SECRET AS AN OBJECT OF CRIMINAL LAW PROTECTION IN THE REPUBLIC OF SERBIA[1]

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INTRODUCTION

Taking into account that criminal offences in the national criminal legislation are governed by the provisions of the special part of Criminal Code (CC) and partly by the secondary criminal legislation, as well as that they are classified in various categories based on a group protection object, the authors attempt to determine systematization criteria used for providing criminal law protection of a secret as a defusing defined category, thus indicating potential options for a different theoretical classification. The authors' aim is to analyse the adequacy of the existing positive legal solutions and to suggest potential amendments to the legal frame in this complex but important field.

A secret in the paper is considered both as an object of protection and an object of action, i.e. as a material object upon which a criminal offence is committed. It is not perceived as an object in an ordinary meaning but as the value, i.e. a set of individual rights or as a secret which the legislator defined as a trade, state, official or military secret.

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The five types of secrets specified by the legislator of the Republic of Serbia are provided the strongest legal and criminal law protection. However, certain types of secrets are explicitly defined in a different way and their protection is prescribed in various chapters defining criminal offences within the Special part of the Criminal Code.

The basic research question and the purpose of the paper is to establish, define and determine criteria used as the basis for different definitions of secrets presenting a substantive criterion for specifying conducts which should be regarded as criminal acts and their categorization in various groups of criminal offences which are mutually heterogeneous.

DESIGN/METHODS/APPROACH

Beside the introduction and conclusion, the paper has four separate chapters. The first chapter deals with the questions of the general theoretical determination of a secret and its normative definition in the Serbian legislation. The second one reviews a secret as a specific object of protection within various types of criminal offences and a secret as an object of action in five incriminating manifestations. The third chapter offers a standard analysis of the characteristics of the substance of the criminal offence of illegal disclosure of a secret, Art. 141 of the CC from the category of criminal offences against the rights and freedoms of man and citizen, while the fourth one surveys a normative analysis of the criminal offences which are provided protection by other manifestations of a secret, such as: disclosure of a trade secret, Art. 240 of the CC from the group of criminal offences against the economy; disclosure of a state secret, Art. 316 of the CC from the group of criminal offences against the constitutional order and security of Serbia; disclosure of an official secret, Art. 369 of the CC from the group of criminal offences against official duty and disclosure of a military secret, Art. 415 of the CC from the group of criminal offences against the Army of Serbia. Special attention has been paid to a criminal offence provided for by Art. 98 of the Data Secrecy Law and its relation with the incriminations from Art. 316, 369 and 415 of the CC.

The authors start their analysis from the standard normative method since the subject of the research is a legal text, i.e. five separate norms providing criminal law protection of the individual secret and the secrets protecting economic or public interest (trade, state, official and military, i.e. secret data).

In addition to the normative method, standard methods of formal logic, induction and deduction, as well as analysis and synthesis have been used in the paper.

THEORETICAL AND NORMATIVE DETERMINATION OF A SECRET IN SERBIAN LEGISLATION

"He who keeps his secrets to himself remains his own master forever" the words of Omar Ibn Al- Khattab (Mislilo – knjiga misli hiljadu mudraca, 1993:787) unequivocally contains the motive of the source and secret keeping. A fundamental requirement for keeping a secret arises from everyone's right to freedom – freedom that the data and information somebody possesses may be obtained freely, without any restraints and that they are employed solely for the purpose they are meant for, meaning that the user, holder of the secret, may use everything that secret contains. On the other hand, La Bruyère's quote "When a secret is revealed, it is the fault of the man who confided it" (Mislilo – knjiga misli hiljadu mudraca, 1993:787) indicates its other dimension – disclosure. If a secret, comprehended solely in its linguistic sense of the word, is determined as "a fact known to a tight circle of people who have justified general or individual interest not to spread it" (Bodrožić, 2019:228), is not kept adequately, it loses its fundamental meaning and becomes its opposite; it becomes a datum, just a piece of information which may be misused against persons and the society who were its legal and legitimate "holders".

The issue of determination of a secret and the system of its keeping in a modern democratic society depends on the method of its basic categorization and determines implications of its disclosure.

According to the literature, a secret may be either private or public. A private secret is the result of a close relation and the relation of confidentiality among people (Peran et al., 2015:127), while a public secret has a broader sense involving data which state bodies or legal authorized persons, as well as natural persons who have access to the mentioned data are obliged to keep secret under certain circumstances and it may be classified as a trade, state, official or military secret (Bodrožić, 2019:228).

We are of the opinion that secrets should be classified according to two important criteria: a) interest which is protected by keeping a secret and b) individual, group or collective values which are the subject of protection. Taking these two criteria into consideration, secrets may be divided into: 1. secrets protecting interests in the field of national security (secret data); 2. secrets protecting interests in the field of corporative security (a trade secret), and 3. secrets protecting interests in the field of individual security (an official or personal secret).

