Ways towards Justice

THE NEW CRIMINAL CODE OF SERBIA

SPEEDILY TOWARD NEW FORMS OF CRIMINALITY

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New definitions of legal categories, collecting in one place and codification of numerous criminal acts dealt with formerly in various branches of legislature, modern methodology and harmonization with numerous international and European documents and conventions, disentanglement from the ideological heritage and terminology in regard to criminal law, new sanctions and offenses, attaching greater significance to financial burdens for those who violate the law. This are, in short, the news introduced into the new codified Criminal Code of Serbia which entered into force on January 1, 2006.

Serbia got the first code in 1860, which testifies anyway to a serious tradition in regard to criminal law. But the political and social changes influenced permanent emergence of new problems which had to be overcome. Offenses dealt with in various branches of legislature, offenses scattered in thousands of laws, cross-reference of regulations which were to separate certain similar groups of criminal acts, ideological frameworks, politicization, division of jurisdiction – all these influenced the legal situation to be rather massy and contributed to have pronouncement of some sanctions which then could not be implemented for many years, as at one point was the case with the death penalty. The threat of serious sanctions does not necessarily mean either severe penal politics, which is typical of Serbian legal practice, or significant progress in preventing criminality and suppressing it or in deterring violation of rules. After horrible crimes and the rise in number of offenses with elements of violence the laymen and politics have always called upon the criminal code to help, called for high penalties, stronger repression, which has never produced results unless the state and the entire system had answers to economic, social and war related crises and the crisis of values and morality.

Among the numerous reasons for the adoption of the Criminal Code of Serbia, apart from the need to answer numerous social challenges, there are also those which are concrete, formal and visible.

With the adoption of the Constitutional Charter criminal matters were transferred under the jurisdiction of the member states which should regulate it in a comprehensive manner. Criminal legislature is divided among the federal state and the member republics. Two laws were being implemented, the Criminal Law of FRY and the Criminal Law of Serbia, and frequent changes and amendments contributed negatively to jeopardize the comprehensiveness of the legal system.

Wavering

The whole world is facing new forms of criminality, which makes it inevitable to modernize the legislature, to introduce new offenses. A variety of offenses which were to sanction corruption in different fields are an indicator of the legislator's wavering.

The essential reasons for the creation of the code are also the harmonization of domestic legislature with numerous international documents and conventions (Statute of Rome of the International Criminal Tribunal, UN Convention against Transnational Organized Crime, European Convention on Suppression of Terrorism, Protocols on suppression of human trafficking and the smuggling of migrants…).

Representatives of the working group for the elaboration of the code had in mind also the need to overcome the socialist legal heritage and terminology and notions like, for instance, social danger.

Although it could seem that the Criminal Code of Serbia does not bring generally turbulent changes, the changes are neither so small nor so meaningless, and the general objection of even the authors of this law is that it was adopted to hastily, that the deadlines were to short and that the judges, prosecutors and attorneys will have problems to adapt to the changes and overcome the way of legal thinking that was nurtured for decades.

Slobodan Soskic, lawyer and member of the working group which completed the essential and biggest part of work related to the creation of the new code said for Pravda u tranziciji that more time should have been left for professionals who will implement the code to study it, and maybe postpone its

implementation.

- Deadlines for the elaboration of the code were rather short and here lies a certain danger, because after all everything takes more time, and so does the innovation and substantial change of the criminal legislature. Although at first sight not numerous, in the general part there are important changes related to definitions of certain categories, the introduction of some new elements and amendments to solutions we had up to now. The novelty is also the definition of the concept of guilt, the changes in regard to self-defense, extreme circumstances, we have also the new notion of actiones liberae in causa, the responsibility for graver consequences defined in a specific manner, and we got rid of the term of social danger – said Soskic.

In contrast to former solutions the notion of guilt in Article 22 defines that guilt is present in case that the perpetrator is conscious or is obliged to be conscious, or could have been conscious, that a certain act is forbidden. Previously focus was upon the perpetrator's consciousness on possible consequences, whilst now in the forefront is something that is forbidden by law, regardless of possible consequences. So, paragraph 2 stresses that a crime includes the element of guilt also if the perpetrator acted with negligence, in case that the law explicitly says so.

