ČLANCI

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Kristian Kühl[*]
Pravni fakultet, Univerzitet u Tibingenu

PET POGLAVLJA IZ NENAPISANE KNJIGE O (KRIVIČNOM) PRAVU I MORALU[**]

Apstrakt: U radu se razmatra složeno pitanje odnosa morala i krivičnog prava. U prvom delu rada ukazuje se na neka opšta pitanja tog odnosa. Drugi, obimniji deo rada, bavi se sa pet pitanja tog odnosa. Prvi odeljak sadrži izlaganje o teoremi kategorijalne razlike između legaliteta kao pravnog oblika i moralnosti kao moralne forme. Drugi odeljak se bavi moralnim i pravnim aspektima samoubistva, kao i shodnom problematikom podstrekavanja i pomoći samoubici u ostvarenju njegove namere. U trećem odeljku sledi izlaganje poznatog kriminalnopolitičkog stava koji zahteva dekriminalizaciju svih delikata koji se ne mogu legitimisati drugačije osim moralnim aspektom. U četvrtom odeljku analiziraju se slučajevi u kojima zakonodavac izričito upućuje na moralna shvatanja, kao onda kada zahteva da delo predstavlja povredu „dobrih običaja" da bi se zasnovala njegova protivpravnost. Završni, peti odeljak bavi se krivičnopravnim i moralnim aspektima krivičnih dela propuštanja (nečinjenja). Za razliku od tzv. nepravih delikata propuštanja, čija legitimnost se zasniva na činjenici da učinilac mora imati status naročitog garanta, krivična dela kakva je inkriminacija nepružanja pomoći iz § 323c nemačkog Krivičnog zakonika ne poznaju sličan uslov, pa je upitno da li i kako se mogu legitimisati. Autor osnov za legitimnost tu vidi u ljudskoj solidarnosti.

Ključne reči: krivično pravo, moral, legitimnost, samoubistvo, „dobri običaji", krivična dela nečinjenja.

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* Dr. Dr. Dres. H.c., redovni profesor, kuehl@jura.uni-tuebingen-de

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Kristian Kühl
Dr. Dr. Dres. h.c.
Seniorprofessor
Juristische Fakultät
Universität Tübingen

FÜNF KAPITEL AUS DEM BUCH ÜBER (STRAF-)RECHT UND MORAL

ZUSAMMENFASSUNG

Das in der Überschrift angesprochene „Buch" über (Straf-)Recht und Moral gibt es nicht. Man könnte sich aber ein solches Buch vorstellen, und zwar als ein „dickes", in dem die beiden Regelsysteme und ihr Verhältnis zueinander dargestellt werden müssten. Dass es zwischen (Straf-)Recht und Moral Verbindendes gibt, liegt schon deshalb nahe, weil sowohl das (Straf-)Recht als auch die Moral das Verhalten der Menschenregeln wollen und dabei

Allgemeinverbindlichkeit „anstreben". Soweit es um die Regelung äußeren Verhaltens geht, treten beide Regelsysteme in Konkurrenz. Das kann zu Verbindendem führen, wenn sie dasselbe Verhalten verbieten oder gebieten. Stellen sie unterschiedliche Verhaltensanforderungen auf, so ergibt sich Trennendes. Trennendes ergibt sich aber auch und erst recht, wenn man (Straf-) Recht auf die Regelung des äußeren Verhaltens von Menschen beschränkt, denn dann wäre die innere Einstellung eines Menschen eine Domäne der Moral.

Der Katalog der Themen im Spannungsverhältnis von (Straf-)Recht und Moral ist so groß und vielfältig, dass er im Aufsatz nicht annähernd vollständig abgearbeitet werden kann. Es ist deshalb eine Auswahl der zu behandelnden Aspekte bzw. Themen vorzunehmen, wenn man nicht alles, was man anspricht, nur antippen will.