Strictly legally speaking, secret has its material and normative dimension. The material dimension implies that a datum or a piece of information comprising a secret is known only to a certain person or a group of people, while the normative dimension of a secret concurrently denotes the fact that the secret is known only to a certain group of persons, as well as the existence of norms protecting it and proscribing its disclosure.

The normative determination of a secret represents both a foundation and limit line for prescribing mechanisms for its protection. The categorization and definition of secrets in the Republic of Serbia are regulated by the Data Secrecy Law, the Law on Personal Data Protection, the Law on Protection of Trade Secret and the Criminal Code.

The Law on Protection of Trade Secret and the CC explicitly define the concept of a trade secret, while the CC also defines the concept of a state, official and military secret. The Data Secrecy Law has particular importance because it systematically regulates the field of information protection which is of interest to the Republic of Serbia and it revokes the former classification of secrets as official, military and state, introducing as a substitute the concept of secret data which is further ranked with adequate secrecy levels (internal, confidential, strictly confidential and a state secret). Although the concept of a personal secret is not explicitly defined by the CC, it relies on other normative by-laws which regulate the labour of certain professions (primarily the work of lawyers and medical staff) and therefore they are labelled as official secrets. Here, the criminal offence of unlawful secret disclosure regulated by Art. 141 of the CC stands out. Furthermore, we may refer to the incriminations protecting constitutional right to privacy since they both directly and indirectly protect a personal secret as well. The following criminal offences may be classified here (adequate articles of the CC are cited in the brackets): unauthorized disclosure of a secret (Art. 141); stalking (Art. 138a, paragraph 1, item 3); violation of privacy of a letter and other mail (Art. 142); unauthorized wiretapping and recording (Art. 143); unauthorized photographing (Art. 144) and unauthorized publication and presentation of another's texts, portraits and recordings (Art. 145); unauthorized collection of personal data (Art. 146); as well as dissemination of information on personal and family life (Art. 172) (Milošević, 2021a:115). Nevertheless, taking into account that the criminal law protection of the right to privacy may justifiably be studied separately from the subject of our paper, we shall not deal with it in detail here. Excluding all of the above mentioned, we shall focus only on the incrimination determining a secret as an indirect object of protection (Art. 141 of the CC).

According to Art. 2 of the Data Secrecy Law "classified information shall mean any information of interest to the Republic of Serbia, which has been classified and for which a level of secrecy has been determined by law, other regulations or decisions of a competent authority passed under law" (Data Secrecy Law, Official Gazette of the Republic of Serbia, no. 104/09).

The purpose of this regulation as stated by Art. 2 of the Data Secrecy Law is to protect fundamental rights and freedoms of natural persons, especially their right to the personal data protection, while its application is connected to processing of personal data entirely or partially, both as automated and non-automated processing of personal data, which are part of a data collection or are intended for the data collection. The syntagma "personal data" as to Art. 4 of this law is defined as any information regarding a natural person whose identity is determined or determinable directly or indirectly, especially on the basis of the identification labels (e.g. the name and unique personal identification number), information on location, identifier in electronic communications networks either of one or more features of his/her physical, physiological, genetic, mental, economic, cultural and social identity, while the concept of "personal information processing" implies any operation or set of operations which are performed in an automated or non-automated way in connection with the personal data or their collection, such as collecting, recording, classifying, organizing i.e. structuring, storing, adapting or modifying, disclosing, granting access, using, disclosing through transmission, i.e. delivering, copying, disseminating or rendering the data accessible in any other way, comparison, restriction, deletion or destruction (Law on Personal Data Protection, Official Gazette of the Republic of Serbia, no. 87/2018).

The Law on Protection of Trade Secret governs the legal protection of a trade secret against unlawful acquisition, use and disclosure. The law entered into force in 2021 - superseding the law with the same name, which had been in effect for ten years but which had regulated the protection of trade secret in a different way - and as such it represents the legal foundation directly regulating the concept, civil-law, corporate offence and misdemeanour protection of a trade secret, while criminal-law protection of such a secret is regulated by the CC provisions. As to Art. 2 of the Law on Protection of Trade Secret, information considered a trade secret 1) represents a secret because it is not in whole or in terms of the structure and set of its components generally known or easily accessible to persons who in their activities usually come into contact with this type of information, 2) has commercial value because it represents a secret, 3) a person legally controlling it has undertaken reasonable measures in order to preserve its confidentiality (Law on Protection of Trade Secret, Official Gazette of the Republic of Serbia, no. 53/2021).

