reasons why the title of the crime is changed to unauthorized production, possession and putting into circulation of narcotic drugs. Despite the best intentions of the legislator, this form caused certain dilemmas. Namely, the commitment of this crime included every unauthorized possession of a substance or preparation which is declared as narcotic drug, unless in case the drug is possessed for selling. On the one hand, this form included even the possession of drugs for one's personal use, and thus incriminated drug use, while on the other hand, this form was used even when it referred to serious dealers in narcotic drugs, i.e. when it referred to a part of Article 246, paragraph 1, but due to the problems in proving intent to keep drugs in order to sell them the act was qualified as summary offence. This actually was the main reason to introduce this form at that time (Stojanović, 2018: 816). It included considerably more lenient penalty, i.e. a fine or imprisonment up to three years. Paragraph 1 and 2 remained unchanged in 2003 amendments in the part of enacting clauses

2 For this form possession must have been for personal use, since otherwise it would constitute some other form of criminal offence from paragraph 1 Article 246. Also, the criminal act of unauthorized possession of narcotic drugs is consumed by the criminal act of unlawful circulation of narcotic drugs from Article 246 paragraph 1, since circulation of a drug cannot be done without having it at the same time, so the accused cannot be pronounced guilty for both paragraph 3 and paragraph 1 of Article 246 (*Ruling of the Supreme Court of Serbia KŽ. 843/06 dated May 13, 2006).*

but the part regarding the penalties included much stricter penalties. For paragraph 1, the imprisonment is at least five years, while for paragraph 2 the imprisonment is at least seven years. Former paragraph 3 became paragraph 4 and it included six months to five years imprisonment (whoever without authority manufactures, buys, possesses or lends for use the equipment, material or substances for which he is aware that they are intended for manufacturing of narcotics).

When the Criminal Code of Serbia came into force the crimes related to abuse of narcotic drugs were systematized into the group of crimes against human health. Criminal offence of unlawful production, possession and circulation of narcotic drugs found its place in the new legislation in Article 246, while the facilitating of taking the narcotics is regulated by Article 247. The basic form of the criminal offence of unlawful production, possession and circulation of Narcotics (paragraph 1), as well as more severe (paragraph 2) and summary forms (paragraph 3) were not amended, but in accordance with the then general orientation which was in line with weakening of criminal-law repression (Kolarić, 2019: 23), the legislator provided for more lenient penalties. New paragraphs 4 and 5 were added, i.e. the possibility was provided to remit from punishment the perpetrator from paragraph 3 if he possessed the narcotics for personal use, and also, there was a novelty that the offender specified in paragraphs 1 through 3 of this Article who discloses from whom he obtained narcotics may be remitted from punishment.

The problems that we mentioned related to application of Article 246, and which will be discussed later in more detail, the legislator tried to solve by the Law on Amendments and Additions to the Criminal Code of 2009 (Law on Amendments and Additions to the Criminal Code of 2009, Official Gazette of the RS, 2009) by deleting the summary form of criminal offence contained in paragraph 3 of Article 246 and by introducing the new independent criminal offence of illegal possession of narcotic drugs (Article 246a). This, however, and particularly in the beginning of application, resulted in wandering of court practice and wrong decisions in the sense that there was a complete decriminalization of possession of narcotic drugs. After the intervention of the Supreme Court of Cassation (Decisions Kzz. 133/10 and Kzz. 153/10) the court practice accepted that this was not complete decriminalization but only narrowing of the criminal offence zone. The Law on Amendments and Additions to the Criminal Code of 2009 incriminates illegal possession of narcotic drugs as a criminal offence, but not every illegal possession of narcotic drugs as was the case with criminal offence contained in Article 246 paragraph 3 of the Criminal Code, but only the possession for one's personal use and in a small quantity. Beyond that illegal possession of narcotic drugs for any other reason was not a criminal offence, so in that sense the new criminal code was much more lenient than the previous one (Stojanović, Kolarić, 2020: 156).

