PUNISHEMENT IN THE PRE-ZONE OF ENDANGERING THE PROTECTED VALUE: *PRO ET CONTRA*?

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Introduction

Democratic state implies democratic criminal law. This was the main tendency in the time of the adoption of the Criminal Code of the Republic of Serbia (CC). Even though the codification in the field of substantive criminal law was something that was waited for a long period of time, in 2005 The Republic of Serbia gained modern and liberally oriented systematic legal document of criminal law provisions (Ristivojević, 2012:43-44). However, the dynamic of modern forms of criminality forces the legislator to make constant changes in order to cover all the new forms of dangerous social behaviour that need to be incriminated. But, the changes need to be done in certain manner and order, due to some of the accepted and proven dogmatic standards and values of contemporary criminal law. They have to be done cautiously, systematically and exceptionally. On the other hand, nobody can expect that criminal law should never be changed, especially because of the application the accepted principle that *ius criminale in status semper reformadus est.*

CC was changed and amended seven times during the 18 years of its existence. Some of those changes were necessary and in line with the needs of applying European standards and internationally accepted obligations from the relevant law documents. Some of them were the result of the need to make legal provisions more clear and applicable in practice. Some of the changes were made in order to exclude mistakes and incoherency between the norms themselves. But, most of the changes were not in accordance with the main principles of the basic text of the CC, from the time of its adoption, and were the changes which made the CC much more unclear, inapplicable and incoherent. Furthermore, most of them were made in a wrong direction, which moved the CC away from its original orientation and conception. Overcriminalization, continuous and almost unlimited tightening of the repression and making the criminal zone increasingly wider-conceived are the negative trends in criminal policy of the Serbian legislator, and in this paper only one of them will be the subject of the discussion and criticism (Bodrožić, 2020:395).

The main purpose of the paper is to point out and to explain the legal nature and the quality of the exceptions to the general rule that the criminal justice system is only initiated at certain stages of the commission of a criminal offence. As modern serious forms of crime require a more effective criminal law response, states often seek changes in the area of substantive criminal law in order to facilitate the processes of solving and proving the mentioned criminal offences. Establishing how justified are the aforementioned activities and what is the difference between the demands of criminal policy and the accepted dogmatic solutions is the main purpose and goal of this paper.

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The paper is organized in three chapters, besides the introductory remarks and the conclusion. The first chapter deals with general rules of the potential stages in criminal progression**.** The second chapter deals with the frequent interventions of legislators in the Republic of Serbia in the direction of punishment in the early stages of criminal progression, while the third chapter analyses arguments *pro et contra* the analysed tendencies.

This research is strictly theoretical one and that is why traditional methods in law research - dogmatic, normative and, in some part, comparative method – have been used.

Authors' approach is extremely critical in accordance with the main hypothesis of the paper which can be defined as importance of critical approach to over-widening the scopes and limits of the criminal law reaction in a pre-zone of endangering the protected value.

The Potential Stages in Criminal Progression-General Rules

The General and the Special part of the CC are the parts of the same law text. They are connected and intertwined. The General part provisions are meant to be applicable to all incriminations in the national criminal law system. That is how it should be. But, the exception confirms the rule. Sometimes, it is necessary to make some modifications within the Special part, in the field of specific incrimination. That policy is not a problem. But when those modifications are not rare and unique, than the question can be asked: are those deviations from the general rules acceptable from the point of view dogmatic principles of legality, but namely legitimacy?

Completed criminal offence is a general form of punishable behaviour. However, there are situations in which the criminal offence stays unfinished, and that is why criminal law theory recognizes several potential phases in the criminal progression (Stojanović, 2020:171).

Those are: making a decision to commit a criminal offence, preparation of a criminal offence, attempt and completed criminal offence. About the first potential phase, making a decision to commit a criminal offence, it is indisputable that it is completely out of the criminal zone. An old Latin phrase *cogitations poenam nemo patitur,* is applicable and necessary in a modern democratic state, and it is not a question of a debate. The first and the last phase in a criminal progression are not a problem. For the first one there is a consensus that it should never be punishable, and the last one is a general rule and standard in a punishing process.

In positive Serbian criminal legislation the first generally punishable phase is an attempt of a criminal offence, under certain circumstances. Under Art. 30 of the CC it is written that "whoever intentionally begins the execution of a criminal offence, but does not complete it, will be punished for the attempted criminal offence for which the law can impose a prison sentence of five years or a heavier penalty, and for the attempt of another criminal offence, only when the law expressly prescribes punishment for that attempted criminal offence" (*Criminal Code of the Republic of Serbia, Official Gazette, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).*

The theoretical position of the attempt is between the preparation and completed criminal offence. Therefore it is important to distinguish the moments and the limits of the punishable behaviour (Stojanović, 2020:177).

