LEGISLATIVE-TECHNICS' CHARACTERISTICS OF CRIMINAL OFFENCE OF ILL-TREATMENT AND TORTURE IN THE REPUBLIC OF SERBIA[1]

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Abstract: In the paper author deals with the criminal law aspect of the protection of the absolute prohibition of torture, inhuman and degrading treatment and punishment, and the manner and modalities of criminal law protection against ill-treatment and torture in the legislation of the Republic of Serbia, in general.

The incrimination of ill-treatment and torture is envisaged within the group of criminal offenses against fundamental freedoms and rights of men and citizens and represents the *ultima ratio* form of state reaction to the violation and threatening of one of the most important civilization heritage. In addition to analyzing the characteristics of the criminal offense and the latest changes regarding the penalties for this offense, the topic of this paper is the nomotechniques - the legislative techniques characteristics that the legislator has chosen in formulating the legal description of this criminal offense. The author will try to answer to several groups of questions regarding the temporal dimension, the development of the legal description structure of this offense, the reasons for predicting two principally separate offenses within a single criminal offense, the extended notion of torture in relation to the relevant international documents.

In conclusion, it is stated that the analyzed offense is in line with international standards and that any modifications, can be based *pro futuro* on differently recognized dominant protection object to which the violation and endangerment of this action are directed.

Keywords: Prohibition of abuse, inhuman and degrading treatment and punishment, criminal offense of ill-treatment and torture, legislative technics characteristics.

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INTRODUCTION

The criminal law system of norms as part of the domestic, public law, regulates the relationship between the state, on the one hand and individual or legal persons on the other, in relation to the commission of the offense and the subsequent imposition of an appropriate sanction to the perpetrator. Criminal law is based on the idea of achieving the protection of society from crime. A modern democratic state, based on the basic ideas of legality and the rule of law, entails a complex legal system which, through stability, certainty and coherence, should ensure the prerogatives of democracy.

This implies the need for the criminal justice system of standards, in which even its basic units, are capable to create and apply the standards by themselves, in accordance with some general, proven legal and dogmatic principles, which provide them with quality and a high degree of adaptability on a *pro futuro* basis.

Therefore, the issues of the quality and manner of construction of criminal law norms appear as a previous legal issue in relation to their later application, since the application of law is deeply and inseparably linked to the norm itself, in the legislative - technical sense, i.e. in relation to its logical and semantic content.

The author will try to determine the importance of the nomotechnical approach chosen when drafting the criminal law norm in relation to its application.

The author will also discuss the compliance of the analyzed norm with the normative regulation of the same legal relationship at the international level, on the example of a specific criminal offense, ill-treatment and torture, from Art. 137 of the Criminal Code of Serbia. She endeavors to determine this norm in relation to its addressee, the way it is formulated, the degree of determination, its creator and the validity, in order to connect it with other norms of the Criminal Code of Serbia and the legal system in general, all listed above in order to assess its quality in the context of the standards of modern legislative procedure, the facilitation of implementation and the achievement of its basic purpose, which is to protect society from crime.

CRIMINAL LAW AS AN INSTRUMENT OF STATE RESPONSE TO ILL-TREATMENT AND TORTURE AND ANALYSIS OF ITS BASIC CHARACTERISTICS

The criminal law of a liberal, democratically oriented state is based on five basic principles — legality, legitimacy, guilt, humanity, and proportionality and fairness. Although criminal law, as a whole, is given the prerogative of democracy, only through their complementary relationship, some of them are of particular importance when it comes to the protection of certain basic human rights and freedoms.

In this context, the constitutional principle of the prohibition of torture, ill-treatment, degrading punishment and treatment, in Art. 25 of the Constitution of the Republic of Serbia[3], has its basis both in the principle of legitimacy and in the principle of humanity. As Art. 3 of the Criminal Code of Serbia (CC) [4] implicitly stipulates that the basis and limits of criminal coercion are the protection of man and other social values necessary for the realization of these rights, it is clear that criminal law, as an instrument of state response to crime, is primarily humanistic oriented.