SECRET AS A SPECIFIC OBJECT OF PROTECTION WITHIN VARIOUS GROUPS OF CRIMINAL OFFENCES AND SECRET AS AN OBJECT OF ACTION

The concept of a secret is comprehended in a defusing way and as such it is protected, and its protection as a direct object of protection is regulated in five incriminations in the CC. They are all grouped in different criminal offences according to the prevalence of interests which are to be realized by their protection. Protection of a personal secret is typically associated with concurrent protection of a trade secret which has been unlawfully disclosed by a person, thus committing a criminal offence against fundamental rights and freedoms of man or citizen. The subject of our analysis is the criminal offence regulated by Art. 141 - unlawful disclosure of a secret. Other criminal offences protecting the right to privacy and thus indirectly a personal secret as well, should not be overlooked either. However, as we have already mentioned, we have chosen to focus on this incrimination because of terminological reasons as the only one among others directly regulating a personal secret as an object of action.

Secrets protecting the interests of the state, i.e. national security, are governed by different chapters of the CC dedicated to the following objects of protection: constitutional order and security, official duty and army.

Secrets protecting corporative security, i.e. interests of business entities (legal entities and natural persons dealing with economic activities) are termed as trade secrets. Socially dangerous conducts in the field of protection of trade secrets are incriminated by the criminal offence in Art. 240 of the CC headed as Disclosing of a Business Secret. This criminal offence is to be found in chapter 22 of the CC dedicated to criminal offences against economic interests.

All mentioned manifestations of a secret in the sense of a criminal offence also represent an object of protection differentiated within a group object of protection as a specific value whose endangerment or violation indirectly compromise and infringe its abstract value. They simultaneously have the function of an object of action, i.e. of the value upon which a criminal offence is committed and which are defined as disclosure and revelation.

CRIMINAL LAW PROTECTION OF A PERSONAL SECRET – UNAUTHORIZED DISCLOSURE OF SECRET, ART. 141 OF CC

The criminal offence of unauthorized disclosure of a secret is stipulated by Art. 141 of the CC under a group of criminal offences against the rights and freedoms of man and citizen. It consists of a basic form provided for in the first paragraph and a special paragraph stipulating a specific basis for exclusion of illegality.

The article deals with a specific criminal offence *delicta propria* since a perpetrator may be a person practicing precisely defined professions. He/she may be a lawyer, physician or any other person who in an unauthorized way discloses a secret learned while performing his/her professional duty. The article specifies two professions that offenders may practice, while other perpetrators may also be persons who because of the nature of their job have opportunity to find out personal secrets of other people and disclose them. These professions include clerics, pharmacists, midwives, nurses and trainee lawyers since personal secrets of people with whom they deal with during performance of their duties may come to their knowledge.

A good example is the Opinion of the Ministry of Labour, Employment, Veteran and Social Affairs stating that "it is unethical and unprofessional practice of the employees in the social welfare centers to pass on information about children and their parents so as to avoid professional procedure, thus giving priority to certain persons who want to adopt children in accordance with their expectations. Furthermore, disclosure of the data from official records is the violation of legal obligation of keeping official secret (Art. 323 and Art. 331 of the Family Law) resulting in criminal liability as to Art. 369 of the CC. All other people, as well as lawyers and physicians, who disclose information about a child for whom there is assumption that it may be adopted and which they have learned during the performance of their professional duty shall be held accountable (Art. 141 of the CC). (Opinion of the Ministry of Labour, Employment, Veteran and Social Affairs 110-00-00681/2007-14, 17th July 2007).

This offence is defined as the disclosure of a personal secret of an individual. The concept of disclosure implies revealing or granting access to a secret, i.e. the data unknown to him/her which are "an official secret the perpetrator was obliged to keep confidential on the basis of regulations and a professional code" (Stojanović, 2020: 528).

As a personal secret is not explicitly defined under Art. 141, it should be comprehended as the data on a person, his/her features, medical status, family and other relations with regard to his/her personality and private life (Đorđević, Kolarić, 2020: 52).

An illustrative example of the obligation of keeping an official secret is a lawyer-client privilege specified under Art. 14 of the Code of Professional Ethics implying "everything that a client, or a person given a power of attorney by a client, has confided to his lawyer representing him/her in the case, has learned or obtained in any other way during the preparation, in the course of or after the legal representation in court" (Code of Professional Ethics of Lawyers, Official Gazette of the Republic of Serbia, no. 27/2012 and 159/2020 – decision by the Constitutional Court). Similarly, a medical secret is defined under Art. 23 of the Code of Medical Ethics of the Medical Chamber of Serbia as professional medical secrecy denoting "all information a physician possesses about his/her patient, his/her personal, family and social environment, as well as all information about determining disease, treatment and disease monitoring obtained during performance of professional duty (Code of Medical Ethics of the Medical Chamber of Serbia, Official Gazette of the Republic of Serbia, no. 104/2016).