Die einzelnen Kapitel, die in dieser Arbeit behandelt werden, sind die folgenden. Zuerst (unter 1.) geht es um das auch noch abstrakte Theorem von Legalität und Moralität, das trotz seines Bekanntheitsgrades oft in seiner Aussagekraft und Reichweite überschätzt wird. Unter 2. geht es konkret um die moralische und rechtliche Bewertung der Selbsttötung mit dem Folgeprobleme der Teilnahme an der Selbsttötung. Es folgt unter 3. die Abgrenzung von Straftaten und sog. reinen Moralwidrigkeiten oder genauer: die Ausscheidung von Moralwidrigkeiten aus dem Bereich des legitimen Strafrechts. Unter 4. wird der Blick auf Verbindungen von (Straf-)Recht und Moral gelenkt, soweit sie vom (Straf-)Recht ausdrücklich hergestellt werden; so etwa, wenn auf einen Verstoß gegen die guten Sitten verwiesen wird, um die Rechtswidrigkeit einer Tat zu begründen. Schließlich geht es unter 5. um die strafrechtliche Sonderproblematik des Unterlassens. Während die sog. unechten Unterlassungsdelikte durch die gesetzliche Forderung einer rechtlichen Einstehenspflicht für den Rechtsbereich reklamiert wird, ist die Legitimation sog. echter Unterlassungsdelikte wie der unterlassenen Hilfeleistung nach § 323c StGB als Straftaten umstritten. Für die Begründung der Strafbarkeit benötigt man einen Begriff, der im Rechtssystem nur eine Nebenrolle spielt: die mitmenschliche Solidarität.

Schlüsselwörter: Strafrecht, Moral, Legitimität, Selbsttötung, „guten Sitten", Unterlassungsdelikte.

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David O. Friedrichs[*]
Univerzitet Skranton, SAD
Univerzitet Zapadne Australije

KAPITALISTIČKE BANKE KAO KRIMINALNI PREDUZETNICI – SLUČAJ VOL STRITA

U ovom članku (namenjenom publici čiji je maternji jezik srpski) koristio sam ideje iz uvodnog poglavlja koje sam napisao za knjigu Suzan Vil, Stivena Hendelmana i Dejvida Brodertona iz 2012. godine, pod nazivom „Kako su izašli na kraj sa tim"[1], a predstavio sam ih i na sednici Američkog kriminološkog društva[2], zatim na Univerzitetu u Stokholmu[3] i Univerzitetu Islanda[4]. Autor iskazuje zahvalnost profesoru Đorđu Ignjatoviću, za ukazanu mogućnost da ovaj članak bude doprinos časopisu Crimen. On je priredio ovaj tekst za objavljivanje, a student Pravnog fakulteta Olivera Ćirković ga je prevela.

Apstrakt. Ovaj članak bavi se finansijskom krizom kao kriminološkim fenomenom. Iako je finansijska kriza razmatrana iz raznovrsnih uglova, malo analiza potiče od kriminologa. U radu se daje pregled objašnjenja o uzroku ove krize, a zauzet je stav da je treba posmatrati kao oblik kriminaliteta belog okovratnika, tačnije finansijskog kriminaliteta. Autor je uporedjivao razbojništvo koje se vrši u okviru banaka sa klasičnim razbojništvom kada su meta učinilaca banke. Posebna pažnja posvećena je jednom slučaju finansijskog kriminaliteta u kome je glavni akter bila prestižna investiciona banka Goldman Saks. Ukazano je i na kriminogene faktore koji utiču na pojavu ovog oblika kriminaliteta belog okovratnika. Autor zaključuje da funkcionisanje finansijske industrije može biti kriminalno, shodno čemu je potrebno preduzeti adekvatne mere u cilju sprečavanja vršenja krivičnih dela.

Ključne reči: finansijska kriza, investicione banke, finansijski kriminalitet, Vol Strit.

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* redovni professor, david.friedrichs@scranton.edu