This implies that the basic aim and function of criminal law is the protection of human rights and the effort, on the other hand, to reduce as much as possible threats and violations of human rights through criminal sanctions as necessary repressive measures, both victims of the crime and the perpetrator.

The criminal law is a mechanism for the protection of the basic constitutionally proclaimed values, but also a corrective of *ius puniendi,* which leads to the achievement of the desired standards of protection of society from crime, with minimal limitation of basic freedoms and rights of man and citizen.

The prohibition of ill-treatment and torture, as a constitutional standard, is one of the issues that must be specified in criminal law, through an incriminatory expression, which provides, in its dispositive part, an unlawful form of abstract wrong, and in the sanction section provides a range of punishment, which presupposes a proportionate and just ethical reprehension, which society has the right to impose on an individual, who can be found guilty of a specific wrong.

The criminal offense of Ill-treatment and Torture, under Art. 137 of the CC, is systematized in *Chapter XIV of the Criminal Offenses against the Freedoms and Rights of Man and Citizen,* and the legal description provides, in the first paragraph, that whoever abuses another or treats him in a manner that offends human dignity will be punished by imprisonment for up to one year. The second paragraph provides that whoever cause great pain or grievous suffering to another, by force, threat or other illicit means, with the aim of obtaining recognition, testimony or other notice from that person or from a third party or intimidating that or a third party to unlawfully punish, or whoever does so to another initiative based on any form of discrimination, will serve a term of imprisonment of six months to five years. The third paragraph provides qualified form of this offense. It implies more severe punishment in cases the offense is committed by an official in the performance of the service, with different criminal ranges depending on which of the first two forms of the offense is committed by an official, with a

3 The principle of inviolability of physical and mental integrity stipulates that no one may be subjected to torture, inhuman or degrading treatment or punishment, or subjected to medical and scientific trials without his free consent, "The Official Gazette of the Republic of Serbia", br.98/2006.

4 "The Official Gazette of the Republic of Serbia", br.85/2005,88/2005-ispr.107/2005 ispr.72/2009,111/2009,121/2012,104/2013,108/2014 i 94/2016.

sentence of three months to three years for the offense referred to in paragraph 1. and imprisonment of one to eight years for the offense referred to in paragraph 2.[5]

This offense as a direct object of protection in the first paragraph has human dignity, as an internationally guaranteed category, which implies the honor and reputation of a person, that is, the right to respect and appropriate ethical treatment of an individual from birth to throughout life, while the second paragraph implies protection physical and physical integrity.

A protective object that is violated or endangered by the commission of this criminal offense are fundamental freedoms and rights of a person and a citizen- personal rights and freedoms, rights related to a person or a personal sphere. [6]

In a legislative-technical sense, this incrimination is complex. It has two basic forms and one qualified form. Its structure is particularly interesting because of the existence of two separate criminal offenses within the same article, which could in principle be systematized in different heads of criminal offenses, within a separate section of the Criminal Code, [7] since these are multipurpose offenses with plurality of protective object, [8] in which only the systematization criterion defined their prediction within the same head of crimes, even within the same criminal law norm, first because of the significant similarities. [9]

Therefore, even before the analysis of the characteristics of the criminal offense under Art. 137 starts, it may raise the principal problematic question of whether these two paragraphs of incrimination could be separated, not only as two separate offenses, but also as normative expressions from different groups of offenses, which differ primarily according to the group protection object.

In relation to the aforementioned, it should be emphasized that ill-treatment existed earlier as a criminal offense in national legislation under the different

5 The latest amendments to the CC have tightened the sanction provided for in paragraph three, such that in Art. 137, paragraph 3, the words "one to eight" are replaced by the words "two to ten". *The Law on Changes and Amendments of the Criminal Code,* "The Official Gazette of the Republic of Serbia", br 35/2019.