An offence may be perpetrated by commission, or occasionally by failing to act. Constitutional feature of the body of criminal offence specifies that the disclosure of a secret must be unauthorized. Consequently, there are situations in which the disclosure of secrets is not only admissible but also the obligation of a person who knows such a secret. In case of the medical profession, such situations refer to disclosing information about contagious diseases, mental disorders of a person applying for a job, the birthdate of a child or en exact hour of death. In all the mentioned situations a doctor is obliged to report the information he/she has come into possession.

Beside these cases, paragraph two of the same article stipulates a specific basis for exclusion of illegality implying that the person committing the offence of disclosure of a secret of general interest or the interest of other person defined in paragraph 1 shall not be punished since the disclosure in such cases is more important than keeping information confidential. It involves two cumulatively defined conditions whose simultaneous realization brings about the exclusion of illegality and accordingly of a criminal offence.

Premeditation as a subjective element of an entity results in the sentence of either a fine or imprisonment lasting up to one year. On an abstract level, the principle of proportionality and justice, as well as the utilitarian character of criminal law are the basis of the relatively lenient sentencing policy of the legislator establishing adequate balance between the protection of fundamental rights and freedoms and necessary and justifiable repression (Bodrožić, 2020: 384).

Taking into consideration sentences provided for by the law, these offences are classified as petty crimes for which courts may opt for sentence substitution as a standard in modern European criminal law sentencing policy and consider imposing community sentence instead of short-term imprisonment depending on a particular case and actual circumstances.

Pointing out minor importance of this offence, Art. 153, paragraph 2 cumulatively provides for a number of criminal offences for which a civil suit may be filed.

CRIMINAL LAW PROTECTION OF A SECRET IN NATIONAL AND CORPORATIVE SECURITY – DISCLOSURE OF A STATE, OFFICIAL AND MILITARY SECRET, SECRET INFORMATION AND TRADE SECRET

Criminal law protection of a secret in national and corporative security (secrets protecting state, i.e. national or business interests) is specified in four criminal offences in the CC and one incrimination in the Data Secrecy Law. These include disclosure of a trade secret, Art. 240 of the CC referring to a group of criminal offences against economy, disclosure of a state secret, Art. 316 of the CC relating to a group of criminal offences against constitutional order and security of Serbia, disclosure of an official secret, Art. 369 of the CC regarding a group of criminal offences against legal duty, disclosure of a military secret, Art. 415 of the CC pertaining to a group of criminal offences against the Army of Serbia and criminal offence stipulated by Art. 98 of the Data Secrecy Law.

The CC provides for a number of criminal offences with a multiple object of protection. There is a great number of incriminations which concurrently include the protection of numerous values. When considering these offences, the legislator must take into account the concept of legitimacy while opting for dominant abstract value as a systemizing criterion. The situation as regards criminal law protection of a secret is less complicated since the legislator in advance prescribes the group in which this offence will be categorized by explicitly defining a particular secret.

The concept of a **trade** secret as to **Art. 240**, paragraph 4 of the CC includes all the data and documents which are declared a trade secret by the law, other regulations or the ruling of a competent authority provided for by the law and whose disclosure would or could result in damaging consequences for the subject of a business (CC, Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005 – amendment, 107/2005 – amendment, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019). Undoubtedly, an object of protection in this criminal offence refers to the right of competition, while a group object of protection relates to businesses, i.e. economy.

The concept of **a state secret** as defined by **Art. 316**, paragraph 5 of the CC includes all the data and documents which are declared a state secret by the law, other regulations or the ruling of a competent authority provided for by the law and whose disclosure would or could result in damaging consequences for the security, defence or political, military and economic interests of Serbia (CC, Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005 – amendment, 107/2005 – amendment, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019). The last part of the definition specifies that the object of protection in this criminal offence refers to the security of Serbia, while a group object of protection relates to the constitutional order (political, military or economic interests) and security of the Republic of Serbia.

The concept of **an official secret** as specified by Art. **369**, paragraph 4 of the CC also includes all the data and documents which are declared an official secret by the law, other regulations or the ruling of a competent authority provided for by the law and whose disclosure would or could result in damaging consequences for the service (CC, Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005

– amendment, 107/2005 – amendment, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019). By putting an emphasis on the service, i.e. official duty as the value that may be endangered by disclosure of a secret, this criminal offence is classified as a classic wrongful act against official duty.