1 Susan Will, Stephen Handelman and David Brotherton, *How Did They Get Away With It? (*2012)

2 American Society of Criminology

3 Stockholm University (Annual Educational Cruise of the Finnish Economic Crime Investigators)

4 University of Iceland

David O. Friedrichs
University of Scranton
University of Western Australia

CAPITALIST BANKS AS CRIMINAL ENTERPRISES: THE CASE OF WALL STREET

SUMMARY

This article addresses the financial crisis of 2008 as a criminological phenomenon. Analysis of and commentary on the global economic crisis has poured forth from a wide range of sources, and in the academic realm, in particular, from historians, economists, political scientists, law professors and many others. Overall, to date, criminology and criminal justice have not had an especially high profile in the avalanche of analysis and commentary. The specific objectives of this article are as follows: First, to address the financial crisis as crime in conceptual terms. If crime – and, more specifically, white-collar crime – played a central role in this crisis, in what sense of the term "crime" was this the case, and what form of white-collar crime was involved? Second, to address the financial crisis as crime in contextual terms: How should the consequences of crime that occurs within the Wall Street context be understood in relation to the consequences of crime that occurs within the Main Street context? And third, to address the financial crisis as crime in critical terms: what kinds of transformative perspective and policy initiatives are needed if we are to minimize the chances of a future financial crisis on a catastrophic level? The article reviews different attributions of blame for the financial crisis, but then argues for viewing it as reflecting a form of white collar crime, namely finance crime. The term *finance crime* was adopted in the original edition of my text for "large-scale illegality that occurs in the world of finance and financial institutions". More specifically, I noted that such crime stands apart from corporate and occupational crime insofar as "... vastly larger financial stakes are involved...

[it is intertwined with] financial networks... [and it] threatens the integrity of the economic system itself." Bank robbery from within banks is compared with conventional forms of bank robbery. The claim is made that the losses caused by these investment banking executives vastly exceeded the losses involved in conventional bank robberies.

The crimes of Goldman Sachs, an especially prestigious investment bank, are addressed. The criminogenic conditions generating finance crime are identified. They include financial organizations that are either "too big to fail" or are too interconnected to challenge without harming financial structures. They also include exorbitant executive compensation and bonuses; excessive leveraging in relation to investments; "innovative", complex and excessively risky financial products or instruments; pervasive conflicts of interest involving entities that supposedly provide some form of oversight of the activities of financial institutions, including boards of directors, auditing firms, and credit rating agencies; weak or ineffective regulatory system, an inherently corrupt political system where wealthy financial institutions and corporations have far too much influence and, more broadly, "free market" fundamentalism. The author concludes with a call for recognizing finance industry practices as crime, and for transformative policies to address them.

Key words: financial crisis, investment banks, finance crime, Wall Street.

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Snežana Soković[*]
Pravni fakultet, Univerzitet u Kragujevcu

USLOVNI OTPUST – SPORNA PITANJA I SAVREMENA NORMATIVNA REŠENJA

Apstrakt: Savremene tendencije u kaznenoj politici, široka primena zatvaranja i fenomen duževremenog rasta zatvoreničke populacije, nameću potrebu preispitivanja svrhe uslovnog otpusta, odnosno ukazuju na novu interpretaciju funkcije uslovnog otpusta. Uprkos bogatom i dugom iskustvu praktične primene različitih formi uslovnog otpusta, održavaju se i dileme, i koncepcijske i normativne prirode, u pogledu modela uslovnog otpuštanja, u pogledu načina odlučivanja i telu nadležnom da odlučuje o uslovnom otpustu, o relevantnom vremenskom periodu izdržane kazne, uslovima pod kojima se vrši uslovno otpuštanje, opravdanosti supervizije osuđenog lica na uslovnom otpustu, kao i oblicima potrebne supervizije, o sadržini obaveza i zabrana koje eventualno treba postaviti uslovno otpuštenom osuđenom licu. Slične dileme u pogledu ovog pravnog instituta prate i praksu uslovnog otpusta u Srbiji, uprkos više od 140 godina kontinuirane primene uslovnog otpuštanja osuđenih lica. Posebno naglašen aktuelni interes za problematiku uslovnog otpusta u domaćim uslovima posledica je, kako višegodišnje preopterećenosti zatvorskih kapaciteta, tako i novih zakonskih odredbi o uslovnom otpustu. Pregled spornih pitanja i njihovo tumačenje u aktuelnim uslovima treba da doprinese razumevanju postojećih dilema i nalaženju funkcionalnih rešenja za praktičnu primenu relevantnih zakonskih odredbi.

Ključne reči: uslovni otpust, kazna zatvora, modeli uslovnog otpusta, supervizija.