6 **Z. Stojanović,** *A Comment on the Criminal Code*, The Official Gazette, Beograd,2016, p. 466.

7 Ill-treatment in the group against honor and reputation, and torture in the group against basic freedoms and rights of man and citizen, or else in the group against humanity and international law, since this is an *ius cogens* norm and a criminal offense is from the category *mala in se.* The classification of this offense in the group of criminal offenses that protect internationally accepted values inherent to man in the context of civilizational norms and humanity, in principle, could be considered and labeled legitimate. The issues of systematization criteria and the predominance of the importance of the object to which criminal protection is given priority are from the category of general criminal policy and orientation of the entire legal text.

8 **Z. Stojanović, O. Perić,** *Krivično pravo – posebni deo,* Pravna knjiga, Beograd 2011, p. 3.

9 In connection with the above, different understandings have Lj. Lazarevic and Z. Stojanović. Lazarević believes that in the relation of paragraf 1 and paragraf 2 a word is about the ratio of the lighter and the qualified form of the same criminal offense. Contrary, Stojanovic considers that these are two separate offenses, which are covered by the same legal article only for certain nomotechnical reasons and the chosen systematization criterion. **Lj. Lazarević,** *A Comment of the Criminal Code,* Faculty of Law of the Union University, 2015, p. 528-529 and **Z. Stojanović**, *op.cit.,* p.485.

name of Malpractice in Service, Art.66 Criminal Code of Republic of Serbia.[10] Torture as a new criminal offense transposed into national law as a result of the need to align the corpus of national criminal law provisions with relevant, binding international instruments ratified by our country.[11] Therefore, not only that one criminal offense, in the normative sense, already existed in the previous criminal laws, and another was not, [12] but it was introduced later as a consequence of the development of criminal law and its standards, but the object of protection itself is different. This could be viewed, *pro future,* as a reason for separating ill-treatment and torture into two separate incriminations, viewed from the angle of their *ratio legis.* [13]

Objective features of the criminal offense of abuse under para. Article 137 (1) consists in the taking of an act of abuse or in any other way that offends human dignity.[14] The term abuse, in the broadest sense, refers to the infliction of physical and mental suffering of lesser intensity, such as slapping, pouring some fluid, pulling on the nose, ears, pushing, and the like, but without causing even slight bodily harm. The notion of acting in a way that offends human dignity is a general clause whose existence will be assessed by the court in each case, appreciating it from the aspect of objective criteria, which can indicate whether certain actions, by quality, could cause a citizen to feel that their dignity was hurt, but not appreciating it subjectively, as the feeling of the passive subject that their dignity was hurt.[15] As an example of such activities, certain actions such as leaving the other person unjustifiably waiting, for an unreasonable period of time, for the exercise of a right, ridicule, non-discussion, etc.[16]

The subjective characteristics of an offense imply intent, and its perpetrator can be any person, which is different from the previous solution, which was *delicta propria.*

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10 This criminal offense was systematized within a group of offenses against the freedoms and rights of man and citizen, and could have been made by an official in the exercise of official duty by abusing, insulting or at all acting in a manner that offended human dignity. This offense was punishable by a term of imprisonment of three months to three years. **D. Jovašević,** *Leksikon krivičnog prava,* Beograd, 2002, p. 148-149.

11 The 1987 United Nations Convention against Torture and Other Inhuman or Degrading Treatment or Punishment and the 1987 Council of Europe Convention on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment.

12 So the legal protection of certain values was only partially covered by some other incriminations.

13 **D. Kolarić,** „Mučenje, nečovečno i ponižavajuće postupanje i Krivični zakonik Srbije", *Pravni život,*9/2017, p. 702.