- In the article which defines self-defense and the notion of extreme circumstances, the novelty is the expansion and accentuating of not only the right to defend life and body but also of other goods, including also property. This does not mean, as some interpreted hastily, that aloud are armed answers in cases of attack against inviolability private property and assets, or the right to deprive of life by excessive use of force. The key words are proportionate defense. This practically means that we aimed at greater protection of property, and that allowed is only necessary defense. Hence, shooting, use of other weapons, inflicting serious injuries, must not be the answer to attacks against property, one's own or other's property, or attacks against life and body of a lower intensity. Simply speaking, as was the case until now, further on it will also not be allowed to kill somebody who is a car burglar, and did not directly attack you nor had weapons. The allowed answer depends, hence, also on what the attacker did. Article 19, paragraph 3 which regulates self-defense, says that the perpetrator who crossed the limits of self-defense will get a mitigated sentence. In case he crossed the limits due to strong irritation or fear caused by the attack, he can also be declared not guilty. There will be a lot of work for the experts as well, and the practice will show how the court will deal with this and how the law will be implemented in such situations – says Soskic.

He said that the notion of actiones liberae in causa (Article 24) is also a novelty which, in his view, will also result in a more stringent penal policy.

- The guilt of the perpetrator who committed an offense and who due to consumption of alcohol or narcotics or in any other way has brought himself into the situation in which he could not comprehend the significance of his act or manage his conduct is established in regard to the time immediately prior to getting into such a condition. A crucially diminished accountability resulting from these reasons will not constitute a basis for mitigating factors. This provision should be significant for both traffic security and other offenses - said Soskic.

System of Sanctions

The member of the working group for the elaboration of the code explains as an important notion also the act of minor significance dealt with in Article 18. If the perpetrator's guilt is of low level, the harmful consequences negligible, or the general purpose of criminal sanctions does not demand pronouncement of sanctions, this will mean that this is a case of an act of minor significance. These provisions can be implemented only for such violation of law where the possible sanctions range up to three years in prison or fine.

- The idea was to define what an act of minor significance is and to make impossible arbitrariness in implementation, to establish a clear limit between this act and the one falling under bigger penalties. We attached far greater significance and role to fines, as can be seen in the entire code. This is also the case with privileged forms of robbery, unauthorized possession of drugs. Besides, there really are acts which represent minor violation of law and numerous life situations illustrate this. The previous penal policy and the range of sanctions were making it possible to pronounce similar sanctions for a professional criminal who committed a more serious crime and someone who has done something for the first time, which is not good. Therefore the system of sanctions was changed, the penalties are now differentiated and better balanced. Objections that the code is milder than necessary in view of what is happening in the society are without foundations because the general legal maximum is higher than it was, so that instead of 15 years in prison the sentence can now reach also 20 years, albeit only in regard to a specified number of offenses – said Soskic.

Sanctions envisaged for the most serious crimes range from 30 to 40 years imprisonment which, as

Soskic says, certainly is a solution that does not differ from European experience.

In a separate part of the Criminal Code introduced are special groups of offenses within separate Chapters, and here belong offences against intellectual property, against security of computer data and against the environment.

The list of new crimes, among which are euthanasia (Article 117), harassment and torture (Article 137), unauthorized use of someone else's vehicle (Article 213), unlawful occupation of houses (Article 219), non-preventing the committing of crime against humanity – command responsibility (Article 384), is also not so short. Significant are also other changes so that in Chapter 18 on offenses against sexual liberties we have the crime of unlawful sexual act, while sexual indecency and unnatural sexual activity were removed. And big polemics are as yet to be expected because of the change which certainly deviates from understandings, tradition, cultures and the present mentality because the rapist can now be also a woman and not, as was the case up to now, only the man.

- By this we wanted to encompass a broad as possible a variety of possible situations. It will be interesting to see how this provision will be implemented, and it is certain that there will be resistance and different interpretations – said Soskic.

Punishment for Drivers

Completely new punishments in the separate part of the law are work in public interest and the suspension of the driver's licenses. To work in public interest can be sentenced only persons who committed something which can be sanctioned with up to three years in prison or fine.

- This sanction has given excellent results in Europe, often even better than the threat of imprisonment. We introduced a limitation, so that the perpetrator can be sentenced to work only in case that he himself accepts this sanction. Of course, the perpetrator must not be in the position to do humiliating work.

