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WHERE IS MATERIAL CRIMINAL LEGISLATION OF REPUBLIKA SRPSKA GOING TO

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Abstract: *In this paper the author is analyzing some characteristic solutions brought by the new 2017 Criminal Code of the Republika Srpska. It is about some institutes dealt with in its general part including: prohibition to drive motor vehicle, joinder/concurrence and continued criminal offence in addition to criminal offences dealt with in its special part, which were defined as independent criminal offences in the previous Criminal Code of the Republika Srpska, while now they underwent significant changes and lost their independent character by being merged with other criminal offences. These changes relate to the criminal offences of theft, forest theft and robbery which deviate from decades-old established principles and standpoints of legal science and court jurisprudence. We expect these solutions to attract noteworthy attention of legal science and professional public as we also expect its practical implementation to cause some dilemmas. Convinced that some of these new solutions are unnecessary, and others incomplete and vague, by this paper we want to draw the attention of the scientific and professional public aiming at creating an opinion on whether or not is necessary to adopt such solutions and where this approach to changing one of the most important material systemic legislation is leading.*

Keywords: *prohibition, joinder/concurrence, theft, forest, robbery.*

1. REASONS FOR THE ADOPTION AND A CONCEPT OF A NEW CRIMINAL CODE OF REPUBLIKA SRPSKA

According to the reasoning attached to the draft Criminal Code of Republika Srpska the reasons for its adoption are multiple amendments of the then applicable 2003 Criminal Code of Republika Srpska (Official Gazette of Republika Srpska, no. 49/03, 108/04, 37/06,

73/10, 1/12 and 37/13) (hereinafter: CC RS). This piece of legislation was amended six times, so it is necessary for certain legal solutions to be adjusted with the current situation in the society and the European Union directives for some criminal offences. To this end amendments took place in both general and special part of the new Criminal Code of Republika Srpska (Official Gazette of Republika Srpska no. 64/17 (hereinafter: the Code).

Pursuant to the provided reasoning, the novelties in the Code regarding the matters tackled in its general part relate to the material gain seizure, seizure of objects or means used in the perpetration of a criminal offence or intended to be used for that purpose, as well as the seizure of assets resulting from its perpetration. A sanction of prohibition to drive motor vehicle is introduced, as well as the option that the pronounced sentence of imprisonment up to one year be exceptionally executed on the premises where the sentenced person resides (house arrest). A new measure of prohibition to attend certain sport events is prescribed, and the previous measure of mandatory psychiatric treatment and safekeeping within a health care institution reinstated. Under this Code a record of those convicted by a final and binding court decision for criminal offences against the sexual integrity of a child has to be established and kept. Amendments lacking reasoning are those related to the changes in regime of pronouncing a sentence of imprisonment up to six months (it can be pronounced only exceptionally), determination of a sentence for concurrent offences, continued criminal offence and some other institutes, so that it remained unclear why the former legal solutions were changed.

In the special part of the Code, new criminal offenses are introduced including the following: genital mutilation of women and forced sterilization, stalking, association for the commission of criminal offenses of trafficking in human beings and children, sexual blackmail, sexual gratification in the presence of a child, compulsory marriage, abuse at work, theft of electricity or gas, fixing the outcomes of competitions. In addition to that, new criminal offenses against constitutional order and security of Republika Srpska are also prescribed, as well as criminal offences of terrorism, criminal offenses of misuse of budgetary funds and unlawful favoring of commercial entities, criminal offenses of causing disorder, violent behavior at a sporting event or a public gathering and perpetration of a criminal offense as part of a criminal enterprise, criminal offenses of endangering the environment by the improper construction of facilities and installations, destruction or damage to protected natural values or goods, destruction of habitats, unlawful export or import of strictly protected plants, animals or genetically modified organisms and endangering the ozone layer. Besides, changes were also made in some criminal offenses, for instance endangering the public traffic, which in many ways change the basic elements of the substance of this offence. In this paper we shall tackle only with a few characteristic institutes and criminal offenses, which, in our opinion, portray the legislator's depletion of all ideas on which a new law should be built, as we shall tackle the values to be protected and methods of doing it in order to preserve the coherence of the law and its economic, social, historical and cultural background.

