ČLANCI

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Zoran Stojanović[*]
Pravni fakultet, Univerzitet u Beogradu

DA LI JE SRBIJI POTREBNA REFORMA KRIVIČNOG ZAKONODAVSTVA?[**]

Apstrakt: Izmene i dopune Krivičnog zakonika do kojih je došlo u decembru 2012. godine predstavljaju korak napred u usavršavanju krivičnog zakonodavstva Srbije. U radu se analiziraju nova rešenja i daje njihova ocena. Autor ističe da su neka važna pitanja ostavljena za buduće izmene i dopune Krivičnog zakonika. Postoji potreba drugačijeg propisivanja nekih krivičnih dela i preispitivanja zaprećenih kazni, a i neka pitanja i instituti Opšteg dela mogli bi biti preispitani. Međutim, postojeća klima koja je u pogledu ostvarivanja preduslova za uspešnu reformu neophodna, ne može se za sada oceniti povoljnom. Iako se zapaža ozbiljniji pristup u pripremi izmena krivičnog zakonodavstva nego u poslednjih nekoliko godina, preterano represivne težnje zasnovane na jakim emocijama i često, iracionalnim razlozima, pothranjivane od većeg dela medija u javnosti ne jenjavaju. Težnje koje u drakonskom kažnjavanju vide rešenje za probleme u društvu, mogu da nanesu štetu krivičnom pravu kao racionalnom sistemu pravnih normi. Preterana represivnost u Srbiji nije posledica samo uverenja da se tako efikasno može suzbijati kriminalitet, već i posledica uverenja da se tako u većoj meri može ostvariti društvena pravda. Umereno, racionalno i realno postavljeno krivično zakonodavstvo ima više izgleda da uspešnije ostvaruje svoju funkciju od previše širokog i previše strogog krivičnog zakonodavstva.

Izmene i dopune KZ iz 2012. godine predstavljaju diskontinuet u odnosu na one iz 2009. godine koje su u mnogo čemu sadržale loša rešenja kako u suštinskom, tako i u legislativno-tehničkom smislu. I pored toga, signali koji se šalju raspravom u Narodnoj skupštini kad god je u pitanju materija iz oblasti krivičnog prava, zabrinjavaju. Oni ukazuju na nepovoljnu klimu za dalje usavršavanje krivičnog zakonodavstva. Za sveobuhvatnu reformu krivičnog zakonodavstva potrebna je i relativno stabilna društvena, politička i ekonomska situacija. Potrebno je i to da kod zakonodavca bude prisutna svest da je materija koju reguliše krivično pravo veoma osetljiva materija i da krivični zakon ne služi tome da se stalno širi krug kažnjivih ponašanja i da se, i inače stroge kazne, dalje pooštravaju. Krivično zakonodavstvo Srbije i ovakvo kakvo je, ne zaostaje u odnosu na krivično zakonodavstvo većine evropskih zemalja, pa stoga sa njegovom reformom ne treba preterano žuriti.

Ključne reči: reforma krivičnog zakonodavstva, kućni zatvor, uslovni otpust, nova krivična dela, dekriminalizacija, novčana kazna, propisivanje kazni.

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* redovni profesor, profstojanovic@gmail.com

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Zoran Stojanović
Full Professor
Faculty of Law
University of Belgrade

DOES SERBIA NEED A CRIMINAL LEGISLATION REFORM?

SUMMARY

Amendments to the Criminal Code (CC) enacted in December 2012, represent a step forward in improving Serbia's criminal legislation. This paper offers an analysis and evaluation of the new solutions. The author points out that some important issues are left to be addressed by future amendments to the Criminal Code. As stated in the paper, different drafting is required, *inter alia,* regarding criminal offences associated with narcotic drugs which, though amended in 2009, are not satisfactory and they keep creating problems in jurisprudence. Still, the general climate, as part of the necessary preconditions for a successful reform, cannot be presently assessed as favorable. Although there is a noticeably more serious approach to the preparations for amending criminal legislation compared to that observed in the past several years, overly repressive public aspirations, driven by strong emotions and, often, irrational reasons, fueled by most of the media, seem to be as intense as ever. Such aspirations which find draconic punishment to be the solution to existing social problems can only hurt criminal law as a rational system of criminal norms. The "punishment frenzy" in Serbia does not come solely as a consequence of the conviction that this is an effective way to suppress criminality but also as a result of popularly-shared belief that severe punishments can provide a higher

level of social justice. However, overreaction in terms of punishment as a compensation for the shortage of justice has its disadvantages and it can, in the best case scenario, only calm down the public to a certain extent, but certainly not bring true justice. A moderate, rational and realistically grounded criminal legislation would stand a better chance of successfully realizing its function than its excessively broad and overly severe counterpart.