A military secret as to Art. **415**, paragraph 4 of the CC includes all the data and documents which are declared a military secret by the law, other regulations or the ruling of a competent authority provided for by the law and whose disclosure would or could result in damaging consequences for the Army of Serbia or defence and security of the state (CC, Official Gazette of the Republic of Serbia, no. 85/2005, 88/2005 – amendment, 107/2005 – amendment, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019). As already defined in the previous three paragraphs of this paper, since the disclosure of a military secret may pose a detriment or endanger the object of protection, this criminal offence is classified in the group of criminal offences against the Army of Serbia.

The interpretation of the terms used in the CC is mostly in connection with Art. 112 which defines the terms in the Code. Since the mentioned article includes the terms of general character that may be found in a number of provisions of the CC, this article specifies their uniform meaning regardless of the provision in which they are used. As for the definition of the term *a secret* in the provisions of the CC, it must be pointed out that these are only interpretative provisions, characteristic for the use of just one norm. Therefore, bearing in mind the necessity for an easier and more systematic review of the method by which the CC provides for the protection of a secret, their interpretation is given successively, both for easier use and the ensuing comparison.

The chosen nomotechnics used by the legislator to define subtypes of a secret is generally consequent. It represents the extension of the definition "the data and documents stipulated by the law, other regulations or the ruling of a competent authority provided for by the law" declaring a particular subtype of secret whose disclosure would or could cause detrimental consequences for one of the selected objects of protection. Although a uniform definition facilitates the use of this norm in practice and provides technical precision, it should be accompanied by a consequent definition of the other part of the norm which will be discussed in the part of the paper dealing with the analysis of the elements of the entity of four criminal offences protecting secret.[3]

3 Various legislative techniques, i.e. styles characterizing them may be in connection with the comprehension of the norm or its technical precision. Legal reasoning is mostly expressed through linguistics, i.e. used nomotechnical style, which after it has been chosen must (should! A/N) be consequently used throughout the whole text of regulations. Otherwise, it may lead to confusion and diversion from the fundamental nomotechnical and legal-political foundations of the legal text (Bodrožić, 2022:124-125).

DISCLOSURE OF A TRADE SECRET, ART. 240 OF THE CC

Disclosure of a trade secret is incriminated by provisions of Art. 240 of the CC. This criminal offence has one fundamental and two supplement forms (qualified and privileged) and it is, as already mentioned, classified in the chapter dealing with criminal offences against economy. The fundamental form (Art. 240, paragraph 1) consists of two alternative perpetrations. The offence shall be committed if a perpetrator discloses, hands over or in any other manner makes available information declared a business secret or otherwise obtains such information with the intention of handing it over to an unauthorized person. Premeditation represents a subjective element, while the other alternative perpetration requires the determination of a specific norm. The maximum penalty for this form of disclosure of a trade secret is imprisonment of six months to five years.

Paragraph 5 of this article offers a criminal law definition of a trade secret. Taking into account that its content has instructing character, it should be interpreted in accordance with the provisions of the special code which deals with the subject of secret protection in the Law on Protection of Trade Secret (Milošević, 2021: 57; Mandić et al., 2017: 302).

The literature emphasizes that the scope of criminal law provision is not sufficiently comprehensive (Milošević, 2021: 60). The Law on Protection of Trade Secret, whose content is inspired by the EU Directives on the Protection of Trade Secrets (Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Official Journal of the European Union, no. 157/1) introduces civil law and criminal law (corporate crime and misdemeanour) liability for unauthorized disclosure, acquisition and use of confidential trade secrets. However, the analysed provision of the CC incriminates only unauthorized disclosure of secrets and excludes acquisition and use by an unauthorized person. The court practice, which is otherwise rather lacking with regard to this criminal offence, supports this position as in the Ruling of the Basic Court in Niš, K 65/14 of 23 April 2014 (Milošević, 2022: 134).

Additionally, the fact that the Law on Protection of Trade Secret introduces criminal law sanctions for unauthorized disclosure, use and acquisition of trade secrets may cause problems regarding the enforcement of the law, i.e. a conflict between criminal law and misdemeanour (i.e. corporate crime) provisions in the light of criminal procedural principle *ne bis in idem* (Milošević, 2021: 63). In fact, unauthorized disclosure is sanctioned by criminal law, misdemeanour and corporate crime provisions, while unauthorized acquisition and use are exclusively the subject of misdemeanour and corporate crime law, which is not logic and sustainable legal solution. Evidently, all three forms of unauthorized acts are the basis for civil law liability (as well as labour law liability if all conditions are fulfilled); nonetheless, these forms of liability are neither mutually competitive nor they exclude the enforcement of penal sanctions.

