INTERNATIONAL SCIENTIFIC CONFERENCE “ARCHIBALD REISS DAYS”
THEMATIC CONFERENCE PROCEEDINGS OF INTERNATIONAL SIGNIFICANCE

INTERNATIONAL SCIENTIFIC CONFERENCE

"ARCHIBALD REISS DAYS"

Belgrade, 2-3 October 2018

THEMATIC CONFERENCE PROCEEDINGS OF INTERNATIONAL SIGNIFICANCE

VOLUME I

Academy of Criminalistic and Police Studies
Belgrade, 2018

Publisher
ACADEMY OF CRIMINALISTIC AND POLICE STUDIES
Belgrade, 196 Cara Dušana Street (Zemun)

Computer Design
JOVAN PAVLOVIĆ
DRAGOLJUB MILUTINOVIĆ

Impression
200 copies

Print
Službeni glasnik, Belgrade

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

ISBN 978-86-7020-404-1
ISBN 978-86-7020-190-3

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SOCIAL, ECONOMIC AND POLITICAL FACTORS OF CRIME

NEW CRIMINAL OFFENCES IN THE CRIMINAL CODE OF SERBIA AND THE GUARANTEE FUNCTION OF CRIMINAL LAW[1]

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Abstract: When we talk about frequent amendments and additions to criminal legislation, it is important to determine that they are implemented, more or less, in accordance with the main requirements that the principle of legality is based on. To what extent and in which way is it accomplished in criminal legislation and court practice? The principle of legality represents one of the most important achievements of a legal state and it is therefore important that it is observed to the full capacity and in its overall meaning. Taking into account that frequent amendments are primarily the results of harmonization with the obligations that the states undertake when they ratify certain international agreements, but also of harmonization with the EU legal heritage, it is important to determine if the guarantee function of criminal law is achieved when specifying certain behaviours as criminal offences and prescribing penalties or other criminal sanctions. The paper analyses new criminal offences introduced by the Law on Amendments and Additions to the Criminal Code of 2016. It is through the analysis of the specific element of each criminal offence individually that the author tries to determine if the guarantee function of criminal offence has been achieved. The accent here is on new criminal offences classified within the group of offences against life and limb, freedom and rights and gender freedom (harmonized with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence).

Keywords: *Criminal Code, criminal offence, guarantee function, stalking, sexual harassment, female genital mutilation.*

INTRODUCTORY REMARKS

Almost every day we are witnesses to the fact that the principle *nullum crimen nulla poena sine lege* and its segment *lex certa* as well as *ultima ratio* dimension of criminal law are derogated from both at European and national levels. In theory the standpoint is underlined that as far as guarantee function of criminal law is concerned what is guaranteed is not much and

1 The paper is the result of research on the project titled "*Development of Institutional Capacities, Standards and Procedures for Fighting Organized Crime and Terrorism under the Conditions of International Integrations*" (No. 179045) and "*Crime in Serbia and the Instruments of State Response*", which carried out by the Academy of Criminalistic and Police Studies.
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it boils down to a negative aspect of criminal law, i.e. that it will not be applied in cases when certain behaviour has not yet become the subject of criminal law provisions. In the field of criminal penalties what is guaranteed by criminal law is even less. However, no matter how small it is very significant (Стојановић, 2016, p.14: d). The standards certainly must be higher when prescribing those behaviours that would represent criminal offences, than in case of criminal penalties and *nulla poena singe lege* principle. Open violation of law in the field of criminal penalties occur rather rarely since there is no need for it, the courts are barely limited by law anyway, i.e. free space for their decision making is rather wide.[3]

The Criminal Code of Serbia has been going through a dynamic stage in the recent period. In the field of substantive criminal law in the Republic of Serbia there was a thorough reform in 2005 and the new Criminal Code was adopted. This Code has been amended and added to for several times so far - twice in the course of 2009, and once in 2012, 2013, 2014 and 2016 respectively.[4]

English lawyer and humanist Charles John Darling observed that "men would be great criminals would they need as many laws as they break".[5] Therefore, right at the beginning we ask the question if the criminal law expansionism and overall hypertrophy of incriminations can solve the problem of crime or on the contrary such occurrences lead to breaking the principle of legality and guarantee function of criminal law.