2. PROHIBITION TO DRIVE MOTOR VEHICLE

The Code has kept the duality of criminal sanctions (sanctions and security measures), but for incomprehensible reasons the traditional safety measure of prohibition to drive mo-

tor vehicle it transformed into a sanction. In addition, it is now positioned exclusively as an auxiliary sanction which can only be pronounced together with imprisonment, fines or suspended sentences. So far, in the domestic criminal legislation, it was not common for a sanction to be pronounced only as auxiliary, only a fine could be pronounced as a main and an auxiliary sanction. It remains unclear what is a *ratio legis* of such a solution because the security measure in a simple, clear and efficient manner fulfills all the purposes of the criminal policy and the protection of the society from criminal offenses against the safety of public transport. Why is a good and well-established solution annihilated and spoiled, and for incomprehensible reasons, not required by neither the legal science nor the legal profession, introduced into the criminal legislation.

Pursuant to the provisions of Article 51 paragraph 1 of the Code this sentence can be pronounced to the perpetrator of a criminal offence of jeopardizing the public traffic for a term between six months and five years, and where the death of one or more persons occurs as a result of this offence for a term between one and eight years. When we analyze the gravest sentence threatened for this criminal offence we can see that it is eight years for the offence committed out of negligence. Since the court, in addition to this sentence as the main one, can pronounce an auxiliary sentence of prohibition to drive motor vehicle, it arises that the auxiliary sentence can have the same duration as the main one. We think that this is wrong, just as the whole solution of transforming the security measure into a sentence, and in no case an auxiliary sentence should have the same duration as the main one.

Now, our attention is drawn to paragraph 5 which stipulates that if a convicted driver had driven a motor vehicle during the period of prohibition, the court will replace this sentence by a sentence of imprisonment in a way to impose one month of imprisonment for every six months of prohibition to drive motor vehicle prohibition. In this way, an auxiliary sentence is replaced by the main one, which is a totally unacceptable solution, especially if the sentence is pronounced as the main one, since then we will have the situation that two prison sentences exist in parallel for the same criminal offense. It raises a number of questions, both in the stage of deliberation and pronouncement, and in the stage of the sentence execution, bringing it into a collision with the basic principles of the general part of the Code. All this means that the legislator has already faced the problem of this sentence execution which it tried to overcome in an unusual, even unacceptable way.

Paragraph 3 of the Code foresees that the court in pronouncing a suspended sentence can determine that this sentence be revoked if the convicted person violates the prohibition to drive motor vehicle. We think that the provisions on revocation of the suspended sentence should not take place. If it was necessary to prescribe the revocation for these reasons, it should have been done in the part governing the revocation of a suspended sentence or additional conditions for suspended sentence, but in no case in the framework of the provisions of this sentence.

Particularly controversial is paragraph 6 which prescribes the content of this sentence to be expanded from the prohibition to drive motor vehicle to the suspension of one's drivers license and prohibition of the issuance of a drivers license. This shows that even the authors of the wording of this Code are not sure how to transform a security measure into a sentence. On the other hand, it is justified to raise the issue of legal certainty, clarity and determination of the legal norm elements of which determine the content of the sentence within the criminal sanctions system. We are convinced that this norm is not clear because

it is divided into two mutually unrelated paragraphs of one article, which is in contravention of the basic principles of the Code itself, and is also wrong from nomotechnical aspect.

3. JOINDER/CONCURRENCE OF CRIMINAL OFFENCES

As a rule, the offender who, by a single or by several actions, has committed several criminal offences for which he is tried at the same time, the court imposes a total, unique sentence. Domestic criminal legislation in case of the concurrent offences adheres to unique rules in deliberation and sentencing for all types of concurrence (ideal real).

Criminal legislation of Republika Srpska determines a total/unique sentence for criminal offences perpetrated in concurrence in a way that it first determines the sentence for each offence separately within the legally prescribed limits for that offence, and then pronounces the unique sentence for all the offences committed in concurrence.