Suspension of the driver's license is no longer seen as a security matter which is part of the verdict, but is now a punishment. It will certainly affect not only those who committed traffic accidents but, which is a novelty, also criminals who during preparing or committing the offense were driving, i.e. were using the car – said Soskic.

"Mercy Killing"

Certain prosecutors criticized the privileged form of robbery (Article 206) which was introduced and which envisages punishment of up to three years of imprisonment (until now it was from 3 to 15), or fine, and even the possibility to pardon from punishment. Many citizens and laymen are also inclined to see this solution as a bad one, but the practice has shown that the punishments are not high anyway, so that it could have even happened that somebody who committed a robbery for the first time, unjustly gets a punishment similar to the one pronounced to an incorrigible criminal. Therefore this differentiation; and there is also the change in regard to classifying robberies, where the minimum punishments are somewhat reduced (one to two years). Life knows situations in which somebody is forcefully robbing a wristwatch from somebody's hand. Here we have all elements of robbery, but in case that the robbed asset is of minor value, up to 10,000 dinars, and the robber has for the first time done such a thing, there must be made a difference in comparison to repeat offenders whose police files are quite big.

There were also opposing standpoints on Article 246 which says that the person who had drugs for personal consumption can be pardoned from punishment (fine, or up to three years).

- The motive is similar as in the case of robbery, and the interest of the society is not to sentence drug-addicts to a minimum of three years of imprisonment as was the case up to now. The interest is to reveal the organized crime groups and networks, and up to now a drug addict and a drug-dealer who distributed smaller quantities of drugs could get a similar punishment, which does not correspond with reality. In the case of drug-dealing there is also the possibility that a small dealer be pardoned from punishment if he contributes to the unmasking of the crime. However, if he possessed a bigger amount of drugs, and if he committed the crime many times, he could not be declared free. Maybe his sentence could be somewhat reduced – said Soskic.

Mercy killing, as it was called in the 1929 Criminal Code of the Kingdom of Yugoslavia is a known category, but now it was named as depriving of life out of pity in order to avoid the word killing. However, it is obvious that this is a case of a privileged form of murder.

Journalists

From the special part removed are also special offenses of defamation and insult and exposure to mockery of the highest representatives of state organs, and it is not envisaged to have prosecution ex officio, in case that these acts were committed against official or military persons in connection with their official performance. This is completely expected, in view of European documents and Conventions on Human Rights, because politicians and people from the government must be ready to stand public criticism even better than ordinary citizens and they cannot be particularly protected only because of their function. Of course, this does not mean that the people from the government do not have the right to lawsuits because of defamation and insult.

There were demands of journalists' associations and professionals, as well as recommendations of the OSCE, that in regard to offenses against honor and reputation Serbia could have a vanguard role even in Europe and decriminalize this field. Many European countries, regardless of recommendations of the OSCE, did not decriminalize this field. However, imprisonment - which threatened primarily to journalists and the media - was removed, and only the threat of fines remained, which is a significant novelty.

Fines do not exclude a lawsuit for indemnity, so that having this in mind the defamer can pay also twice for his sins. All modern solutions go in the direction of protection of the right to public expression of thought and criticism. Of course, this is why this solution, which seems to be a good one, was adopted – said Soskic.

Soskic explained that the legislator wanted to make things simpler and instead of having numerous offenses in the field of corruption which is present in different professions - and special attention was given to this phenomenon - and decided to remove the unnecessary legal mass and unclear situations. All was reduced to the substance, namely the offense of accepting and giving bribe which is described and defined in detail and which could be easier implemented in practice.

Aleksandar Milosavljevic, president of the executive board of the prosecutors association of Serbia and the Deputy District Prosecutor in Belgrade said for Pravda u tranziciji that obviously the aim was to get closer to European standards and experience, which influenced the form of the code. He confirmed that the code is more modern, refreshed with modern legal theories and stressed that codification and collecting of the biggest number of offences in one place is a positive step forward.

- Essentially, the general part of the code contains all those necessary and known categories with certain changes which are not only of cosmetic nature, one would say. Although the wording "social danger" was removed (the aim was to modernize), the question is how quickly will the judges, prosecutors and lawyers adapt to changes, because it is difficult to change the way of legal thinking and old habits. The second problem is that in regard to some legal categories there nonetheless can be noticed some room for dilemmas. The notion of guilt is set too broadly. The attitude of the perpetrator to the offense, the conscience that it was forbidden to commit it, the identification of intention, are some problems which have been present up to now as well. But the definitions were changed so that it remains to be seen in the forthcoming period how the novelties will show in concrete cases – said Milosavljevic.