14 **M. Žarković , I. Bodrožić , N. Kovačević,** „Normative regulation of prohibition of ill-treatment in the criminal law framework of the Republic of Serbia", in: *Towards a better future: Democracy, Eu integration and criminal justice,* Conference proceedings of the international scientific conference, Faculty of Law, „St. Kliment Ohridski", University of Bitola, Bitola, 2019, p. 169.

15 **Z. Stojanović, N. Delić,** *Krivično pravo – posebni deo,* Pravni fakultet Univerziteta u Beogradu i Pravna knjiga, Beograd, 2013, p. 49.

16 **Lj. Lazarević,** *op. cit.,* p.529.

In paragraph two of Art. 137, torture is incriminated. It involves the infliction of great pain and grievous suffering, which may be physical or mental, for the purpose of achieving specifically the objectives listed in the Code, namely: obtaining confession, testimony or other information, intimidation or unlawful punishment. These actions must be undertaken in a specific manner which involves the use of force, threat or other authorized means, or alternatively, the activities mentioned above from other initiatives, which must be based on some form of discrimination.

The subjective character of being a criminal offense involves, in addition to intent, the attainment of a specific goal. It is an intention that directs the intent toward the achievement of the stated purpose. As with all offenses that contain intent as a subjective feature of the crime, its realization is irrelevant from the point of view of the existence of the offense, but the offense alone will not exist unless the intent is proven. Alternatively, in order to achieve the above goals, it is envisaged to take actions from certain motives, such as hatred, malice, cunning, which are based on some form of discrimination, such as religious, racial, national, political and other.

As relevant international documents link torture to the characteristic of officials as perpetrators, it can be stated that the legislator in the Republic of Serbia has enhanced criminal justice protection for human dignity and integrity of body and mental integrity, providing for punishment for abuse and torture and when undertaken by any which person in the capacity of the executor.

Both criminal offenses, or both basic forms of this criminal offense, shall receive their qualified form if the criminal offense referred to in paragraphs 1 and 2 is committed by an official in the exercise of his or her service. **It is an unlawful** crime against official duty, which implies that an act can be committed by any person, and becomes an offense against official duty only when it is performed by an official and is not contained in the head against official duty, but in the head against liberties and human and citizen rights. The term official is defined in Art. 112. 3 and means: a person who performs official duties in a state body; an elected, appointed or appointed person in a public authority, local self-government body or a person who permanently or occasionally performs official duties or official functions in those bodies; notary public, executor, arbitrator, as well as a person in an institution, enterprise or other entity entrusted with exercising public authority, which decides on the rights, obligations or interests of natural or legal persons or on the public interest, as well as a person effectively entrusted with exercising certain official duties and jobs and a military person. The term in the performance of the service implies the act of an official within the scope of his authority.

LEGISLATIVE TECHNICS' CHARACTERISTICS OF CRIMINAL OFFENSE OF ILL-TREATMENT AND TORTURE

After analyzing the characteristics of the criminal offense of abuse and torture, an analysis of its legislative technics characteristics can be carried out in order to provide an answer regarding the ways and modalities of constructing the standard under consideration. By its legal nature, this article is a criminal law regulation and as such has a specific structure. It consists of two parts, one of which contains a provision of an offense, that is, a commandment, a ban or an expectation, which society places before an individual, abstractly observed, or a dispositive part of a criminal law regulation, while the other contains a provision on the punishment for that crime, that is, sanction.

Depending on how the disposition is determined, they can be divided into simple and complex ones, and the dispositions can then be divided into ordinary, descriptive, pointing and blank ones, depending on their formulations. [17] In relation to the above, the incrimination under Art. 137 of the CC constitutes a complex incrimination composed of two separate simple incriminations, both of which are plain and descriptive in content.