In the second phase of deliberation the court adheres to the special rules where three systems are applied:

a) absorption system – where the gravest sentence takes over all the others by means that a sentence be pronounced for all the offences committed in concurrence, and then the gravest foreseen sentence which absorbs all the other lesser sentences is pronounced,

b) aggregation system – a sentence is pronounced for each offence committed in concurrence, and then the gravest established sentence is increased, but not to exceed the sum of individual sentences, nor the general legal maximum for that particular type of sentences. This system is applied when the sentence of deprivation of freedom is in question, and

c) cumulating system (summing up the sentences) – the sentence for the individual offences is first determined, and then all these sentences are summed up and a single sentence imposed on the perpetrator. This system applies to monetary fines, and exceptionally for short prison sentences.

In its Article 56 the Code prescribes the rules for determination of a sentence for criminal offences committed in concurrence, which differs from the former law and does not fall within any of the above mentioned systems. It relates to the paragraph 2 of this Article where it is provided that if the court has determined the sentence of imprisonment to a period longer than ten years for two or more criminal offences, the sum of which exceeds 25 years, the court can pronounce a total/unique sentence of long imprisonment which may not be as high as the sum of all incurred sentences, nor may it exceed a period of forty five years. This departs from the rule prescribed in paragraph 3 which provides that if the court has determined sentence of imprisonment for the concurrent criminal offences, the total sentence must be higher than each of the individual sentences, but the total sentence may not be as high as the sum of all incurred sentences, nor may it exceed a period of twenty years. This is in contravention with Article 45 paragraph 1 of the Code which provides that the long term imprisonment for a term between twenty five and forty five years can be imposed only for the most serious criminal offences and the gravest forms of serious criminal offences committed with premeditation.

Two types of sentences totally different by their nature and content are mixed here and this enables the pronouncement of a sentence which is not prescribed for neither of concurrent criminal offences. It is contrary to the principle of legality under Article 2 paragraph 2 of the Code according to which no punishment or other criminal sanction can be pro-

nounced if it was not defined by the Code. In this way the perpetrator can get a sanction which is not prescribed for any of the concurrent offences. On the other hand, the sanction of imprisonment for a term exceeding ten years can be determined for criminal offences which are not the gravest ones in their nature, nor they constitute the gravest form of the serious criminal offences, so that it remains unclear how the long term imprisonment sentence can be pronounced for such offences (for instance for multiple offences of aggravated theft and like). By this a more strict legislative act is created unnecessary and contrary to the legal science rules, and also the principles presented in the Code itself. Judgment of the Constitutional court of Republika Srpska (Constitutional court of Republika Srpska, judgment no.: U-69/17 dated 31 October 2018) corroborates that this solution is not sound and that Article 56 paragraph 2 Item 2 of the Criminal Code of Republika Srpska is not harmonized with the Constitution of Republika Srpska. The legislator did not enforce the mentioned judgment till the date failing to harmonize the disputed article with the Constitution.

4. CRIMINAL OFFENCE OF THEFT

Criminal offence of theft is the basic criminal offence against property governed by Article 224 of the Code and it consists of taking away someone's movable property with the intention of acquiring an unlawful material gain. Here we have the issue of the content of the perpetrator's intent which is determined as unlawful appropriation. Unlawful appropriation can be incited by different motives where the motif of the perpetrator is not always acquiring an unlawful material gain. Taking away and unlawful appropriation of someone's movable property without the intention of acquiring an unlawful material gain are the elements of the criminal offence of taking away someone's property.¹ Since the existence of the intention of acquiring the material gain is not necessary in such a disposition, the movable property does not have to be valuable at all. Former criminal legislation always required the perpetrator of a criminal offence of theft to act with the intention of acquiring the unlawful material gain.² That was absolutely clear, corresponded with the nature of the criminal offence of theft and differentiated it from other similar criminal offences, such as taking away someone's movable property item and like. With so imprecisely determined elements of this criminal offence it remains ambiguous what is the content of the perpetrator's intention, whether or not it includes the intent of acquiring the unlawful material gain or not. This is an issue to which the court jurisprudence and court practice will have to find an answer, while we think that this needs to be changed and the earlier solution which is defined and checked by criminal legal science and court case law, needs to be reinstated.