And finally, the Law on Amendments and Additions to the Criminal Code of 2019 (Law on Amendments and Additions to the Criminal Code of 2019, Official Gazette of RS, 2019) introduces a new form of criminal offence from Article 246a, which consists of illegal possession of a large quantity of substances or preparations which are declared as narcotic drugs (paragraph 2). In court practice there have occurred many arguable situations and the new form is aimed at unification of this, as stated in the explanation of the proposal of the Code. Also, the result of 2019 amendments is harmonization with the EU *Council Framework Decision 2004/757/JHA* of 25 October 2004, so the new qualified forms are prescribed which exist if anyone sells, offers for selling or without any compensation gives for circulation narcotic drugs to a minor, mentally ill person, temporarily mentally disturbed person, mentally challenged person or a person treated for addiction to narcotic drugs or puts into circulation narcotic drugs mixed with a substance which can result in serious harm to health, or whoever commits act from paragraph 1 of this Article in an educational institution or in its vicinity or institution for the execution of criminal sanctions or in a public bar or at a public event, or if the acts from paragraphs 1 and 2 of this Article are committed by a public official, a doctor, a social worker, a priest or a person who works at an educational institution by using its office or whoever uses a minor to commit this crime.

(UN)JUSTIFIED AMENDMENTS OF CRIMINAL OFFENCES RELATED TO NARCOTIC DRUGS IN THE LAW ON AMENDMENTS AND ADDITIONS TO THE CRIMINAL CODE OF 2019

The majority of amendments in the Law on Amendments and Additions to the Criminal Code which the National Assembly of the Republic of Serbia adopted on May 21, 2019, is bordering on strengthening criminal-law repression (life imprisonment, multiple recidivism, expanding prohibition of penal mitigation, stricter conditions of suspended sentence, preparation of murder, assault on a lawyer, stricter penal policy through prescribed penalties...), which is the result of general social-political climate and the cloud we could call penal populism.

Here we shall discuss the novelties related to narcotic drugs related criminal offences. Some of the novelties are the result of harmonization with the international sources (introduction of new qualified forms), while some amendments, as pointed out in the explanation are aimed at solving the problems of uneven court practice.

For criminal offence of illegal production and circulation of narcotic drugs the act of perpetrating is determined alternatively and can consist of production, processing, selling or offering for selling narcotic drugs, as well as buying, possession or transport with the purpose to sell of narcotic drugs. Possession in selling or buying, as well as any other illegal circulation of narcotic drugs is also incriminated. In any case, the offender must act in an unlawful manner, since production, processing and circulation of narcotic drugs for certain purposes are allowed (for instance, for medical, scientific and other purposes, which is regulated by law and other regulations). The concept of the majority of the said acts of perpetration is not disputable. In court practice the attitudes were taken for some acts which meant their specification.[3]

3 Thus, it is generally accepted that the *act of perpetration of selling a narcotic drug* is achieved by very agreement between the buyer and the seller, and therefore for the existence of this offence it is not necessary for the drug to be handed over to the buyer (see verdict of the Court of Appeal in Belgrade Kž.1 3480/11). In the same decision the attitude is taken that for *intermediation* as an act of perpetration it is not significant whether it was successful, i.e. if the selling or buying of a narcotic drug were completed. The court practice in particular dealt with determining *the notion of production and procession* of narcotic drugs. The court practice has had no doubts that planting and growing of Cannabis indica represents such a production if the obtained ripe plant contains active substance which is declared a narcotic drug (Supreme Court of Cassation Kž. 890/04). If during the growing of the plant such a stage was not reached, then the attempt would exist which, considering the penalty, would also be punishable. The production means any activity of a perpetrator by which substance with the characteristics of a narcotic drug can be obtained (Supreme Court of Cassation Kž.. 1517/05). However, it should bear in mind that now growing plants from which narcotic drugs are obtained is prescribed as summary offence, so the act of perpetration of production as in paragraph 1 is understood in a narrow sense and does not include sowing and nurturing of a plant until its biological ripening and completion of vegetation. The court practice accordingly has taken an attitude according to which it is necessary to differentiate between growing a plant from which narcotic drugs are obtained and the production of narcotic drug from the plant, which is the criterion to delimit between the basic form of offence as in paragraph 1 and less serious form as in paragraph 2 (see Decision of the High Court of Cassation Kzz. 130/10). It is a generally accepted attitude in court practice that it is irrelevant whether a narcotic drug is produced or processed for selling, or putting into circulation or for personal use (thus, Supreme Court of Cassation Kž. I 60/09). *Putting otherwise narcotic drugs into circulation* includes all manners used to make a narcotic drug available to another person, which are not explicitly stated in the legal description of the basic form of this criminal offence, and do not represent the act of giving narcotic drug to another person for use as in Article 247. It is predominant in court practice to understand the notion of putting into circulation widely. Thus, the Court of Appeal in Belgrade considers that this act includes not only