Incrimination, nomotechnically, is in accordance with basic criminal law principles, most notably the principle of humanity, which is manifested in criminal law in such a way that the protection of fundamental human freedoms and rights is at the heart of criminal law, since its primary function is the protection of society from crime. On the other hand, there is a guarantee function, which is precisely a defense, restriction and corrective to the state's limited repression in exercising the right to punishment. The incrimination under Art. 137 of the Criminal Code represents a coherent whole with other criminal offenses in the group of criminal offenses against the freedoms and rights of man and citizen, and has its closest connection with the criminal offense under Art. 136 CC Extortion of testimony. This criminal offense provides that a sentence of imprisonment for a term between three months and five years will be imposed on an official who uses force or threat or other illicit means or illicit means in order to deliver a statement from a witness, expert witness or other person, while according to Art. 2 of the same article, the perpetrator shall be punished by imprisonment for a term between two and ten years if the extortion of the statement or statement was

17 Ordinary dispositions are those for which the offense is defined by a term whose content is considered to be known, so its description is not made. Descriptive dispositions contain the definition of an offense by describing in the disposition what the offense consists of. Referral dispositions are those in which the description of the act is partly used and the formulation of a term given in some other provisions of the Criminal Code and blank dispositions imply that they provide a description of the offense, but that some element of the term of this offense is not specified, but *instead it must determine on the basis of other legal provisions to which such dispositions refer.* **Đ. Đorđević,** *Krivično pravo – posebni deo,* Kriminalističko – policijska akademija, Beograd, 2014, p. 2 -3.

accompanied by grave violence or if the grave consequence resulted in particularly grave consequences for the defendant in the criminal proceedings.[18]

What can be observed is that only in the case of criminal offense under Art. 137 the perpetrator of the first and second forms does not have the capacity of an official, while this property implies more severe punishment and a more severe form. It should be noted that this form of norm, which essentially extends the criminal zone, since it is not limited to an official as a potential perpetrator, is something that provokes criticism by the United Nations Committee against Torture and Inhuman or Degrading Treatment or Punishment (CAT), which requires States Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) to make a clear distinction between acts of ill-treatment and torture taken by officials from those who study not persons who do not have this status. Here, the author emphasizes the importance of a good knowledge of nomotechnical rules, and points out that the extension of the scope of application of the norm, in criminal law, by extending the criminal zone to a larger circle of persons, can in no way be interpreted as a reflection of the inconsistency of national legislation with the relevant international document, but only as the freedom and right of the national legislator to give the norm greater latitude, so as to first reduce the number of incriminating expressions of the national legislator, in an era of criminal expansionism, which takes not only national character but the supranational level also. Therefore, we consider that the objection does not stand, since the state has the possibility to prosecute individuals, without the status of an official on the basis of the same incriminating expression, by no means gives the norm less importance, but rather shows that the Republic of Serbia is beyond the required set a criminal zone.[19]

In the context of the certainty of disposition and sanction in the criminal offense of ill-treatment and torture, the author states that the dispositive part of the regulations is defined in a clear and precise manner, and that a high degree of certainty of the content is fulfilled. Conduct that is punishable is defined in such a way that it leaves room for the subject to oblige himself to choose whether to act in accordance with the disposition, which is consistent with both the principle of

18 CAT remains concerned about the inconsistency of Art. 136 and 137 c. 2 and 3 of the CC relating to acts of torture and the fact that they are not harmonized with all elements of the crime of torture, as defined in Art. 1 of the Convention, and considers that there is an overlap between the two offenses. **N. Kovačević, R. Dragićević Dičić, G. Jekić Bradajić, J. Tintor,** *Zabrana zlostavljanja,* Beogradski centar za ljudska prava, Beograd, 2017, p. 67.
Although these kinds of remarks refer to the simplification of the system of criminal law norms of the republican legislation and as such they are good in dogmatic terms, nevertheless there are differences in the characteristics of the beings of the two criminal offenses, which justify their independent existence. This does not mean that the *de lege ferenda* could not consider the separation of the criminal offenses of abuse and torture into two separate criminal offenses, and in this context the potential merger or prediction of the acts of torture and extortion of testimony within a new renumbered and reformulated norm.
19 States similarly: D. Kolarić, *op. cit.,* p .706.