LAW ON AMENDMENTS AND ADDITIONS TO THE CRIMINAL CODE OF 2016

The amendments set out in the Law on Amendments and Additions to the Criminal Code[6] of 2016, according to the reasons for their adoption, can be classified into several groups. The first group of amendments and additions are the solutions approached because of the need to harmonize them with international obligations that the Serbia undertook by ratifying some international agreements. As a step in that the direction an important novelty includes certain new criminal offences systematized in the group of criminal offences against life and limb, and offences against gender freedom (harmonization with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[7]). The second group includes amendments and additions which represent the result of the need to harmonize with the common standards in some European countries (for instance economic crimes). The third group includes the solutions which needed to be made precise additionally for their easier application, since there were doubts which led to problems in practice (fine, release on parole). As mentioned earlier, the reasons for the amendments have also included our negative experiences and problems anticipated in practice (violation of prohibitions determined by certain safety measures, the amendments regarding the abuse of office, incriminating traditional insurance frauds). There is a small number of language-related legislation improvements. For instance, in Article 46, paragraph 2, indent 4, the word "unconditional" is erased. Namely, this word was a specific hybrid in the Criminal Code, since release on parole and prison sentence are two kinds of penalties, and it is sufficient to read that the court may release on parole a person convicted more than three times to unconditional prison sentence

3 *Ibidem.*
4 „*Сл. Гласник РС*", бр. 85/2005, 88/2005 – испр. 107/2005 – испр. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014. и 94/16.
5 *Ризница правних изрека*, Београд, 2007, стр. 176.
6 „*Сл. Гласник РС*", бр. 94/16.
7 *Сл. Гласник РС- међународни уговори*, бр. 12/2013.

(optional release on parole, if the requirements specified are met and in these circumstance the court may but is not obliged to release a person on parole).

AMENDMENTS IN THE SPECIAL PART OF THE CRIMINAL CODE

As for the interventions in the Special part of the Law on Amendments and Additions to the Criminal Code, they are characterized by improved criminal-law repression, particularly in the sphere of criminal offences against economy and gender freedom. The focus of this paper is harmonization with the Istanbul Convention, i.e. the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. In the part referring to substantive criminal law it contains mainly unified word combinations according to which Parties "shall take" the necessary legislative or other measures to establish that the conduct of […] is criminalised. For the purpose of legal protection from domestic violence the state organs in Serbia have many "means" available whose application is provided for by the Law on Prevention of Family Violence, [8] the Family Law, [9] the Law on Public Peace and Order, [10] the Law on Police[11] and the Criminal Code[12]. With all the comments that can be made related to criminalisation of family violence in the Criminal Code, even related to certain provisions of the Family Law (the provision of the Family Law is more declaratory in nature, while the Law on Public Peace and Order has sanctioned the application of violence for years...), the most disputable is the Law on prevention of family violence.[13]

Upon ratification of the Istanbul Convention the debates on new criminal offences that should be prescribed by the Criminal Code have become live issue again. Due to these reasons the Law on Amendments and Additions to the Criminal Code prescribes several new criminal offences as follows: female genital mutilation; stalking; sexual harassment and forced marriage. Similarly to domestic violence, where some acts are already included in other instances of criminalisation here also there is a question of legitimacy and the limit of criminal-law protection. But, criminalisation of domestic violence, although it is the behaviour that could be punished otherwise (for instance, endangering safety, abuse of a minor, and in case of serious consequences, serious bodily injury, negligent homicide, etc.) perseveres. As we already know, domestic violence as a separate offence was introduced into criminal legislation of the Republic of Serbia in March 2002. [14] Were the family members unprotected before that time? Of course they were not. There is even now, and there existed then an entire range of offences which "cover" each element of criminalisation of domestic violence. This offence is inexistent in many European countries, such is Germany for instance, which naturally does not mean that there is no domestic violence there, or that violent persons are not punished, or that the victims of such violence are not protected, since domestic violence basically is not a criminal-law concept, it more criminological-phenomenological notion, in the similar way as is the case with other "offences with elements of violence" (Шкулић, 2012, p. 68). The manner in which the offence of domestic violence found its place in the Criminal Code says a lot

8 „*Сл. Гласник РС*", бр. 94/16.
9 „*Сл. Гласник РС*", бр.18/2005, 72/2011 – др. закон и 6/2015.
10 „*Сл. Гласник РС*", бр. 6/2016.
11 „*Сл. Гласник РС*", бр. 6/2016.
12 „*Сл. Гласник РС*", бр. 85/2005, 88/2005 – испр. 107/2005 – испр. 72/2009, 111/2009, 121/2012, 104/2013, 108/2014. и 94/2016.
13 О Закону о спречавању насиља у породици види више: Д. Коларић, С. Марковић, Поједине недоумице у примени Закона о спречавању насиља у породици, *Анали Правног факултета у Београду*, бр. 1/2018, стр. 45-72.
14 „*Сл. Гласник РС*", бр. 10/2002.

about the quality of criminalisation and the need of its existence in the Criminal Code. It was introduced by "amendments", and not according to "regular" or "usual" procedure, which as a rule still implies a considerably higher level of quality in formulating a specific criminalisation (Вуковић, 2012, p.128).