On the other hand, when it comes to a criminal offence of robbery³ as a complex criminal offence involving theft and duress, it was kept that other's movable property is taken away with the intent of acquiring an unlawful material gain. The construction of a complex criminal offence here is built by merging duress and the criminal offence of theft as it was defined in the former legislative act which seized to be in force rather than theft as defined in the Code. This completely destroys all that the criminal legal science has built by now which

1 Judgment of the Regional Court in Kragujevac K-136/04 dated 23 November 2005 and the Supreme court of Serbia Kž-I-113/07 dated 10 April 2007

2 See Article 231 paragraph 1 of the 2003 Criminal Code of Republika Srpska

3 Article 227 paragraph 1 of the Code

was elaborated and accepted by the court jurisprudence. What is behind such action of the legislator related to such an important criminal offence remains unclear.

Protected object in this criminal offence is property of any kind, irrespective whether it is material or non-material, movable or immovable, or legal documents or instrument for proving the entitlement to this property.⁴

The object of the attack is someone's movable property items, which means it can be any produced or collected energy⁵ for illumination⁶, heating or moving, telephone impulses, as well as the registered data resulting from electronic data processing (computer data or a program). A human being is not a thing so it cannot be an object of this criminal offence, but it can be separate human body parts, either natural (cut hair, extracted tooth) or artificial (prosthetic denture, arms, legs). Corps and its parts can be an object of the attack at the criminal offence of theft if they have a special purpose, implants or valuable items.

A movable item subject to theft has to have two characteristics. These are the following a) to have proprietary, monetary value or could be used to get such value (with the current solution this remains unclear) and b) to be someone's property, that is, not to be owned by the perpetrator since nobody can steal from themselves. There is an exception from this and this exception is when the item is co-owned by the perpetrator and another person or persons and the perpetrator ends up the possession of that other person and establishes his possession. Abandoned and lost items⁷, as well as the items for which the owner is not known cannot be subject to theft unless they are lost, forgotten, misplaced or abandoned on premises owned to other person as a possessor since in this case that other person can dispose with such items.

Executed action here is taking away someone's movable property item⁸. There are different theories on when taking away is considered committed (when the criminal offence of theft is executed). These theories are: a) *Contrectatio (touching) theory*, b) *Amotio (removal) theory*, c) *Ablation (taking away) theory*, d) *Illatio (illation) theory* and e) apprehension the-

4 Article 123 Item 25 CC

5 Article 123 Item 18. CC. Water can be subject of theft when the perpetrator used it to the detriment of the utility company by arbitrary connection to the water pipeline and used water consumption of which was not registered on water meter.

6 Theft of electric power exists when the perpetrator uses not measured electric power in a way to connect any electric power facilities to a power grid using the electric energy without or against the prescribed measuring devices.

7 By appropriation of a lost or a forgotten item when the person who has lost or forgotten this item presumes where this item is located and by searching it manifests their intent to establish factual possession over this item the perpetrator is committing the theft.

8 Actions of those accused of appropriation of items of the injured party from a house entrusted to them for use as temporary beneficiaries over which they had factual possession in moment of appropriation have characteristics of the criminal offence of embezzlement rather than theft since these items were not in factual possession of the injured party, but in factual possession of the accused so that this situation does not involve unlawful taking away of other's movable items possessed by the injured party in the moment of taking away, which is a characteristic of the criminal offence of theft.

ory. Apprehension theory is accepted in the domestic law according to which the action of a perpetrator by which he ends up the possession (factual, corporal possession, detention) of another person over a thing/property item and establishes his possession, that is, when the perpetrator starts the factual disposal with that item, or when he creates the conditions enabling him a free, unhindered disposal and utilization of that item⁹.

Taking away an item can be done in different ways, secretly or publicly, by different means. In order to amount to a criminal offence it is important for an action to be done with the intention of unlawful appropriation for himself or another person of the item which is taken away. A perpetrator must have an intention at the time of the execution of taking away action, but this intention does not have to be realized. By appropriation of a thing one does not acquire ownership over that thing, but manifests the proprietary behavior by disposal of things.

Any person can be a perpetrator of the offence, but for guilt, it is necessary to have a direct premeditation featured by the mentioned intention to appropriate someone's thing.

A less grave form of a theft (petty theft) exists when the value of an property item taken away does not exceed the value of 300 BAM, where a perpetrator intended to acquire small material gain. For this offence two elements are characteristic: a) objective element – determined by small value of acquired material gain and b) subjective element – a perpetrator's intention was to acquire such small material gain. Here we can see that intention of material gain acquisition is required, which does not exist in the basic form of this criminal offence, which additionally renders legislator's intention unclear.