The issue of punishment for the preparation of a criminal offence is a complex one. Contemporary legislators, both the national one and the legislators in modern European democracies, take the stand

that the main criteria for punishing the preparation of a criminal offence should be value of a protected object and the intensity of its endangering.

So, there can be two modalities for punishing the preparation of a criminal offence: predicting preparation as a separate criminal offence, and predicting the punishment of a preparation as a stage in a commission of a criminal offence.

Criminal acts of preparation conceptually imply moving the border of the criminal zone backwards, to a phase that precedes the emergence of the consequence, to a phase of planning and preparation, which implies that a criminal offence was committed in the pre-zone of endangering the legal value, even though the behaviour is emphatically far from the threatened evil that should threaten it (*Core Concepts in Criminal Law and Criminal Justice,* 2020:54).

In the earlier Serbian legislation, before the adoption of the current CC, in the case of certain criminal acts, their preparation, as a separate phase in their realization, was also criminalized. Since the formulation "who prepares the criminal offence" was imprecise and inconsistent with the principle of legality, the legislator provided an orientational definition of preparatory actions for four groups of named preparatory actions: acquiring and equipping means for the commission of a criminal offence, removing obstacles for the commission of a criminal offence, agreeing, planning or organizing with others the commission of a criminal offence and other actions that create the conditions for immediate committing the criminal offence, which do not represent the act of committing the criminal offence.

Preparatory acts in the narrower sense, *delicta preparata*, which imply the general concept of preparatory acts common to all criminal acts, are no longer punishable, but this principle has not been consistently implemented. Therefore, the legislator decides on the second option, the introduction of punishment for preparatory actions, by raising the activity of preparation to the level of execution, within the framework of a special part of the CC, the so-called *delicta sui generis.* This type of preparatory actions can also be recognized as a phase in the committing of a criminal offence, but they enjoy an independent criminal-political justification, they have a corresponding criminal amount, and with regard to actions determined in this way, nothing is disputable, except for the fact that they essentially represent a disavowal of general principles, which should be applied to all criminal acts in the Special part (Bodrožić, 2022: 159).

Interventions of the Legislator in the Republic of Serbia in the Field of Punishment in the Early Stages of the Criminal Progression

General attitude about punishable phases in criminal progression is provided in the provisions of the General part. However, in certain situations, the legislator introduces the deviations from this general institute on the level of an abstract wrong, as a special form of a criminal offence, or a separate criminal offence. This can be considered as a way to modify certain needs of enhancing the potential performance of the legal norm itself, but only in the form of an exception.

In 2006, when the CC entered into force, even if the attitude toward excluding preparatory actions as a potential punishable phase in the criminal progression within the norms of the General part of the CC was accepted, legislator made one obviously deviating provision. It was the case with Art. 320 of the CC, under the title Preparation of acts against the constitutional order and security of the Republic of Serbia, which defines that preparation consists in procuring or equipping means for the commission of a criminal offence, in removing obstacles for the commission of a criminal offence, in agreeing,

planning or organizing with others the commission of a criminal offence or in other actions that create the conditions for the immediate commission of a criminal offence (Milošević, 2022:191-193). At this place it should be emphasized that the legislator in 2006 first omitted the provision on preparatory actions as a general criminal law institution and thus made it impossible to punish for the preparation of certain criminal acts, without specifying what this preparation consists of, but already in the same edition made a deviation of this principle in the Special part, by providing a collective provision on punishment for the preparation of criminal acts against the constitutional order and security of the Republic of Serbia, as a separate act.

This exception was the only one of this kind, so it was quite acceptable to continue to exist within the complete text of the CC. But the following changes introduced during the period of the legal existence of the CC were continuously characterised by implementing newer forms of separate offences, which is not in accordance with the attitude about the rare exceptions in this field.

Tendencies to prevent crime at all costs impose a new, unusual function, a security function, in the criminal law of the EU member states. It serves the implementation of the preventive paradigm, which arises as a result of the state's efforts to prevent serious forms of crime, such as terrorism, organized crime and corruption. Such tendencies shift the centre of gravity of the criminal law reaction to the zone of pre-endangerment of the protected value, introducing specific *ante delictum* measures, such as predicting preparatory actions as a separate act of execution or predicting danger as a reason for criminal law reaction (Bodrožić, 2022:160).