legality and the general rules for constructing disposition, as the central imperative part of the legal norms.[20]

Considering the fundamental values of the legal system, which are given their expression through the principles of law, it can be stated that the analyzed criminalization is in a qualitative way connected with other parts of the system, which means the principle of coherence and the principle of completeness and the principle of certainty are respected.[21]

According to the degree of generality, [22] the norms can be divided into abstract and concrete, and in the context of the mentioned division the criminal law norm referred to in Art. 137 has to be designated as a concrete norm, since it can be directly applied.

According to the scope and range of entities on which this norm can be applied, norms can be divided into general and individual,[23] so criminal offense of ill-treatment and torture is classified as general norm, because it is adaptable to the application of a potentially indefinite number of delinquent situations, which corresponds to the degree of abstract injustice which must be attained in criminal law regulations in a Special Part of CC.

The division of norms according to the way, the order in the operative part of the regulations is formulated, divides them into ordering, prohibiting and authoritative, so in the context of such classification, the offense of ill-treatment and torture can be defined as a prohibiting norm, since it specifies the constitutional prohibition of abuse, torture and inhuman and degrading treatment and punishment.

According to temporal validity, norms can be norms with definite or indefinite validity, as well as norms with retroactive, current and deferred validity,[24] so the norm from Art. 137 of the CC is considered the norm for an indefinite period of validity.

Finally, we emphasize that the nomotechnics or the linguistic-semantic structure of the norm of the criminal offense, has been well placed, in compliance with both the basic criminal law principles and the basic standards of legal norm construction, and that only in cooperation with relevant international bodies, non-governmental organizations, law enforcement and ultimately the legislator, may be considered the justification of further modification of this provision in order to put it into practice and to improve the quality of nomotechnical expressions, from the dogmatic point of view.

Adherence to modern nomotechnical rules on language clarity, overlapping of normative solutions, avoiding incoherence and inconsistency of a number of

20 About the legal norm and its structure in more detail: **R. Zekavica, M. Živković,** *Uvod u pravo,* Kriminalističko – policijska akademija, Beograd,2014, p. 241- 256.
21 **D. Mitrović,** *Uvod u pravo,* Pravni fakultet Univerziteta u Beogradu, Beograd,2011, p. 189.
22 ***Ibid,*** p. 188.
23 ***Ibid.***
24 ***Ibid.***

norms within the legal system are standards that a modern legislator must respect in order to remain true to the cultural and legal traditions of his country.

On the other hand, the legislator should harmonize its normative framing of the same phenomena with relevant international instruments, within a broader process of harmonization of provisions of national legislations at regional and non-national level.[25]

CONCLUDING CONSIDERATIONS

In the end, we consider that the importance of incriminating ill-treatment and torture as a separate criminal offense in the group of criminal offenses against human and civil liberties and rights is a priority in concretizing and strengthening the constitutional principle. It represents an unequivocal reflection of the connection and linking of criminal provisions with constitutional postulates, that is the result of harmonization of national corpus of criminal law norms with ratified relevant international regulations in this field and it should be an example of continuous improvement of criminal law in accordance with *maximus ius criminale semper reformanum est.* Aforementioned does not, in any way, means that in some future amendments to the criminal legislation *de lege ferenda* could not be considered separation into separate incriminations, which would further strengthen criminal repression and a preventive effect on the counteraction to ill-treatment and torture.

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25 Law is a "literary profession"and lawyers often write more than storytellers, and similar to handling a scalpel in medicine, the misuse of words can cause great harm. *Nomotehnika i pravničko rasuđivanje*, Program Ujedinjenih nacija za razvoj u Srbiji i Pravni fakultet Univerziteta u Beogradu, Beograd, 2018, p. 25.

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