Special form of theft is a „forest theft“. This offence in the former CCRS was classified as an offence against the environment, and in pre-war legislation as an offence against economy. We think that this offence goes primarily against the environment which is endangered by cutting the trees for theft (where still exists a criminal offence of depredation of forests which is similar to this offence), and then the property. For that reason this criminal offence needed not to be governed as a separate form of theft as it is currently done.

The offence is committed if a person, with the intention of theft, cuts down the trees in quantity exceeding five cubic meters. The object of protection is a forest, and the executed action is cutting down the trees. This is a separation of a tree trunk from its root. In order to be qualified as a criminal offence such an action should be done: a) at a certain place - in a forest, b) with a certain intention - for theft, that is, to take away someone's movable property for its unlawful appropriation, and c) in a way to result in cutting down a quantity of timber exceeding five cubic meters. Lesser resulting quantity of timber does not amount to theft. According to the explicit legal provision an attempt to commit this offence is punishable.

There is a couple of disputable things here. First, linguistic interpretation of the notion „cut the trees“ suggests that it is a plural, meaning that it is necessary to cut down multiple trees, at least two. Earlier in the criminal offense of forest theft, as an independent offense, it was prescribed that one or more trees should be cut down, which further confirms that now it is about more trees than one. It is possible that the legislator, determining a resulting quantity of the five cubic meters, thought that a tree could not contain this amount of wood.

9 For executed criminal offence of theft a mere detention is not sufficient, it should be possession which enables the perpetrator unimpeded disposal of the item which is taken away.

However, this is not true because there are trees in a high quality forest that exceed five cubic meters by their mass, so that by their cutting down the perpetrator would remain unpunished because he did not cut the trees but one tree. Since we think that the aim is not to leave the cutting down of quantity exceeding five cubic meters unpunished, it should be written that cutting down one or more trees in specified quantity is amounting to theft.

Second, the quantity of five-cubic meter is large because when the forest was better protected and less vulnerable, the limit was set first to two cubic meters in the previous legislation and later raised to three cubic meters. Here it should be kept in mind that once the ruler allowed his subjects to cut down the wood in the forest for heating the households in winter time and for that they would be unpunished. Since their needs were modest, the quantities of cut down wood were small. Later, the state authorities set a limit of two cubic meters, which was enough for a household to survive the winter without damaging the forest. We consider that the quantity of three cubic meters was the optimal and that it did not have to be changed. After all, this criminal offense by its nature is not a purely criminal offense of theft and therefore it was necessary to remain as before among the criminal acts against the environment since it is the primary object of protection.

Forest theft manifests in two aggravated forms.

First aggravated form exists in the following cases: a) if the action of cutting down the trees was committed with the intention to sell the wood. This intention must be present with the perpetrator at time of the action execution, but not always necessarily realized, b) if the quantity of cut down wood exceeds fifteen cubic meters where a qualificatory circumstance is the scope and intensity of the caused consequence and c) if the offence has been committed in a protected forest, national park or some other forest of a special purpose. Type, significance and character of the commitment venue represent a qualificatory circumstance.

Second aggravated form of the offence exists if the cut down of wood in quantity exceeding a hundred cubic meters represents the executed offence with the intention of selling. The basis for more strict punishment is the scope and intensity of the resulting consequence and the intention of a perpetrator which qualifies as a direct premeditation at time of the commitment of the offence.

5. THEFT OF ELECTRICITY OR GAS

Theft of electricity or natural gas under Article 225 CC as a special form of theft consists of connecting any electric power facilities to a power grid, using electric energy, thermal energy or natural gas without or against the prescribed measuring devices, or otherwise uses unauthorized electrical or thermal energy or natural gas, or prevents an authorized person from registering the consumed electricity or heat or natural gas.