* redovni profesor, ssnezana@jura.kg.ac.rs

Snežana Soković, Ph. D.
Faculty of Law, University of Kragujevac

CONDITIONAL RELEASE – DISPUTABLE QUESTIONS AND MODERN NORMATIVE SOLUTIONS

SUMMARY

Modern tendencies in penal policy, the wide use of imprisonment and the phenomenon of the longtime growth of prison population impose the need to reassess the purpose of conditional release, i.e. to show the new interpretation of the conditional release function. In spite of the rich and long-lasting experience of the practical use of different forms of conditional release, dilemmas are being maintained, both conceptual and normative, regarding the models of conditional release, the method of the decision-making and the body authorized to decide about conditional release, the relevant period of the served sentence, the conditions needed for conditional release, the validity of the supervision of the sentenced person on conditional release, as well as the forms of the necessary supervision, the content of the obligations and prohibitions that should possibly be posed to the sentenced person on conditional release. Similar dilemmas regarding this legal institute are following the practice of conditional release in the Republic of Serbia, despite more than 140 years of continuous use of conditional release. Especially emphasized current interest for the conditional release problems in domestic conditions is the consequence of the perennial overburdening of prison capacities as well as the new legal provisions about conditional release. The review of disputable questions and their interpretation in current conditions should contribute to the understanding of the existing dilemmas and finding the functional solutions for practical use of the relevant legal provisions.

Key words: conditional release, prison capacities, supervision, sentenced person.

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Igor Vuković[*]
Pravni fakultet Univerziteta u Beogradu

PRETPOSTAVLJENI PRISTANAK U KRIVIČNOM PRAVU

Apstrakt: Za razliku od pristanka povređenog, koji se u srpskoj literaturi smatra osnovom isključenja protivpravnosti, pretpostavljeni pristanak se u našim udžbenicima krivičnog prava ne razmatra kao osnov opravdanja. Ovaj institut počiva na ideji da u pojedinim slučajevima ne zaslužuje da bude krivično delo ono ponašanje koje se čini bez izjavljenog pristanka titulara dobra, ili zato što se čini u njegovom interesu, ili zato što se odnosi na bagatelna dobra. Uslov je da se pristanak titulara mogao očekivati. Pretpostavljeni pristanak je uobičajen u sferi medicinskog lečenja, gde je neretko neophodna intervencija u odnosu na nesvesnog pacijenta. Nasuprot vladajućem shvatanju u stranoj literaturi, autor zastupa stanovište da pretpostavljeni pristanak ne zaslužuje svoje samostalno mesto u sistemu krivičnog dela, s obzirom na njegovo preplitanje sa institutom krajnje nužde.

Ključne reči: pretpostavljeni pristanak, krajnja nužda, nezvano vršenje tuđih poslova, medicinski zahvati.

* vanredni profesor, igorvu@ius.bg.ac.rs. Ovaj članak je nastao kao rezultat rada na Projektu br. 179051 „Kaznena reakcija u Srbiji kao ključni element pravne države“, koji finansira Ministarstvo nauke Republike Srbije.

Igor Vuković
Faculty of Law, University of Belgrade

PRESUMED CONSENT IN CRIMINAL LAW

SUMMARY

Unlike the actual consent of the victim, which is in Serbian literature considered as a ground for excluding unlawfulness of a crime, in our textbooks of criminal law presumed consent is not usually considered as an independent ground of justification. This institute is based on the hypothetical will of the victim, on the idea that in some cases, although the holder of the good didn't actually consent, act which endangers some of his goods does not deserve to be considered a crime, either because it appears to be in the holder's interest, or because it represents an insignificant value to the holder. The requirement is that the perpetrator could have expected that the holder of the good, if asked, would consent. Presumed consent is common in the field of medical treatment, where an unconscious patient is often in dire need of immediate medical intervention. Contrary to the prevailing theory, the author argues that the presumed consent does not deserve its own place in the structure of crime, given its overlap with the institute of necessity.

Key words: Presumed Consent, Necessity, Negotiorum gestio, Medical Treatment

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Saša B. Bovan[*]
Pravni fakultet, Univerzitet u Beogradu