Having in mind several recent amendments, we shall stick to the act of possession of a narcotic drug with the intent to sell which is of particular importance in court practice. Possession is equitable title over a thing, in this case a narcotic drug, so it is of no significance whose the narcotic drug is. However, there is a problem here of delimiting with the summary offence from Article 246a, and it is even more serious problem of delimiting with the cases which are not covered by the criminal zone at all. Namely, we are talking about possession of a narcotic drug which is not intended for selling. Although this is a frequent excuse which is pointed out in defending the accused in order to avoid responsibility, it cannot be disputed that there exist such cases as well when a person is in possession of a drug not for selling but for some other reasons. These include possession for one's personal use (but not a smaller quantity, therefore linguistic interpretation does not provide ground for the existence of criminal offence from Article 246a), or, for instance, for giving another person to use it (which represents non-punishable preparatory act for criminal offence in Article 247). It would not be justified to start from the assumption that narcotic drugs which are not in smaller quantity are always kept with the intent to sell although such a trend can be discerned in our court practice. Thus, for instance, the Court of Appeals in Kragujevac states that the quantity over 54 g of marihuana and about 5 g of hashish, which have been found at the accused, were intended for selling and not for personal use. The quantity of narcotic drug can be just one of the circumstances (although an important one) to determine if the drug is intended for selling. In the said case, it is certain that the condition for the existence of the act from Article 246a that it was a smaller quantity of narcotic drugs was not fulfilled, but the stated quantity per se is still not enough to conclude that it was intended for selling.

Therefore, although the intent is not explicitly entered into the legal description, it is still necessary for some forms of act of perpetration. Namely, buying, possession and transport of narcotic drugs must be done with the intent to sell, which means that intent of the offender must exist to do this with the intent to sell. This subjective feature, as a rule, is determined indirectly through objective circumstances of the specific case. For instance, this is suggested by the quantity of drugs, their packaging, and so on. When determining if the drugs are intended for selling or personal use, the courts pay special attention to the circumstances if the accused is a drug addict, and if he has been treated. It is necessary for several such circumstances to indicate that the purpose of possession was selling. The quantity of drugs itself which was possessed would only in rare cases be sufficient for such a conclusion (if we are talking about big quantities of narcotic drugs). The Supreme Court of Serbia points out that regarding the possession of narcotic drugs for selling "the subjective characteristic of this act of perpetration is determined indirectly, through objective circumstances of a specific case, which is usually indicated by the quantity of narcotic drugs, their packing, the circumstance if the offender is also a consumer of narcotic drugs, as well as all other circumstances that can indicate the intent of the offender to engage in selling of narcotic drugs" (Supreme Court of Serbia Kž. I 811/08). The said attitude is acceptable in

---

borrowing and exchange for some other drug or goods, but also giving drug away (Court of Appeal in Belgrade Kž1 3480/11). However, regardless of the fact that a part of court practice advocates the attitude that even a present represents an act of putting into circulation, there are certain dilemmas to that effect, so this issue is controversial. Not only because of the problem of delimitation with the criminal offence as stated in Article 247, but the very notion of "putting into circulation" is related to trade as activity. If this notion is understood as it is usually understood in trade (including positive-legal regulations in this field), it does not include giving away goods free of charge, i.e. its giving as a present. However, there are still reasons here to determine this notion more widely so that it includes giving away the goods free of charge, i.e. giving it as a present. This is possible in exceptional cases, and depending on the circumstances of the concrete case even here the giving away of a narcotic drug could be understood as putting into circulation in the sense of the act of perpetration of this criminal offence. Related to this, *de lege ferenda*, in the description of numerous acts of perpetration the legislator should use the expression which undoubtedly includes the present, i.e. giving away narcotic drugs free of charge.

principle, whereas it is not necessary to determine the intent to "engage in selling", but it is sufficient that there exist intent for the concrete narcotic drug to be sold.