Milosavljevic is of the view that it is too early to evaluate which solutions could bring certain changes in practice. He agreed with the view that repression, the level of envisaged punishments is neither a reliable remedy against crime, nor something that guarantees success in suppression of criminality and its reduction to reasonable proportions.

"Borrowing"

The press has already published articles and reactions of the police who claim that the introduction of the offense of unauthorized use of someone else's vehicle will have negative effects, and that many thieves will be free or it will be more difficult to catch them than until now because the punishments were from three to five years in prison.

- I think this comment is not appropriate because for theft, which is separated, in the future it will also be possible to pronounce the sentence of up to five years in prison. This act is envisaged in order to make a difference between those who steel a vehicle for the purpose of resale and, for instance, of young adults or other perpetrators who just take a drive in the vehicle, leave it somewhere, to put it simply, borrow it. But, who has carefully read the code, can see that the fine or punishment of up to

three years of imprisonment is possible only if there was no violence – said Soskic.

Of course, the person who does something of the kind, can be sentenced to fine or up to three years in prison which is not a mild one, and there is also the possibility that he be declared not-guilty. However, every repeated borrowing implies the implementation of paragraph 2, i.e. the punishment of three up to five years in prison.

European Solutions

- The fact that up to now there was a minimum punishment of three years in prison for robbery did not influence in any significant degree the sentences pronounced and a more stringent penal politics. Privileged form of robbery, hence, does neither mean that the penal policy will be milder nor that those who "get through" with a fine or will be declared not guilty if they violated the law for the first time, will the next time also avoid a more severe sanction. They can get a second chance, but depending on the concrete act also a punishment of up to three years in prison. The sanction of one year in prison is also not a small one. It is true that the maximum punishment for some forms of felony were also reduced, while others continue to be sanctioned more severely. Simply, a more realistic classification was made, which is more in accordance with the reality and with what the practice has shown – said Milosavljevic.

He commented remarks that it is not good that possession of drugs can result in a not-guilty verdict, fine or up to three years in prison.

The purpose of the law is not to punish drug-addicts, but rather the dealers of a bigger criminal network. Of course, if somebody is caught with a bigger quantity of drugs, this does not mean he will avoid prison. In regard to possession of drugs it will be particularly important whether the perpetrator had the drug for personal use. In this case, he can be also declared not-guilty. However, practice showed that even the dealers, most often, will not have more than 10 grams of drugs. The possibility remained that even a small drug-dealer does not get a sentence if he contributes to the identification of other perpetrators and bigger drug-dealers. Practice up to now showed that there is a small probability that somebody from the lower ranks will "sing out" and reveal the more dangerous criminals. It is true that the law envisages a minimum of two years, as well as a maximum to 12 years in prison, but this will not have an essential influence, like in the case of robbery, upon the frequency of offenses.

Resale, smuggling, production are an international organized crime business where only inter-state cooperation and modern methods produce results. This is a problem which the entire society should be solving, and it will not be removed by unrealistic punishments which you will not even be able to pronounce – said Milosavljevic.

In his view the offense of harassment and torture does not represent a big novelty, but it is good that for this detached offense all persons will be liable to responsibility, and not only - as was the case up to now - official persons committing these offenses in the line of duty as previously was the case. This act will "reach" also robbers and rapists, all those who in committing some other offenses do also resort to torture, as well as those whose offense is only torture. One of the reasons for introducing this novelty certainly are international documents on torture, as well as the desire to expand the responsibility of criminals for something that implies also attack against life and body, as well as dignity of the person.

- Important is the bigger significance attached to fine, which is also practiced in the world. We had many suspended sentences and everybody preferred to get probation than to be "hit in the purse". Solving the problem in this way gives better results. Fines for offenses against honor and reputation, defamation and insult is also a good solution. "Skirmishing" of politicians in the media, senseless accusations, former obligation to act in official capacity, should really be left in the past. Introduction of new punishments such as suspension of the driver's licenses and work in public interest, in my view, are not the best developed and good solutions. Although defined as a punishment, it seems to me that the suspension of the licenses still by character does more resemble a security measure which is pronounced together with the sentence. I don't know, maybe it will give better results in regard to traffic security. It is difficult to say that it is a good solution to suspend someone's license because he was driving the car while committing a crime – thinks Milosavljevic.