METODSKI POTENCIJALI HERMENEUTIČKOG PRAGMATIZMA U RAZUMEVANJU I PRIMENI NAČELA NE BIS IN IDEM

Apstrakt: U radu se razmatraju saznajne mogućnosti hermeneutičkog pragmatizma u razrešavanju kontroverzi vezanih za primenu načela *ne bis in idem*. U krajnjoj liniji, ovaj rad je pokušaj da se pronađe srednje rešenje između hermeneutičkog realizma, koji dolazi do izražaja u poslednjim presudama Evropskog suda za ljudska prava na ovu temu, i hermeneutičkog relativizma, izraženog u delu pravne teorije i praksi sudova u SAD, gde se zapravo konfrontiraju dva ključna načela pravnog poretka: pravna sigurnost i pravičnost. Srednje rešenje za koje se zalažemo u ovom slučaju predstavlja pokušaj relativizacije načela *ne bis in idem* u situacijama kada se postavi dilema dvostrukog suđenja, ali relativizacije koja će uspeti da izbegne zamke arbitrernosti u ovoj oblasti. U suštini, ovaj pristup polazi od hipoteze da ocenu istovetnosti kažnjivog dela treba vršiti ne samo polazeći od činjeničnog stanja već i sa stanovišta vrednosti koje se štite u konkretnom slučaju.

Kumulativnost kriterijuma ocene istovetnosti dela nije posebna novina ovog pristupa. Drugi bitan momenat zapravo je odgovarajući pokušaj teorijskog opravdanja ovog pristupa. Taj pokušaj se fokusira na jedno realističko shvatanje teleološkog metoda po formuli „vaganje interesa na osnovu vaganja činjenica“ što omogućava formulisanje modela primene principa *ne bis in idem* u gore izloženom smislu.

Ključne reči: hermeneutički pragmatizam, ne bis in idem, Evropski sud za ljudska prava, istovetnost dela, pravna sigurnost, pravičnost.

* redovni profesor, bovan@ius.bg.ac.rs

Saša B. Bovan
Law Faculty, University of Belgrade

METHODICAL POTENTIAL OF HERMENEUTICS PRAGMATISM IN UNDERSTANDING AND IMPLEMENTATION OF THE NE BIS IN IDEM PRINCIPLE

SUMMARY

The work examines the methodical potential of hermeneutics pragmatism in solving the controversy linked to implementation of the ne bis in idem principle. The key part of the paper is focused at forming adequate criteria for evaluating the similarities of the punishable deed, in situations of application of the principle "evaluating the interests based on evaluating facts". Thence, a stance based on hermeneutics relativism is to be taken, which has as a consequence a certain relativisation of the principle ne bis in idem with a view of establishing a fitting balance between the principles of legal security and fairness. The work discusses in which way the hermeneutics relativism spills over into hermeneutics pragmatism / sociologism and what are the benefits of that approach for deliberation of the issue of ne bis in idem.

Key words: hermeneutics pragmatism, ne bis in idem, similarity of deed, legal security, fairness.

PREGLEDNI ČLANCI

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Dr Veljko Delibašić[*]

POJEDINA SPORNA PITANJA U VEZI SA OPOJNIM DROGAMA U KRIVIČNOM ZAKONIKU

Apstrakt: U radu se ukazuje na potrebu preciznog definisanja pojma opojnih droga, kao i na pojedine probleme koji su bili prisutni zbog neusklađenosti Krivičnog zakonika i Zakona o psihoaktivnim kontrolisanim supstancama, pri čemu se dozvoljava mogućnost da se u narednim izmenama Krivičnog zakonika termin opojne droge zameni terminom psihoaktivne kontrolisane supstance. Istovremeno se analizira i jedan broj problema koji se odnose na krivična dela čijim propisivanjem se suzbijaju zloupotrebe opojnih droga, uz predlog kako se uočeni problemi mogu rešiti u praksi. Pri tome se zauzima stav da bi bilo bolje neovlašćeno držanje opojnih droga propisati kao prekršaj, a ne kao krivično delo.

Ključne reči: opojne droge, neovlašćena proizvodnja droga, držanje opojnih droga, omogućavanje uživanja droga.