The idea of a purely preventive oriented criminal law, which protects citizens and society to a much greater extent within the framework of broader security law, may seem tempting at first glance. However, this is a dangerous idea. It is not certain that such "new" criminal law would perform better protective function than traditional criminal law, but it is very likely that it could lead to totalitarianism, some elements of which are already visible today in some democratic states. (Stojanović, 2013:486). According to Zedner & Ashwort, "security has always been a core function of the modern state. Yet the rise of the Preventive State captures an intensification of that role as threats to security and demands for public protection increase, prompting states to prioritize new practices of preventive criminalization, policing, and punishment. The rise of the Preventive State may promise greater security, but the costs of ever more coercive preventive laws and measures are burdensome and pose a threat to civil liberties" (Zedner & Ashworth, 2019:429).

Next changes, made in order to provide punishing for certain criminal offence, was made in 2016. The legislator's activities in the area of preventing criminal acts of terrorism are marked by moving the criminal zone to the pre-zone of endangering protected value and justified by the fact that the legislator moved terrorism from the group of criminal acts against the constitutional order and security of the Republic of Serbia to the group of criminal acts against humanity and international law. As a special form, it foresees the preparation of the criminal offence of terrorism, using previously used nomotechnics from Art. 320 of the CC. In the case of the criminal offence of terrorism from Art. 391 of the Criminal Code, the legislator envisaged preparation as a special form of this criminal offence, which he defined by using the wording inherent to the general concept of preparatory actions for some criminal offences against the constitutional order: "Who acquires or equips the means for the execution of the criminal offence from paragraph 1 of this Article either removes obstacles for its execution or agrees with others, plans or organizes its committing or undertakes another action that creates the conditions for its immediate committing".

In addition to these expansions of the criminal zone, the previous amendments to the CC included a comprehensive enumeration of the most diverse forms of the act of committing the crime of terror-

ism. Both amendments and additions were not fully in accordance with the principle of legality and the principle of legitimacy. Too abstract and enumerative approach in defining the criminal act of terrorism is also present when determining the circle of preparatory actions that are also considered a criminal act of terrorism. A more abstract and general way of formulating the norm can sometimes appear as more acceptable for the application of the norm in practice.

In 2019, the trend of punishment for the preparation of a criminal offence is confirmed by prescribing punishment for the preparation of serious murder. The structure of the criminal offence is complicated by the addition of a new paragraph (para. 2), which provides the punishment of preparation of aggravated murder. In this new paragraph, it is said that whoever acquires or prepares the means for the commission of the criminal offence referred to in para. 1, Art. 114, or removes obstacles for its execution or whoever arranges, plans or organizes its commission with others or who undertakes another action that creates the conditions for its immediate commission shall be punished by imprisonment from one to five years.

The focus in the legal formulation of aggravated murder should be on the content of the qualifying circumstances, and not only on their number. They are characterized by an emphasized casuistry, and the terms and expressions are not unambiguous and clear enough to ensure a uniform interpretation and subsequent application of norms of this type. The balance between the enumerative and abstract way of determining the action and the well-formulated general clause in the nomotechnical sense should adorn the norm that foresees one of the most serious criminal offences in the CC (Delić, 2021:112).

It is quite obvious that the norming process is very similar in the case of the criminal offence of aggravated murder and the criminal offence of terrorism. The used legislative technique should be simpler, more general, and on the other hand, more concentrated only on the most serious violations and threats to the protected object. Particular criminal law protection is appropriate for those situations when it appears as a special quality in relation to the general, for example in the case of the criminal law protection of secrets in the CC (Bodrožić & Milošević, 2022). In other cases it is much better to form a general rule, or to define the norm as generally as possible.

Arguments Pro and Contra for Punishing for Endangering the Protected Value

Before dividing the argumentation into *pro* and *contra* parts, it should be emphasized that one of the main principles of criminal law is the principle of legitimacy. It means that criminal law should always be the "last resort" for the state reaction to criminality. This *ultima ratio societatis* tool must be in accordance with its necessity and justification. Whenever other parts of the law system can be used in order to regulate some relations, criminal law should not be applied. This is the direct consequence of literally implemented ideas about the subsidiary, accessory and fragmentary character of criminal law.

Deviations from the general opinion that acts of endangerment should be punished only exceptionally are analysed in the previous section. How they should be understood, will be exposed through *pro et con* argumentation.

The main argument *pro* is the need for more effective proving and solving of criminal offences. In the pre-zone of threats to the protected value, law enforcement agencies could react and prevent their commission. This is a criminal policy argumentation. It is contrary to the accepted general dogmatic rules, which say that criminal law reaction should be used only when the protected object is of exceptional value, as well as when the degree of its endangerment or injury is high.