Until the Law on Amendments and Additions to the Criminal Code of 2019, observing some examples from court practice, it was clear that the condition for the existence of the act from Article 246a, that it was a smaller quantity of narcotic drugs for personal use, was not fulfilled. The court, therefore, had the possibility either to interpret[4] the notion of 'smaller quantity' extensively, which would lead to qualification according to Article 246a or to consider that there is no criminal offence (either 246 or 246a) since the stated quantity per se is still not sufficient to conclude that it is intended for selling (Marković, 2015: 224). This is why in 2019 the legislator decided to introduce a new form of criminal offence from Article 246a, which consists of unlawful possession in a large quantity of substances or preparations which are declared as narcotic drugs (Đorđević, Kolarić 2020: 154).

Further, when we are talking about the amendments, the Law on Amendments and Additions to the Criminal Code of Serbia from 2009 introduces a form of summary offence. Its act of perpetration is growing poppy or psychoactive cannabis or other plants from which narcotic drugs are obtained or which contain narcotic drugs themselves. The Law on Amendments and Additions to the Criminal Code of 2019 specifies this form of summary offense emphasizing that it should be the opium poppy.[5]

---

4 In Belgrade, on October 19, 2012, the accused bought 31 g of heroin and put it in his underwear for transport. During the search of his vehicle by the police 30.93 g of heroin was seized from him. Higher Court in Valjevo in the verdict K. No. 92/12 dated March 28, 2013, *convicted MM for committment of criminal offence according to Article 246a* and meted out conditional sentence. When reaching a sentence the court took the stand that 30,93 g of heroing found at the person in a vehicle represented a smaller quantity intended for personal use (because it was not packed in several PVC bags but only one and the accused according to his own statement consumed up to 2 g of heroin a day, so from his subjective aspect this could be considered a smaller quantity). Higher Public Prosecutor's Office lodged an appeal on the first degree sentence, but the Court of Appeal in Belgrade confirmed the first degree sentence (Kž.1 2821/13 dated May 27, 2013). Similarly, in the next example, the police found 357.55 g of marihuana, manufactured from 17 trees of Canabis indica which was grown in the household and five PVC begs to the total net mass of 253.72 g of marihuana, which according to the statement of the accused he bought from an unknown person. During the main hearing the accused defended that the marihuan found there was for his personal use (611 g) and that he uses 20-30 g making tea from it, which he consumes during the day. By the verdict of the Higher Court in Valjevo K. No. 39/121 dated May 27, 2013, PP was convicted for criminal offence according to Article 246, paragraph 2 of the Criminal Code concurring with criminal offence of illegal possession of a narcotic drug according to Article 246a of the Criminal Code and sentenced him to unified imprisonment of one year and three months. In the explanation of the verdict it is said that the Higher Public Prosecutor's Office did not suggest to the Court or offer any evidence that the accused intended to sell the narcotic drug seized from him. The intent in any criminal offense, even the intent to sell narcotic drugs is legal institute and it must not be assumed, but must be proven undoubtedly during the procedure. The Court presented the opinion that if the intent is to be assumed then the presumtion of innocense would be violated of the person against whom the procedure is led, which would then violate one of the basic principles on which contemporary criminal procedure is founded. The Court supported their opinion also with the data obtained from the procedure that the accused used 20/30 g of marihuna which he boiled for tea, and considering his long-lasting addiction, it is realistic that the quantity of marihuana found with him could be used for personal needs.

5 Growing must be illegal. When and under which conditions it is allowed is prescribed by the Law on Psychoactive Controlled Substances. After the growing stage, as a rule, there is a stage of production or processing, so if it comes to it, this offence does not have a character of a summary offence since it will be the offence in its basic form as stated in paragraph 1. As with production, here it is also irrelevant if growing is for selling of narcotic drugs, or its circulation, or for personal use.