Work in public interest is a good solution which in Europe produced excellent results, said Milosavljevic, but European legislature has precisely defined who will control over the implementation of this

punishment, in which institutions it can be performed, and numerous other details.

- It is good that this punishment was introduced, but I am afraid that we lack these other elements so that for the time being it is difficult to say how it will be implemented. Who is going to control whether somebody is skiving off, how many hours a day he is working – said Milosavljevic.

The important novelty, as the Deputy District Prosecutor in Belgrade explains, are more severe conditions for an act to be classified as a prolonged offense. This will not produce any consequences and changes in the penal policy.

There are changes also in the case of self-defense where more attention is paid to other goods, and not only to life and body. The property, namely the ownership, is the sacred right in the West. Here the reality is much more different and the conscience in this regard is not yet mature. Essentially, the code is worked out under the influence of all that what is happening in Europe and in the West. This is a radical undertaking, but maybe a step further could have been made – assessed Milosavljevic.

In view of Milosavljevic the offense of unlawful occupation of houses, as it seems, is a belated reaction of the legislator, because this phenomenon was much more present in the nineties and in the first phase of transition.

- Those who invest in housing are interested in preventing this phenomenon and give the keys directly to their clients. However, this phenomenon is to a certain extent still present, and maybe this provision will after all have a certain preventive significance – said Milosavljevic.

Challenges of Protection

Groups of offences which are included into the code are a significant novelty, first of all those related to security of computer data, intellectual rights, environment.

- It is good that room was made for these provisions, but I think that our social system is not sufficiently ready for challenges of protection, for instance of the environment. If the standards for privatization and the arrival of foreign investors were more rigorous, precise, fewer of them would decide to invest in Serbia. Few investors built factories and different plants with respected for certain standards at all. There are a lot of things which are "squeaking" here, so it is difficult to implement incrimination, and even also sentence individuals when the entire chain of protection does not function. The consciousness of our citizens is also on a low level, and suppression of not only the ecological crimes implies a broader social action, different measures, from economic ones to numerous other ones, the adaptation of the system. The fact is also that the technology for protection along international standards are rather expensive for our local conditions – said Milosavljevic.

Different offenses against security of computer data are the expected answer to contemporary forms of criminality, but the question is how much the police, the prosecutors and the court have a genuine infrastructure and capacity to efficiently oppose this evil of the modern era.

Including these provisions is inevitable, but there will be a lot of problems in the implementation of the law. I had also a personal experience in a case of a cyber attack against the Serbian café web-site. A dissatisfied player who was expelled from the game made an electronic attack and crashed the site. We managed to identify the perpetrator, identify the address from which the attack was performed and sent the police. And, they took away the computer, brought the box, the monitor, the keyboard. There were no diskettes, and it was difficult to break the password to the computer. Hence, it is difficult to collect the evidence, and it is necessary to have also a greater quality of training of people in this field – noted Milosavljevic.

The Deputy District Prosecutor thinks that the answer to numerous legal dilemmas will come in time, and will be given through the practice and the criminal proceedings themselves.

Command Responsibility

Particularly stressed as the harmonization with the norms of international criminal law was the offence from the Article 384, i.e. the non-prevention of committing crimes against humanity, which in the public was brought to the level of command responsibility. And, offences related to war crimes make a separate chapter of the code.

The biggest criticism, although only a few months have passed since the beginning of the implementation of the law, relates to the mentioned offense in Article 384, with the claim that it relates to future legal situations and that therefore it does not leave the possibility for trials against the commanding cadre in

front of domestic courts.

- We cannot pass laws “backwards”, and this is clear. However, there is little probability that The Hague Tribunal will transfer to the local judiciary exactly these cases. Here will be held trials mainly against those who committed war crimes, and even if some of the lower ranking commanders in the chain of command would show up, namely a lower ranking officer or a commander of a smaller group, he would certainly stand trial for war crimes and some other, also envisaged acts – said Soskic. Although it could seem that the Criminal Code of Serbia does not bring generally turbulent changes, the changes are neither so small nor so meaningless, and the general objection of even the authors of this law is that it was adopted to hastily, that the deadlines were to short and that the judges, prosecutors and attorneys will have problems to adapt to the changes and overcome the way of legal thinking that was nurtured for decades.