The qualified form of the offence, for which the maximum penalty is imprisonment of two to ten years including a fine, is committed if it was perpetrated with an intent – if it is motivated by greed or if the disclosed data were exceptionally confidential. Greed represents the motive for unlawful material benefit (Delić, 2021; Vuković, 2021), while exceptionally confidential data are defined as "those whose disclosure could inflict considerable damage to the holder of a trade secret" (Milošević, 2022: 134). "Nevertheless, with the purpose of reaching conclusion that a certain datum of a trade secret was particularly confidential when compared to others, it is necessary for the holder of that secret to declare it as the secret of higher confidentiality and to take stricter measures than the ones used for the protection of other data of that trade secret" (Milošević, 2022: 134; Mandić et al., 2017: 303).

A less serious form of the disclosure of a trade secret is committed when the objective elements of the basic form are perpetrated negligently. The prescribed penalty is up to three years of imprisonment. "A negligent form is committed when e.g. an employee does not keep to the recommended company procedures and protection standards, taking it for granted that the data will not fall into the hands of an unauthorized person or that he will be able to prevent the disclosure to an unauthorized person. The same thing will happen in the case when the perpetrator does not expect or is not aware that his conduct may cause the violation of a trade secret although he/she is obliged or could foresee it on the basis of his/her personal features and circumstances. An illustrative example is the situation in which the perpetrator leaves recorded parameters for electronic access to the data on his/her office desk (unprotected from unauthorized persons) without considering that someone could take advantage of them" (Milošević, 2022: 135).

DISCLOSURE OF A STATE SECRET, ART. 316 OF THE CC

The criminal offence of disclosing a state secret is provided for by Art. 316 of the CC of the chapter 28: "Criminal offences against the constitutional order and security of the Republic of Serbia" (Milošević, 2010). Confidential data, which are defined and ranked in accordance with the existing regulations, are protected by this incrimination. As already emphasized, the basic law regulating the confidentiality of data is the Data Secrecy Law. However, the fact that this law comprises a criminal law provision arises questions and dilemmas in practice (Kovačević, Milošević, 2022). "Consequently, both the criminal offence of disclosure of secret data provided for by the Data Secrecy Law and "old" criminal offences (disclosure of a state secret, disclosure of an official secret and disclosure of a military secret) stipulated by the CC are contemporarily in force. The criminal offence defined by Art. 98 of the CC refers to the disclosure of secret data which are ranked through the provisions of that law (chiefly, all confidential data originating upon its enactment in 2009), while the criminal offences from the CC refer to the disclosure of the data defined by previous provisions, i.e. provided for before the Data Secrecy Law came into effect" (Milošević, 2022: 215). Hence, we shall firstly present three criminal offences from the CC, then discuss their relation with the incrimination from Art. 98 of the Data Secrecy Law.

The basic form of the offence defined by Art. 316 of the CC is committed when the perpetrator discloses, hands over or in any other way makes available to an unauthorized person information or documents that are entrusted to him/her or that he/she acquired otherwise. In this case premeditation is the subjective element.

The disclosure of a state secret, as opposed to espionage, does not include a foreign element (Stojanović, 2018; Đorđević, 2014; Delić, 2021; Milošević, 2022). Espionage therefore presents incrimination protecting secrecy of data, but it requires additional elements that make it sufficiently specific for not being a separate subject of this paper. Prescribed penalty for the basic form of the disclosure of a state secret is from one to ten years of imprisonment. The legal definition of a state secret is specified by paragraph 5, while paragraph 6 defines which data and documents cannot be declared a state secret.

Art. 316 comprises paragraph 2 defining one of the privileged forms of the criminal offence for which the prescribed penalty is from six months to five years of imprisonment. This form of the offence is committed when a perpetrator reveals the data that he/she unlawfully obtained to an unauthorized person. It incriminates the perpetration of a person who is not a lawful holder of a secret but who obtains it unlawfully and then hands it over, discloses or makes available to another unauthorized person. The same penalty is prescribed for the form from paragraph 4 (which is also lenient). This form is committed when a state secret is disclosed negligently (Kovačević, Milošević, 2022: 100).

Nonetheless, it should be mentioned that "it is still not clear why the legislator fails to incriminate unlawful acquisition of the ranked documents by an unauthorized person regardless of the fact whether the secret has been handed over or not" (Kovačević, Milošević, 2022: 101).

Art. 316, paragraph 3 defines the qualified form for which the penalty of three to fifteen years of imprisonment is provided for. The legislator specifies two alternative qualifying circumstances: the first referring to the offence committed during the state of war or emergency state, the second one in case the security, economy or armed forces of the state are endangered.

DISCLOSURE OF AN OFFICIAL SECRET, ART. 369 OF THE CC

The offence under Art. 369 of the CC is formulated similarly to the offence under Art. 240, although with some differences arising from the nature of these incriminations. The basic form may be committed solely by officials who unlawfully disclose, hand over or in any other way make available the data representing an official secret, or gather such information in order to hand it over to an unauthorized person. The prescribed penalty is from six months to five years of imprisonment - the same as for the basic form of the disclosure of a trade secret. Oddly, the legislator evaluates the level of abstract social jeopardy of these two offences as equal although the offence under Art. 240 protects the interests of business entities, while the incrimination under Art. 369 protects official, i.e. public interests.