In order to harmonize with the EU Framework Decision there are new qualified forms prescribed (paragraph 4) which exist if someone is selling, offering to sell or without compensation gives narcotic drugs for further circulation to a minor, mentally ill person, temporarily mentally disturbed person, a person who is seriously mentally challenged or a person treated for drug addiction, if narcotic drug is circulated mixed with a substance that can result in severe harm to health, or whoever commits the act from paragraph 1 of this article in the educational institution or in its vicinity or in the institution for the execution of penal sanctions or in a public bar or at a public event, or if the act from paragraphs 1 and 2 of this article is committed by a public official, a doctor, a social worker, a priest or a person employed in educational institution, using their office or whoever uses a minor to commit such an offense.

Another novelty of the Law on Amendments and Additions to the Criminal Code of 2019 deserves attention. Namely, regarding the basic form of this criminal offense (paragraph 1), as well as more severe form from paragraph 3, the Law on Amendments and Additions to the Criminal Code of Serbia from 2009 introduced a prohibition to mitigate penalties (Article 57, paragraph 2). This prohibition did not refer to the most severe form from paragraph 4, i.e. it was possible to mitigate penalty if the offence was committed by an organised criminal group, but not if it was committed by a group. Namely, in 2009 there were amendments by which new provisions were added (Article 57, paragraph 2), according to which the penalty may not be mitigated for certain criminal offences such as: abduction (Articles 134 paragraphs 2 and 3), rape (Article 178), sexual intercourse with a helpless person (Article 179), sexual intercourse with a child (Article 180), extortion (Article 214 paragraph 2 and 3), unlawful production and circulation of narcotics (Article 246 paragraphs 1 and 3), illegal crossing of state border and human trafficking (Article 350 paragraphs 3 and 4) and human trafficking (Article 388). In this way the mitigation of penalty ceased to be a general institute in the Serbian criminal law, because since then it has not been applied for all but only for some (although far larger number of) criminal offences (Delić, 2010: 238). This provision opened a series of dilemmas, because its true purpose cannot be seen. Penalty mitigation is always optional, so this was the case with these criminal offences as well. This has only taken away one possibility to the court and nothing was gained in the field of penalty meting out (Đorđević, 2010: 169). The Law on Amendments and Additions to the Criminal Code of 2019 amended paragraph 3 of Article 56 (mitigation of penalty by the court), in such a way that it expands the circle of criminal offences for which penalty mitigation is prohibited, which removes what was observed as illogical in earlier solution, but on the other hand the reserves towards this prohibition still exist. The expansion occurred since some serious criminal offences, such as aggravated murder, were left out from Article 57, paragraph 2. Also, the same case was with Article 246, paragraph 4 (it is now prohibited to mitigate penalty even if the act from Article 246 was committed by the organized criminal group).

As for the criminal offence of illegal possession of narcotic drugs, the new paragraph 2 was added. Namely, until now the penalty applied on whoever unlawfully possessed a smaller quantity even for the personal use of substances or preparations which are declared as narcotic drugs (paragraph 1). According to the Law on Amendments and Additions to the Criminal Code of 2019 whoever possesses a large quantity of substances or preparations which are declared as narcotic drugs will also be punished (paragraph 2).

Uneven conduct in court practice and the problems in proving intent to sell as provided by Article 246 have obviously resulted in many bad legal solutions in the field of substantive law. Starting from these problems, in 2009 the legislator attempted to solve them by eliminating a form of summary offence from Article 246, paragraph 3, and by introducing a new criminal offence of illegal possession of narcotic drugs (Article 246a). Unlike the previous form of this criminal offence, which read “whoever has in their possession a substance or preparation which has been declared a narcotic drug”, now

Article 246a reads "whoever has in their possession for their own personal use a smaller quantity of a substance or preparation which has been declared a narcotic drug". Therefore, for the act stated in paragraph 1 to exist, it is necessary, among other things, that two cumulative conditions are fulfilled: a smaller quantity and for personal use.