Amendments to the CC entered in 2012 represent a discontinuation relative to those adopted in 2009 which contained poor solutions with respect to a multitude of issues in both essential and legislative and technical sense. Still, signals coming from debates held in the National Assembly whenever criminal law matter is on the agenda, are not promising. They indicate a climate not so favorable for further improvement of criminal legislation. A comprehensive reform of criminal legislation requires a relatively stable social, political and economic situation. Another very important requirement is the legislator's awareness of the fact that the matter regulated by criminal legislation is very sensitive and that the role of criminal law is not to constantly broaden the circle of punishable behavior and to further toughen already tough penalties. Indeed, criminal legislation of Serbia, in its presently effective state, does not lag behind criminal legislations of the majority of European states and, therefore, there is no need to rush its reform.

Keywords: reform of the criminal law, house arrest, probation, criminalization, decriminalization, fine, punishment.

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Đorđe Ignjatović[*]
Pravni fakultet, Univerzitet u Beogradu

NORMATIVNO UREĐENJE IZVRŠENJA VANZAVODSKIH KRIVIČNIH SANKCIJA U SRBIJI

Apstrakt. U ovom radu bavićemo se pre svega kritičkom analizom uređenja materije alternativnih krivičnih sankcija u krivičnom izvršnom pravu Srbije, sa posebnim osvrtom na Nacrt Zakona o probaciji koji je javnosti predstavljen sredinom maja 2013. godine, naročito sa stanovišta njihove usaglašenosti sa preporukama koje su za regulisanje ove materije sadržane u Tokijskim pravilima i Probacionim pravilima Saveta Evrope. Takođe, ona će biti razmotrena i sa stanovišta uporednih rešenja koja su došla do izražaja u nekoliko drugih, pre svega bivših socijalističkih država iz okruženja. Pošlo se od pretpostavke da bi ovakva analiza mogla da pruži osnov za procenu da li bi vanzavodski tretmani normativno uređeni na način kako je to učinjeno u Nacrtu Zakona mogli pomoći u rešavanju jednog od ključnih problema našeg kaznenog sistema: hipertrofije u primeni kazne lišenja slobode i sa tim u vezi – prenaseljenošću naših kaznenih ustanova.

Ključne reči: Probacija, vanzavodski tretman, Srbija, komparacija, izvršenje krivičnih sankcija.

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

Đorđe Ignjatović
Full Professor
Faculty of Law
University of Belgrade

EXECUTION OF NON-CUSTODIAL SANCTIONS IN SERBIAN LAW – CRITICAL ANALYSIS

SUMMARY

In this paper author analyzes legal solutions in execution of alternative sanctions in Serbian penal law. He primarly focused Draft Probation Code, represented to the public in the mid-May 2013, especially with regard to their compliance with recommendations of Standard Minimum Rules for Non-Custodial Measures („Tokyo Rules") and Council of Europe Rules & Recommendations on Probation. They are also analyzed from the comparative aspect of legal solutions in some countries, in the first place ex-socialist countries in the region. The author started with the assumption that this analysis could provide a basis for assessing whether non-custodial treatment, normatively regulated in the way it was done in the Draft Probation Code, could help to resolve one of the key problems of the penal system in Serbia: hypertrophy in punishment of deprivation of liberty and in this regard – overcrowding of our penal institutions.

After critical analysis of principle (starting with the observation that the title "Code of Probation in execution of non-custodial sanctions and measures" is inadequate) as well as concrete solutions selected from creators of the Draft Probation Code, author tried to answer on two key questions: first- do we need one more special code in the field of penal sanctions execution law? Considering the solutions from the Draft Probation Code, and especially the organizational structure (Probation Service is conceived as part of the Administration for execution of penal sanctions and within the „organizational unit for treatment and alternative sanctions), scope of competence of the probation officers, lack of criteria for their election, lack of mechanisms for work control and a range of other solutions – the answer to the first question is negative. In other words, there are no real reasons to enact a special code on probation. The way the matter is defined in the Draft Probation Code, it would be better if it was a part of general Penal Sanctions Execution Code. In that case, the further fragmentation of Penal Sanctions Execution Law in Serbia, that has received alarming proportions, would be prevented.