Analogously to the adequate provisions in Art. 316, the legislator defines the concept of an official secret and the so called unlawful official secret in paragraphs 5 and 6. As these provisions are also of indicating character, other regulations should be consulted for their comprehension, primarily the Data Secrecy Law and other laws that had been in force before it came into effect.

Even the basic form of disclosing an official secret, more precisely its other alternative commission, the act which is by its nature a preparatory action, is equalled to a completed action indicating in that way the importance of early criminal justice response and prevention of these acts by which the confidentiality of the data in national security is breached. It is interesting that paragraph 6 of Art. 369 specifies explicitly that an offence may be committed by an official after his position of an official has ceased. This solution is logical because an official is still acquainted with the secret data after his official position has ceased. Therefore, it is of vital importance to secure criminal justice protection in such a case.

The legislator provides for a serious form of this offence: “If the offence specified in paragraph 1 of this Article is committed for gain or in respect of particularly confidential information or for publishing or use abroad, the offender shall be punished by imprisonment of one to eight years” (Art. 369, paragraph 2 of the CC). This offence differs from the serious form of the disclosure of a trade secret by one qualifying circumstance - the foreign element. It seems that this circumstance is not classified as a feature of the qualifying form of the offence of the disclosure of a trade secret due to the omission by the legislator (Milošević, 2021; Milošević, 2022). The legislator stipulates the punishment of one to eight years of imprisonment for this form of offence, while a more severe sentence is prescribed for a serious form of the disclosure of a trade secret. It is difficult to find the excuse for such a solution provided for by the legislator since it is neither logic nor legitimate from the criminal law policy point of view.

Eventually, the specified sentence for negligent disclosure is up to three years of imprisonment, the same as for the adequate form of the disclosure of a trade secret. It is interesting that unlike the offence of disclosing a state secret, the law does not provide for a form of the offence relating to unauthorized use of secret. We consider this to be the omission by the legislator (Kovačević, Milošević, 2022: 103).

DISCLOSURE OF A MILITARY SECRET, ART. 415 OF THE CC

Article 415 of the CC incriminates the disclosure of a military secret. The basic form is characterized by almost the same features as for the criminal offence specified in Art. 369 although the perpetrator is not defined as "an official" but as "a person who unlawfully communicates…". The prescribed sentence is from six months to five years of imprisonment (once again exactly the same as for the disclosure of a trade secret, which we consider to be a rather unusual solution).

Although it is not explicitly specified that the perpetrator may be solely an army officer or an official employed in the Army of Serbia, i.e. the competent Ministry of Defence, it is clear that a military secret may be disclosed only by a person in lawful possession of such a document or information. Beside an army officer or official (e.g. a civilian dealing with official duties in the Ministry of Defence), this offence may be committed by any other person who is entrusted with such a document or information (e.g. an employee dealing with technical and other professional duties, a courier, an official of another body of public authority, an authorized person in a legal entity discharging public authorities functions or a person employed with a company dealing with legal obligations in the field of defence, i.e. developing a defence plan, etc.).

Paragraphs 2 and 3 of this article are formulated in exactly the same way as the criminal offences of the disclosure of a state secret although there are certain differences relating to the object of action (a military instead of an official secret). Even the range of prescribed sanctions is the same. Here the attention should be paid to the fact that if judged by the prescribed sentences, the legislator estimates the abstract social value of the disclosure of a trade secret in a qualified form as greater value compared to a serious form of the disclosure of a military secret (?!). Additionally, we want to emphasize that the punishment for unlawful use of a military secret is not provided for in this criminal offence (Kovačević, Milošević, 2022: 103).

As in the case of disclosing an official secret, paragraphs 5 and 6 define the concept of a military secret specifying data and documents which are not to be deemed a military secret.

THE RELATION BETWEEN THE OFFENCES PROVIDED FOR BY ART. 98 OF THE DATA SECRECY LAW AND CORRESPONDING INCRIMINATIONS IN THE CC

The provision of Art. 98 of the Data Secrecy Law provides for the criminal offence of the disclosure of secret data, as we shall term it freely, considering the fact that it does not have a legal name (Kovačević, Milošević, 2022:98). This offence has its basic, qualified and privileged forms. Objective and subjective elements are essentially identical as in the already analysed criminal offences except for an important difference with regard to the object of action. The basic form occurs if the object of action (secret data) is labelled with levels of confidentiality "internal" and "classified"; a serious form involves the data categorized as "strictly confidential", while a more serious form is labelled as "a state secret". The most serious form exists when one of the following qualifying circumstances occurs: the offence is committed during either the state of war or emergency, for obtaining unlawful gain or for the use abroad. The stipulated sentence depends on the fact whether the perpetrator has committed the offence defined in paragraphs 1, 2 and 3 involving adequate qualifying circumstance. The legislator provides for the criminal offence of disclosing secret data committed from negligence.