The act of perpetration is possession of narcotic drugs. For paragraph 1 it is necessary to have in possession a smaller quantity of a narcotic drug (objective condition) and for personal use (subjective condition). If one of the two conditions is fulfilled, there would be no criminal offence. In that case there could be an offence from Article 246 or no offence at all. This is why the legislator decides to have a separate paragraph which incriminates when a person has in possession a large quantity of a substance or preparation which is declared as a narcotic drug. There was a particularly debatable situation in practice when the characteristics of offence as stated in Article 246, paragraph 1 do not exist, and it is not a smaller quantity of narcotic drug meant for personal use. In such a situation the notion of smaller quantity was either interpreted extensively, which led to the qualification according to Article 246a, or it was considered that there was not a criminal offence (either 246 or 246a). Of course, there were situations in court practice where the opinion was that the very fact that a person had in possession a larger quantity of narcotic drugs suggested that it was possessed for further circulation, which is the significant circumstantial evidence but must not be the only one (Stojanović, 2019: 46). By introducing a new form there appeared a new danger, which was that all cases of possession of narcotic drugs in a larger quantity were qualified according to Article 246a and that in that way determination of important characteristics of the act from Article 246 were neglected (it did not have to establish why a person had a narcotic drug in possession and in addition to this there was not a penalty mitigation). Of course, it was left to court practice to do the fine polishing of this provision as well and to specify the notion of "larger quantity" (Stojanović, 2019: 46). Therefore, when it comes to the act of perpetration in terms of paragraph 2, it should be possession of a large quantity of narcotic drugs.

As for the question what the smaller quantity of narcotic drug is, there are some criteria set in the court practice. One of the criteria is how much certain drug is required by an average drug consumer for several days. As a rule, in specific cases where this criminal offence was applied, these include insignificant quantities, for up to several grams if it is marihuana for instance. It deserves to mention the Obligatory guidelines of the Republican Public Prosecutor A. No. 478-10 dated February 24, 2011, in which it is stated that there is justification to apply the principle of opportunity in order to postpone criminal prosecution in terms of Article 236 of the Law on Criminal Procedure for the criminal offence from Article 246a in cases of possession of narcotic drug marihuana in the quantity up to 5 grams taking into account all other circumstances which are evaluated for any other criminal offence. Still, in some cases the courts considered that this condition was fulfilled even if there were quite small quantities. Thus the Basic Court in Čačak (K. No. 1344/10), as well as the Court of Appeal in Kragujevac (Kž1 No. 5003/10) were of the opinion that "narcotic drug marihuana in the total net quantity of 15.25 grams represents a smaller quantity of a narcotic drug in terms of objective element of criminal offence of illegal possession of narcotic drugs according to Article 246a, paragraph 1 of the Criminal Code". At the end of this part we would point out that paragraph 2 of the criminal offence of facilitating the taking of narcotics was amended in the Law on Amendments and Additions to the Criminal Code of 2019. More severe form from paragraph 2 exists now if the offence specified in paragraph 1 was committed regarding a minor (person below 18 years of age), a mentally ill person, a temporarily mentally disturbed person, a person who is seriously mentally challenged or a person treated for drug addiction or several persons (at least two), or if the offence is committed in the educational institution or in its vicinity or in the institution for the execution of penal sanctions or in a public bar or at a public event, or if this offence is committed by a public official, a doctor, a social worker, a priest or a person employed in the educational institution, by using their position.

CONCLUDING REMARKS

Therefore, in an attempt to combat illegal circulation of narcotic drugs the states, depending on the approach, are more or less successful. As much as it is surprising, more liberal approach to possession of so called "soft drugs" for personal use, primarily cannabis, as well as free selling of them have influence on the reduction of the marihuana user rate, reduction of the HIV infected rate and what is the most important the reduction of illegal drug trafficking (Ćirić, 2014: 543). Such an attitude is not shared by all European states and the various approaches often cause conflicts among the EU member states, since some of them consider their neighbours' policy on combatting narcotic drugs as negative influence (Anderson, 2012: 3).

Various models of legislator's response can be observed.[6] The most avant-garde one is of course the model of Holland, which is known for its tolerance of cannabis trade in well-known coffee shops, but in the meantime it limited "drug tourism" by the quantity of cannabis that can be sold by coffee shops (Anderson, 2012: 3). Namely, according to the Holland's regulations cannabis can be sold to adults, freely, based on special licenses issued by the state institutions according to which the shops are classified as coffee shops. Such behaviour does not contain threat by penalty if the following conditions have been fulfilled: it must not sell more than five grams of cannabis per person in one transaction; it must not sell hard drugs; narcotic drugs must not be advertised; coffee shops must not make noise and inconvenience; the municipality did not order the coffee shop to close and there must not be more than 500 g altogether for selling (Wade, 2009: 156). Uruguay has also taken the path of decriminalization. In this country marihuana is legal, i.e. everyone can buy up to 40 g a month (Ćirić, 2014: 543).