Uncritical ratifications of international agreements can lead to problems. As it is pointed out in theory, when ratifying international agreements legislators as a rule do not embark upon their content and there is no debate in the process of their adoption, but the adoption of the confirming law boils down to a mere formality. International agreements increasingly impose on ratifying countries the obligation to prescribe new criminal offences and expand the existing ones. Regarding the criminal-law intervention in the field of sexual relations there is a regression to that effect: while until several decade before in this field liberal attitude was taken, as well as the stand on undesirable influence of sexual moral on criminal law, the things have started to change substantially at the beginning of the 21st century. Although there is tendency to justify the expansion of repression in this field by the protection of individual, particularly children, it seems unconvincing and it seems that to a considerable degree there is penal populism. This at the same time negates the fragmentary character of criminal law since there is tendency towards comprehensive protection which criminal law should not and cannot provide (Стојановић, 2016, p.19:c).

Thus, for instance, concerning rape, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, brings to the forefront the lack of consent during a sexual act, and not coercion, so the question is asked how to implement this harmonization and is it necessary? Even if the new criminal offence is accepted *de lege ferenda* which would criminalise rape and the non-consensual act which is made equal to it and which is committed without the consent of the persons in question, the penalty should be considerably lenient since there is no coercion. But, such and other attempts of criminal-law expansionism directly negate the claim that criminal law is *ultima ratio*. The legislator still decides to exclude rape as summary offence from the Proposal of the Law on Amendments and Additions to the Criminal Code of 2016, although its Draft provided a new paragraph 2 of Article 178 of the Criminal Code which referred to non-consensual sexual act when the features of the basic form of offence of rape have not been fulfilled. The cases of sexual acts committed against the will of a passive subject without the use of coercion are very similar. While some are relatively rare (for instance, use of surprise of a passive subject, then misleading a passive subject or the use of impact of previous coercion on a passive subject's will which is not in causal connection with the sexual act), the others are, on the contrary, very frequent and common that it is for this reason that they deserve to be criminalised, i.e. they are not sufficiently serious to deserve criminal-law response. Even the application of the existing criminal offence of rape is often based only on the statements of the accused and the passive subject. If the use of force would not be required, it would be even harder to prove that the offence had been committed. In any case, the Istanbul Convention represents a radical shift regarding the concept of criminal offence of rape and other related offences.[15]

However, a whole range of objections can be made referring to the newly introduced criminal offences from which it was not given up. In our opinion, new criminal offence of forced marriage, which is introduced to the Law on Amendments and Additions to the Criminal Code and which has its place in Article 187a, is the least disputable and we shall not analyse its specific element (Коларић, 2016, p.665:b).

15 See: Explanation of the Proposal Law on Amendments and Additions to the Criminal Code

Stalking

For the introduction of stalking as a criminal offence which is set out in the Istanbul Convention (Article 34) there are certain criminal-political arguments even if there was not an obligation resulting from the Istanbul Convention. It is the behaviour which may seriously endanger the psychological integrity of a victim, and it is directed towards fundamental rights and freedoms of men. However, this is a complex behaviour which not so often is expressed by psychotic manifestations, which makes its criminal-law suppression even more complex. The main problem is how to cover adequately this phenomenon by legal description. The experiences of the countries which introduced this criminal offence (Germany, Italy, and Austria) are not encouraging. On the one hand, when prescribing a specific element of a criminal offence the principle of precision may be challenged, while on the other hand the protection of a victim is not achieved. This suggests the need for a very serious approach when formulating a legal description of this criminal offence (Стојановић, 2016, p. 27: b). However, in the Law on Amendments and Additions to the Criminal Code the legislator has not managed to escape a wide formulation of this offence and violation of the *lex certa* principle.

The offence is committed by a person who within a certain period of time: 1) unlawfully follows the other person or undertakes other acts to get physically close to that person against his or her will; 2) against the will of another person makes attempts to establish contact directly, through a third person or by means of communications; 3) abuses the information on another person or a person close to him or her for offering goods or services; 4) makes threats against life, limb or freedom of another person or a person close to him or her; 5) undertakes other similar actions in a way that can substantially endanger the personal life of a person against whom these actions are undertaken. This offence is punished by either fine or imprisonment up to three years. Qualified forms exist if: there is danger to life, health or body of a person against whom the action is taken or to a person close to him or her or if there is death of another person or a person close to him or her. In the first instance the penalty includes imprisonment ranging from three months to five years while in the second case the penalty includes one to ten years of imprisonment.