* Advokat iz Beograda, veljkodelibasic@open.telekom.rs

Veljko Delibašić, PhD
Lawyer from Belgrade

SOME OF THE DISPUTABLE QUESTIONS REGARDING NARCOTIC DRUGS IN CRIMINAL CODE

SUMMARY

It is ascertained in the work that the criminal acts prescribed to surpress the abuse of narcotic drugs have blanket character, and it is for that reason extremely important to correctly define the concept of narcotic drugs. According to Criminal Code (act 112. paragraph 15) by narcotic drugs are considered substances and preparations announced by law and other regulation based on law, as narcotic drugs and controlled psychoactive substances. Given that the Code about controlled psychoactive substances prescribes that the controlled psychoactive substances are narcotic drugs, psychotropic substances, products of biological origin which have psychoactive effect and other controlled psychoactive substances, it is obvious that these definitions are a pleonasm, therefore the work allows the possibility that in the Criminal Code instead of the term narcotic drugs the term controlled psychoactive substances is introduced. While evaluating if it should be done, it stands out that the following fact should be considered. We use the term narcotic drugs in criminal law traditionally in a different way, as well as that this term is used in all other countries, while the term controlled psychoactive substances has a rather medical character, which is all in favour of keeping the term narcotic drugs in the Criminal Code. Following this part the work points out some of the problems related to criminal acts unauthorised production and selling narcotic drugs (act 246. CC), unauthorised keeping of narcotic drugs (act 246a CC) and enabling enjoying narcotic drugs (act 247. CC), with stating the ways of solving noticed problems in practice.

Keywords: narcotic drugs, unauthorised production drugs,keeping of narcotic drugs,enabling enjoying drugs.

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Olga Tešović[*]

DELO MALOG ZNAČAJA I NAČELO OPORTUNITETA KRIVIČNOG GONJENJA

– Potreba njihovog istovremenog zakonskog regulisanja –

Apstrakt: Delo malog značaja kao jedan od osnova isključenja postojanja krivičnog dela predviđen je u članu 18. Krivičnog zakonika Republike Srbije, te je tako i sa novim zakonikom nastavljena tradicija rešavanja problema sitnog kriminaliteta kroz materijalnopravnu odredbu, a što je i do tada bio slučaj sa institutom neznatne društvene opasnosti. S druge strane, procesnopravnim odredbama već od 2001. godine u našem pravnom sistemu ozakonjeno je načelo oportuniteta krivičnog gonjenja čija se primena kasnijim izmenama Zakonika o krivičnom postupku, a potom i donošenjem novog Zakonika, sve više širila, s tim da je navedeno načelo široko uvedeno i u postupku prema maloletnicima.

Imajući u vidu činjenicu da sada uporedo sa materijalnopravnim institutom koji rešava slučajeve bagatelnog kriminaliteta u pravnom sistemu naše zemlje postoji razvijeni procesnopravni mehanizam u vidu postupanja javnog tužioca po načelu oportuniteta, a koji ima istovetnu svrhu, autor postavlja pitanje neophodnosti paralelnog postojanja navedene dve ustanove. Da li je neka od njih suvišna? Koji se od navedenih instituta u praksi uspešnije primenjuje i da li iziskuje dodatnu primenu drugog?

Ključne reči: Delo malog značaja – Načelo oportuniteta krivičnog gonjenja – Sitni kriminalitet – Krivično materijalno i procesno pravo

* Sudija Osnovnog suda u Požegi i student doktorskih studija Pravnog fakulteta u Beogradu, otolgates@gmail.com

Olga Tešović
PhD student at the Faculty of Law in Belgrade
and jugde in the Primary court in Požega

AN ACT OF MINOR SIGNIFICANCE AND THE PRINCIPLE OF OPPORTUNITY OF CRIMINAL PROSECUTION

SUMMARY

An act of minor significance as one of the grounds for excluding the existence of the offence is regulated by the Article 18 the Criminal Code of Serbia and in that way new Criminal Code continues the tradition of solving problems of petty crime through substantive provision which was previously the case with the institute od insignificant social endanger. On the other hand, already since 2001. procedural provisions are establish in our legal sistem the principle of opportunity of criminal prosecution whose application with subsequent amendments of the Criminal Procedure and, after that, the adoption of the new Code of Criminal Procedure increasingly more widespread. Above principle has been widely introduced in proceedings against juveniles.

Bearing into account the fact that along with the substantive institute that solves cases of petty crime in the legal system of our contry is developed procedural mechanism in the form of a public prosecutor handling the principle of opportunity, which has the same purpose, the author raises the question of the necessity of coexistence of these two institutions. Did any of them redundant? Which of the following institutes are more successfull in practical application and whether it needs further implementation of the other institute?

Key words: An act of minor significance – The principle of opportunity of criminal prosecution – Petty crime – Criminal law and procedure