In 2001, Portugal changed its attitude towards combatting narcotic drug abuse, starting from the assumption that the persons who are found in possession of a small quantity of narcotic drugs are sick people who should be offered the corresponding medical treatment. The Portuguese model can be called "partial decriminalization" unlike Holland and Uruguay (Wade, 2009: 156). Namely, in Portugal, the citizens found in possession of 10 daily doses were tried before special administrative tribunal (a kind of magistrate's court) where they were delivered a special measure, for instance, commitment in the institution for treatment of addiction together with the measures of voluntary work in the public interest (Ćirić, 2014: 548).

Some countries made classifications of narcotic drugs and prescribed penalties according to their respective kind.[7] Also, in the last ten years amendments in the area of penalties have been observed particularly regarding the possession of small quantity of narcotic drugs for personal use. Thus Belgium has considerably reduced the penalties (in Belgium possession of a small quantity of cannabis for personal use was originally punished by imprisonment of at least five years, now it is punished by a fine).[8]

---

6 Countries in Europe, as well as other developed countries worldwide must deal with the problem of drug abuse. Pointing out how much the narcotic drug abuse can endanger public health and lead to rise in criminal offences related to illegal production and circulation of narcotic drugs, the EU member states have helped establish the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA). The Centre keeps detailed information on drug use and legal means of response in European countries.

7 For instance, in Romania the law of 2004 differentiates between highly risky and risky substances. The penalty for the former is imprisonment from two to five years, and for the latter from six months to two years. See: *Annual report on the State of the drugs problem in Europe, European Monitoring Centre for Drugs and Drug Addiction*, 2011. See: http://www.emcdda.europa.eu/online/annual-report/2011/policies-law/5 Retrieved on December 1, 2014

8 *Ibidem.*

As far as our country is concerned, it is difficult to expect the change in orientation of the legislator in the near future and the special treatment of persons who are drug users. They are criminal offenders and can possibly count on the application of the measure of mandatory treatment of drug addicts. Through the insight in some cases we have determined that there is a huge recidivism of these offences. This is mostly special recidivism. These are the persons who in addition to criminal offences as stated in Articles 246 and 246a often commit property crimes, which is connected with their addiction to use narcotic drugs. These are, therefore, sick people. This is surely the main reason for different approaches of certain countries in suppression of these offences.

Frequent amendments of these provisions in the Criminal Code of Serbia, which consist of prescribing new forms of criminal offences, expansion of criminal zone or tightening of penalties, can yield positive results only if the state is ready to deal with this problem, but it also requires a multidisciplinary approach which implies including all competent government authorities and institutions. Also, it is not sufficient just to amend the provisions of the Criminal Code, the efficient application is also necessary. Good coordination is necessary between the prosecutor's office and the police, especially in gathering evidence, as well as to prevent prequalification of the offence stated in Article 246 paragraph 1 into the offence as stated in Article 246a. It is possible that the most recent amendments have opened the path even more to application of Article 246a, as we have already pointed out, since now all cases of possession of narcotic drugs in larger quantity can be qualified according to Article 246a and in that manner it is possible to neglect determining important features of the offence according to Article 246 (meaning that it is not necessary to determine why a person is in possession of a narcotic drug, and in addition to this there is no prohibition of penalty mitigation).