The way in which this criminal offence is prescribed is problematic for several reasons. First there is question of what was our obligation taking into account the Istanbul Convention? Namely, the Convention imposes on ratifying countries to "take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised". It is necessary, therefore, to have repeated threatening to another person which would cause that person to fear for his or her personal safety. This behaviour could obviously be criminalised through a special paragraph of criminal offence of endangerment of safety.

Further, explaining the notion of stalking, in paragraph 1, point 5, of the proposed new Article 138a of the Criminal Code, in addition to listed actions in the first four points, it is said that stalking is represented by "other similar actions as well". This is the biggest objection which can be referred to the legislator.

What can be done when it is the case of some borderline behaviours so that they could be considered positive and socially acceptable? Is criminal-law intervention justified then? This limit is hard to find. In criminal law it should always bring to the forefront its features - that it is subsidiary, accessory and fragmentary in character. If someone gets flowers or SMS messages every day, but does not state clearly that they do not accept such behaviour, it is difficult to say that the criminal offence exists. However, linguistic interpretation of point 1 "who unlawfully follows another person or undertakes other actions in order to get physically close to that person against his or her will" suggests that the criminal offence will exist. There are of

course behaviours which although they are not socially acceptable by their significance and seriousness still do not deserve to be criminal offences (Стојановић, 2017, p.4: a). This is why it should insist upon repeated action and clearly expressed opposition of a passive subject. It is necessary to apply objective criterion to assess if the concrete behaviour can cause a forbidden consequence (Ђорђевић, 2017, p.134).

There are also different opinions which consider that stalking of a victim can be considered a form of abuse, in other words that stalking of a victim can be covered by the current legal formulation of callous violent behaviour within domestic violence, regardless of whether it involves following, harassment by phone calls or sending electronic messages. Such acts really can create feeling of jeopardy and are quite frequent in life. Therefore, according to such opinion, notwithstanding the stalking is not explicitly prescribed as an act in this criminal offence it does not exclude its understanding as a form of callous behaviour (Вуковић, 2012, p.131).

Sexual harassment

The offence is committed by a person sexually harassing another person. The penalty is either fine or imprisonment up to six months. If this offence is committed against a minor, the perpetrator shall be punished by imprisonment from three months to three years.

When talking about sexual harassment, from legally-technical and legislative point of view it is not quite common to give meaning to expressions used in the very article of the law regulating some criminal offence, as it is done in the Law on Amendments and Additions to the Criminal Code. As the legislator says, sexual harassment is any verbal, non-verbal or physical act the intention of which is to offend or which represents the offence of dignity of a person in the field of his/her sexual life, and which causes fear or creates hostile, degrading or offensive environment (paragraph 3, Article 182a).

There are many problems recognized for this criminal offence as well. First, there can exist a serious problem in delimitation with unlawful sexual acts, the criminal offence which is already set out rather wide.

Second, from the standpoint of the topic we elaborate in this paper, we point out that "any verbal, non-verbal or physical act" is quite wide. Observed from the standpoint of guarantee function of criminal law this is the main problem both for stalking and sexual harassment. We agree with the claim that such determination of the act is both logically and linguistically nonsense since any act can be verbal or non-verbal (Ђорђевић, 2017, p.135). It is obvious that the intention was to achieve differentiation between verbal, real and symbolic offence, but it is rather unsuccessful.

Certain exaggerations could be heard in the public concerning this criminalization even from the representatives of the Ministry of Educations as an authorized proposing party of the law. Thus, according to these claims, the persons similar to exhibitionists, who were immortalized in a few domestic movies, would be observed as criminal offenders starting from June 01, 2017.

Is criminal-law protection really justified in this case? Are these actually the assets that each person can protect on their own? The aim of the criminal law is not to protect assets even from the most benign forms of jeopardy and attacks on them, in cases where individuals as a rule are capable of defending them on their own. It should mention that the Law on Public Peace and Order includes a corresponding provision.[16]

16 Члан 8 ЗОЈРМ „*Сл. Гласник РС*", бр. 6/2016.

Female genital mutilation

This offence is committed by a person who mutilates the external genitals of a female person. The punishment is imprisonment from one to eight years. If there are particularly mitigating circumstances under which this offence was committed, the offender shall be punished by imprisonment from three months to three years. Whoever abets or aids a female person to perform such an act shall be punished by imprisonment from six months to five years.