The fundamental question arising here is how to determine when to implement Art. 98 of the Data Secrecy Law and when the articles 369 or 415 of the CC. The answer is clear: "[…] Art. 105, paragraph 1 of the Data Secrecy Law explicitly defines that the data and documents assigned a classification level based on earlier regulations shall keep the type and level of classification assigned under such regulations (Art. 105, paragraph 2 of the Data Secrecy Law). The intention of the legislator to reconsider all former secrecy labels (Art. 105, paragraph 2 of the Data Secrecy Law) could not easily be implemented in practice because of the expected extent and number of labelled data and documents" (Kovačević, Milošević, 2022: 102). Therefore, the data labelled according to the formerly existing regulations that have not been revised, i.e. revoked or otherwise labelled according to the regulations of the Data Secrecy Law will be treated compliant with the corresponding provisions of the CC, while the secret data labelled in accordance with the provisions of the Data Secrecy Law shall be sanctioned by its prescribed sentences.

However, the attention should be paid to another important legal inconsistency. Namely, the qualifying circumstance - the commission of the offence during the state of war or emergency is provided for by Art. 316, paragraph 3. However, the same circumstance is stipulated by Art. 321, paragraph 3 of the CC, as well as Art. 98, paragraph 4 of the Data Secrecy Law. Yet, different sanctions are prescribed in all three cases (Art. 316, paragraph 3 of the CC stipulates from three to fifteen years of imprisonment; Art. 321, paragraph 3 of the CC prescribes a specified minimum of ten years or life imprisonment; Art. 98, paragraph 4 of the Data Secrecy Law prescribes the punishment of five to fifteen years of imprisonment). This discrepancy and contradiction should be eliminated by legal intervention (Milošević, 2010; Milošević, 2021; Kovačević, Milošević, 2022).

FINDINGS, ORIGINALITY AND VALUE

CONCLUSION

As the subject of this paper belongs to the field of the special part of criminal law and consists of a classic analysis of the entity elements of the selected criminal offences, its significance is viewed in the systematization of the knowledge about criminal law protection of secret and offering suggestions for introducing new theoretical classification criteria. The authors have not dealt with all criminal offences which are ensured secrecy protection but only with those considering secret as a separate object of protection or direct object of action. This implies the authenticity of the subject, as well as contribution of the research question which served as a starting point. The incriminations providing for a secret as an object of protection both in the CC and the Data Secrecy Law have been singled out; the distinction among the types of secrets has been noticed; new criteria for their classification as per which secrets should be categorized into three types depending on the context they originate from and the interests protected by keeping data confidential has been suggested. Accordingly, secrets have been classified as: 1. secrets introduced for the protection of personal interests, i.e. privacy of individuals (a secret protecting personal security); 2. secrets introduced for the protection of the interests of business entities (a secret protecting corporative security), and 3. secrets introduced for the protection of national, i.e. state interests (a secret protecting national security). This type of a selected legislative technique is considered useful, although the legal interpretation is not overvalued since the field of the norm enforcement facilitates its comprehension and provides a broader protection range.

The paper emphasizes the peculiarities of the nomotechnical approach which makes difference between the protection of a personal secret and the secrets protecting business or national interests. Next, the paper draws attention to the subsidiarity of criminal law regulations in the cases of their relation with *lex posterior* and *lex specialis* norms of the Law on Personal Data Protection, the Data Secrecy Law and the Law on Protection of Trade Secret within the definition of the concept of public secret.

Scientific contribution is manifested through the originality of the systemizing criterion used for the selection of incriminations, systematization of the knowledge about criminal offences involving a secret as a direct object of protection and an object of action, then the analysis of the peculiarities of distinguished interpretative norms, as well as their partial inconsistencies. The authors have definitely established that the provisions of the criminal law of the Republic of Serbia provide for a relatively adequate level of legal protection characterized by *ultima ratio societetis*, and that efficient protection system, which should primarily serve as prevention and only in rare cases as repression in the fields analysed in this paper, can be realized by consecutive use and enforcement of other regulations from this field.

However, the noted inconsistencies, discrepancies and non-compliance of certain legal solutions should be corrected by legislative intervention. The authors emphasize the need for different regulation of certain issues and offer clear, theoretically credible and practical suggestions as regards the solutions for the matter in question.

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