REFERENCES

1. Anderson, S. (2012). European Drug Policy: The Cases of Portugal, Germany and the Netherlands. EIU Political Science Review, 1, 1-16.
2. *COUNCIL FRAMEWORK DECISION 2004/757/JHA* of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.
3. Ćirić, J. (2014). Mogućnosti i granice krivičnog prava u suzbijanju ilegalnog prometa opojnim drogama. Pedesetpeta redovna godišnja konferencija Srpskog udruženja za krivičnopravnu teoriju i praksu - Optuženje i drugi krivičnopravni instrumenti državne reakcije na kriminalitet (str. 545), Zlatibor: Srpsko udruženje za krivičnopravnu teoriju i praksu.
4. Delić, N. (2010). Zabrana (isključenja) ublažavanja kazne u određenim slučajevima. *Crimen*, 2, 228-246.
5. Đorđević, Đ. Kolarić, D. (2020). *Krivično pravo-posebni deo*, Beograd:Kriminalističko-policijski univerzitet.
6. Đorđević, Đ. (2010). Nova rešenja o ublažavanju kazne u KZ Srbije. Revija za kriminologiju i krivično pravo, 3, 161-173.
7. Kolarić, D. (2019). Krivični zakonik i (ne)adekvatnost državne reakcije na kriminalitet (sadašnje stanje i nova rešenja). Šezdeseta redovna godišnja konferencija Srpskog udruženja za krivičnopravnu teoriju i praksu - Izmene u krivičnom zakonodavstvu i status nosilaca pravosudnih funkcija i adekvatnost državne reakcije na kriminalitet (međunarodni pravni standardi i stanje u Srbiji) (str. 23), Zlatibor: Srpsko udruženje za krivičnopravnu teoriju i praksu.

8. Kolarić, D. (2016). Evropske integracije i krivično materijalno zakonodavstvo Republike Srbije. Pedesetsedma redovna godišnja konferencija Srpskog udruženja za krivičnopravnu teoriju i praksu - Evropske integracije i kazneno zakonodavstvo, poglavlje 23-norma,praksa i mere harmonizacije (str. 31), Zlatibor: Srpsko udruženje za krivičnopravnu teoriju i praksu.
9. Kolarić, D. (2019). Orjentacija zakonodavca u poslednjem zakonu o izmenama i dopunama Krivičnog zakonika - (ne)opravdano jačanje krivično-pravne represije. Arhiv za pravne i društvene nauke, 3-4, 13-45.
10. Marković, S. (2015). Zloupotreba opojnih droga i institut zabrane ublažavanja kazne u praksi Višeg suda u Valjevu. Pedesetšesta redovna godišnja konferencija Srpskog udruženja za krivičnopravnu teoriju i praksu - Suđenje u razumnom roku i drugi krivičnopravni instrumenti adekvatnosti državne reakcije na kriminalitet (str. 224), Zlatibor: Srpsko udruženje za krivičnopravnu teoriju i praksu.
11. Moccia, S. (2013). Volto attuale del sistema penale. *Rivista italiana di diritto e procedura penale*, 3, 1093-1094.
12. Stojanović, Z. (2020). Kazneni rasponi i represivnost krivičnog zakonodavstva – uporednopravna analiza. Crimen, 1, 3-34.
13. Stojanović, Z. Kolarić, D. (2020). Krivičnopravno suzbijanje organizovanog kriminaliteta, terorizma i korupcije. Beograd: Pravni fakultet Univerzitet u Beogradu.
14. Stojanović, Z. Kolarić, D. (2015). Savremene tendencije u nauci krivičnog prava i krivično zakonodavstvo Srbije. Srpska politička misao, 3, 111-136.
15. Stojanović, Z. (2018). Komentar Krivičnog zakonika. Beograd:Službeni glasnik.
16. Stojanović, Z. (2019). Krivični zakonik, predgovor i registar - Z. Stojanović. Beograd:Službeni glasnik.
17. Wade, M. (2009). Prosecutors and Drugs Policy: A Tale of Six European Systems. Utah Law Review, 1, 153-174.
18. Law on Ratification of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Official Gazette of the SFRY – international agreements, 14/1990
19. Law on Ratification of the Single Convention on Narcotic Drugs, Official Gazette of the SFRY, 2/1964
20. Law on Amendments and Additions to the Criminal Code of the SFRY, Official Gazette of the SFRY, 3/1990, 38/1990, 45/1990, 54/1990
21. Law on Amendments and Additions to the Criminal Code of the SRY, Official Gazette of the RS, 39/2003
22. Law on Amendments and Additions to the Criminal Code, Official Gazette of the RS, 72/2009
23. Law on Amendments and Additions to the Criminal Code, Official Gazette of the RS, 35/2019.