Female genital mutilation, as a newly prescribed criminal offence in the Law on Amendment and Additions to the Criminal Code, can be disputed on many grounds.

First, its aim is to criminalize traditional practice of cutting off certain parts of female genitalia which some communities perform on their female members. As said in the UN report on women (2010),[17] such behaviour is customary in Africa, Indonesia, Malaysia, and it shows slight decrease in practice. Taking into account that social danger of certain behaviour represents at the same time the basis and justification for its prescribing as a criminal offence, the question is then asked if female genital mutilation should be prescribed as an independent criminal offence. Some behaviour can objectively exist in a part of the world, but only through certain social relations, conditions and occasions it can have certain consequences which require response.

Second, it is interesting that this is one of criminal offences which were excluded from the principle of gender neutrality in criminal law which makes part of this Convention. This article contains criminal offence of female genital mutilation, where the victims are essentially women, or girls.

And third, it is clear that in such situations corresponding criminalisation can be applied from the group of criminal offences against life and limb. To be more precise, for special or particularly serious bodily harm there is penalty prescribed from one to eight years. Therefore, this offence should constitute an especially serious bodily harm but according to the punishment it entails this is certainly not the case.

CONCLUDING REMARKS

In criminal-political sense, certain solutions of the Law on Amendments and Additions to the Criminal Code of 2016 lead to weakening of criminal-law repression (out of two conditions that must be fulfilled in order to apply release on parole the one which required the purpose of the punishment to be achieved is erased since it is difficult to determine; a wider application of fine is enabled; abuse of authority in economy is decriminalized, such as issuing checks and use of payment cards without coverage, and so on), while some amendments are on the line to strengthen repression (interventions in a part of small significance, new criminalisation – particularly in the sphere of criminal offences against economy and gender freedom, erasing conditions for some offences to be prosecuted on motion, and so on).

As for frequent amendments and additions to the criminal legislation, it is important to determine if they are carried out, more or less, in accordance with the main requirements on which the principle of legality is based. The most comments can be given on *lex certa* segment (Коларић, 2017, p.50). This is probably because the standards of shaping legal norms in domestic law are considerably higher and should be the same as at European level. However,

17 The Worlds Women 2010, Trends and Statistics, United Nations, New York, 2010, Department of Economic and Social Affairs, стр. 132. http://unstats.un.org/unsd/demographic/products/Worldswomen/ WW2010pub.htm 22.10.2015.

this is not the case. According to the Lisbon Treaty, the main jurisdiction in criminal matters is set out by Article 83, paragraph 1, of the Treaty on the Functioning of the EU and refers to the possibility that "by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". Therefore the *lex certa* segment should have a more complex character since it is applied in two stages of criminalisation. One is at European and the other is at the national level (Коларић, 2016, p. 11-35:a). The situation in which directives are literally transferred into national law is unacceptable since in this way the coherence of national criminal-law systems is undermined. Also, if every member country would unilaterally, in its own way, adopt the definition of a criminal offence there is a risk of diverging from real EU goals. It is necessary to find balance. The EU makes efforts to determine minimum rules to define a criminal offence and *lex certa* should be obliging for European legislator as well, since otherwise it would be impossible for national legislators to adopt certain instances of criminalisation in their national systems. The majority of provisions to which the remarks can be referred that they are vague are the result of harmonization with the corresponding regulations of the EU and the Council of Europe. The *lex certa* problem is even more pronounced in the field of prescribing criminal penalties where sometimes penalty ranges are set widely but there is also another extreme of absolute prohibition of penalty mitigation. There are two reasons. The first one is that criminal law is used for populist purposes, which is the case when the reality and function of criminal legislation are not taken into account while shaping the legal norm. The public (which is additionally manipulated), and even the great number of members of parliament do not express willingness to have better criminal law, but only to have as much punishing as possible and that the law is as repressive as possible (there are many offences for which prescribed penalties or penal frameworks are amended in a way that the majority of amendments referred to prescribing more strict penalties). The second reasons is again related to the harmonization with the international sources.

As for *lex previa*, *lex stricta* and *lex scripta* segments, we can point out that they are observed in criminal law. The exceptions, if we could mark them as exceptions, refer to situations of application of more lenient law, to the analogy as a way of interpreting according to similarity the Article 7, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[18] Naturally, all these are the topics which can be discussed separately.

18 According to Article 7, paragraph 1 of the Convention, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Also, a heavier penalty cannot be imposed than the one that was applicable at the time the criminal offence was committed. In Article 7, paragraph 2, of the same Convention, it is pointed out that this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

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