However, it is interesting that, apart from qualifying this offence as theft whereby in its paragraph 4 as a qualificatory form mentions the value of the stolen energy, the legislator does not mention any intention of acquiring the unlawful material gain, intention of appropriation or any other intention. In its original form this offence is taken over from the Law on Electric Energy (Article 80a), which does not prevent the legislator to adjust this offence in the framework of CC and govern in line with criminal offences belonging to the related group. On the other hand, electricity, heating power and gas have always been considered as movable things that may be the subject of the perpetration of a criminal offense of theft.

There is an extensive court practice in this matter, but the question arises as to why to separate the theft of these energy sources from theft of other movable things. Everything else, such as the unauthorized connection, use without prescribed measuring devices without the intention of obtaining unlawful property gains, or preventing an authorized person from registering the consumed energy, can hardly be classified as criminal offence of theft.

Subject to protection is a property, and the object of attack: a) electric energy, b) heating energy and c) natural gas.

Action of execution is determined in multiple alternatives including: a) connection to the electric grid in contravention with the applicable regulation, b) consumption or use of electric or heating energy or natural gas without the prescribed measuring devices or against it, c) consumption of unauthorized electrical or thermal energy or natural gas otherwise and d) preventing (in form of prohibiting, disturbing, aggravating by physical or psychological actions) an authorized person from registering the consumed electricity or heating or natural gas.

Any person can be a perpetrator of the offence, and to be considered guilty, premeditation is required.

A special form of this offence exists if the end customer of electric or heating energy or natural gas does not report the commitment of this offence. This is a special form of failure to report of criminal offence or its perpetrator (as a criminal offence against the judiciary).

This offence manifests in two aggravated forms.

First aggravated form of this offence exists if the action of execution was taken by end customer of the electric or heating energy or natural gas.

Second aggravated form of this offence exists if the value of the stolen electric or heating energy or natural gas exceeds the amount of 10,000 BAM. If the value of the stolen energy or gas according to the market conditions at time of commitment of the offence exceeds the amount of 50,000 BAM, then the prescribed cumulative prison sentence ranges between two and eight years in addition to monetary fine.

If the perpetrator of this criminal offence is a legal person, then the prescribed monetary fine ranges from 20,000 to 200,000 BAM, and a responsible person in this legal person the sentence of imprisonment for a term up to three years cumulatively with monetary fine. This is an exception in the Code to provide for a criminal offence a minimum and a maximum sentence for legal person and responsible person within that legal person. This solution is not bad at all, but is inconsistent since it is not the case with other criminal offences, so the question can be raised as to why the legislator excludes this criminal offence from the others. We incline to a conclusion that it was hastily taken over from the mentioned Law on Electric Energy. The very structure of the punishment for the legal and the responsible person more reminds to responsibility once prescribed for economic crimes and is strange to a criminal law matter.

6. CONCLUSION

To change the material criminal code is always a serious and complex, time consuming task, which requires expertise on part of its creators, clarity of vision of the legislator and the interest of the professional and scientific public to give useful suggestions and critical assistance in its creation through a public debate or in some other way. The legislator assures

us that there were real needs to make relevant amendments to the RS Criminal Code so far, which we also accept as justified. However, one cannot avoid the impression that these amendments went in another direction departing from real needs and that some changes took place in contravention with what was decided to be done. In other words, we think that the legislator is acting without a clear purpose, not in keeping with the rules of criminal law and nomotechnical rules, applying the principle to take parts from the legislation of different countries as it finds interesting, but not in harmony with other similar norms. This conviction of ours is bolstered by the fact that some changes, as mentioned in our critical review, to put it mildly, are hardly acceptable as necessary or justified, not to mention their quality and practical applicability. This effort was certainly extensive and its effects should be carefully analyzed in future and new solutions offered by the legislator need to be analyzed. This analysis is based on the premises of the criminal law science and court jurisprudence which is to be established. Only careful follow-up and monitoring of the court practice will reveal advantages and disadvantages of certain solutions. In this paper, we have made certain observations, remarks and suggestions, considering that, from the practical point of view, it could be useful for the legislator in the future amendments to the Code that will certainly take place. We feel that it is not good to make experiments and without the actual need change the traditional solutions related to the composition of some criminal offenses that have so far accomplished the function and purpose of criminal law. Only in this way a high-quality law can be produced, otherwise we will have a poor compilation of Serbian and Croatian material criminal law, with a series of bad and unsustainable domestic innovations, which have not been mentioned so far.

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