The next argument *pro* is the value of the protected value and the need to provide it with a higher level of protection. In all three analysed cases, the value of the protected object is high. On the other hand, actions that represent a threat to the protected value are not indisputable from the perspective of the principle of legitimacy. It is about an overly preventively-oriented approach of the legislator. These tendencies move criminal law away from its basic function, which is to protect society from crime. Traditional and rational criminal law becomes security criminal law. This is a negative criminal law tendency and it should be avoided.

The main argument *contra* is preserving the coherence of the CC. If the general rule is not followed, then the question arises - what will ultimately be the limits to further violations of the consistency of the analysed regulation? The norms of the general and special part of the CC must be harmonized, so that the general norms apply to all criminal offences without exception. In all three analysed cases of punishment for preparing a criminal offence, the integrity of the CC was violated.

The second argument *contra* is that a wider-conceived criminal zone reduces the possibilities of criminal law, because it is wider and hypertrophied. The abovementioned is not in accordance with the principle of legitimacy and the principle of *ultima ratio societatis*. According to the opinion of Macluan & Gil Gil, "this change of orientation with regard to the use and meaning of criminal law is often invoked, without a prior analysis of its real capacity, to fulfil the aims assigned to it by these doctrines. That is to say, even before verifying whether the drawbacks of this doctrine are compensated by the benefits it may bring, we must analyse whether criminal law is indeed able to fulfil the purposes attributed to it when punishment is conceived of as a state's obligation and a victim's right" (Macluan & Gil Gil,2020:132-133). Melander also states that the main purpose of the preventive turn in criminal law is primarily intended "to prevent actual harm from occurring by criminalising preparatory acts, possession and other action that might – or might not – in future increase the risk of the harm-affecting completed offence" (Melander, 2023: 12).

Similar argumentation is given in the book *Prevention and the Limits of the Criminal Law* edited by Ashworth, Zedner & Tomlin, in which the group of authors points out that "preventive measures include controversial crime control approaches such as pre-inchoate offences, pre-trial detention, restraining orders, and prevention detention of the dangerous. There are good reasons to justify state use of coercion to protect the public from harm, but while the rationales and justifications for state punishment have been extensively explored, the scope, limits, and principles of preventive justice have not received the same attention (Ashworth, Zedner & Tomlin, 2013).

Arguments *contra* punishing of preparation are related to the absence of a clearly determined criminal will of the perpetrator, to the lower degree of social danger they contain, to the temporal and spatial distance from the potential planned wrongdoing, as well as to the fact that criminal law repression is based on the idea on punishment *post delicti*, not *ante delicti* (Vuković, 2021:292).

According to Zedner, "although the objective of preventing harm underpins state authority to criminalize, police, and punish, it has always been tempered by the risk that the state will exercise that authority excessively or arbitrarily" (Zedner, 2017:89-91).

Cocnluding Remarks

Originality and value of the paper can be seen in pointing out the negative tendencies in the processes of constant changes to the CC. Some of them, such as the analysed deviations of the principles of punishable phases in a criminal progression, are only one of the negative tendencies in a wider con-

temporary criminal policy. Importance of researching those deviations can be seen as a way to move forward to the better solutions in a norming processes that take part continuously.

Changes in the area of the special part of the CC, which are aimed at punishment in the early stages of criminal progression, in order to facilitate the proving of certain serious crimes, are not in accordance with the rules of the general part of the CC and fundamentally violate the general concept on which the CC rests. Deviations from proven dogmatic principles are not the best way to solve the issue of proving criminal offences, and should be reduced to the necessary minimum.

The analysed processes, in which the expansion of the criminal zone to the preparation phase, the complexity of the normative structure of a large number of criminal acts, as well as the introduction of completely new ones, led to counter-effects. The level of efficiency is reduced and the norms only exist as an abstract expression of the legislator's wishes for as much repression as possible, and the level of the desired prevention of criminal behaviour is decreasing.

The exception turns into the rule, the system becomes bulky and hypertrophied. When one adds to that the constant increase in the number of criminal offences and the tightening of punishment ranges, the following conclusions can be reached about the possibilities of such a conceived criminal law.

Criminal law, which in its redactions has moved away from the postulates on which the CC was based, on accessory, subsidiary and fragmentary criminal law, is no longer consistent and aligned with the basic principles that represent its basis and landmark.

Protecting society from crime turns into paranoia about possible danger to society and the individual, and due to the fact that "eyes are wide open in fear", the creation and shaping of norms are linked to previous levels of endangerment, especially to abstract danger to the protected good, as a basis for interventions.

Therefore, this paper has its own *value* importance in the area of pointing out the harmful changes within the CC and is theoretically an attempt to maintain the system before its complete change and adoption of a new one are needed.

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