The second question is: is it possible to expect that norms of Draft Probation Code contribute to a wider use of non-custodial measures and sanctions and consequently to provide a more effective reaction to crime? Unfortunatelly, the answer to this question is also negative. It is hard to imagine that the Draft Probation Code (in the way it is proposed) if enacted, would contribute to expected innovations in this scientific field.

Key words: probation, non-custodial treatment, Serbia, comparision, penal sanctions execution.

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*Milan Škulić**
Pravni fakultet, Univerzitet u Beogradu

DOMINANTNE KARAKTERISTIKE OSNOVNIH VELIKIH KRIVIČNOPROCESNIH SISTEMA I NJIHOV UTICAJ NA REFORMU SRPSKOG KRIVIČNOG POSTUPKA

Apstrakt. U radu se objašnjavaju dominantne karakteristike dva osnovna velika krivičnoprocesna sistema – evropsko-kontinentalnog i adverzijalnog, pri čemu se izlaže sumarna analiza osnovnih karakteristika dva tipična predstavnika ovih sistema: 1) krivičnog postupka Nemačke, kao države koja ima klasičan kontinentalno-evropski krivični postupak i 2) krivičnog postupka SAD, za koje je karakteristično da im je krivični postupak ustrojen kao tipičan adverzijalni krivični postupak.

Autor posebno analizira novi Zakonik o krivičnom postupku Srbije iz 2011. godine, koji se argumentovano kritikuje, jer sa jedne strane na pravno-tehnički prilično loš način istragu svrstava u nadležnost javnog tužioca, ali sasvim nepotrebno uz to uvodi i potpuno adverzijalnu konstrukciju glavnog pretresa, te s druge strane, eliminiše načelo istine u našem krivičnom postupku, što je inače, kontradiktorno u odnosu na brojna druga krivičnoprocesna pravila, jer je nelogično da se u novom Zakoniku o krivičnom postupku, kao i ranije, omogućava podnošenje žalbe protiv presude i zbog *pogrešno ili nepotpuno utvrđenog činjeničnog stanja*, drugim rečima, *usled zasnovanosti presude na neistini*, a da pri tom, *sud uopšte i nema dužnost utvrđivanja istine,* a da je izvođenje dokaza, što znači i stvaranje podloge za utvrđivanje činjeničnog stanja, primarno povereno strankama.

U radu se konstatuje da novi Zakonik o krivičnom postupku Srbije nije nikakva „amerikanizovana" krivična procedura, već on predstavlja veoma lošu mešavinu akuzatorskih elemenata krivičnog postupka sa nekim izrazito nedemokratskim inkvizitorskim elementima. On u stvari, najviše liči na „haški" krivični postupak, odnosno pravila postupka koja se primenjuju u Haškom tribunalu. Potpuno adverzijalna konstrukcija glavnog pretresa, odnosno suđenja, nije adekvatna za naš krivični postupak i ona bi u praksi mogla dovesti do ogromnih problema. U takvom postupku bi stranke samo formalno bile ravnopravne, dok bi u praksi to bilo po pravilu, veoma nepovoljno po okrivljenog, naročito onda kada nema branioca, a u našem krivičnom postupku je samo za relativno ograničeni krug krivičnih dela, propisana obavezna stručna odbrana.

Ključne reči: Zakonik o krivičnom postupku, uporedno krivično procesno pravo, evropsko-kontinentalni krivični postupak, adverzijalni krivični postupak, načelo istine.

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

Dr. Milan Škulić
Professor at the
Faculty of Law
University of Belgrade

THE DOMINANT CHARACTERISTICS OF THE MAJOR CRIMINAL PROCEDURE SYSTEMS AND THEIR IMPACT ON THE REFORM OF THE SERBIAN CRIMINAL PROCEDURE

SUMMARY

Author explains in the article the dominant characteristics of the major criminal procedure system and their impact on the reform of the Serbian criminal procedure. In the article there are analyses of to main so called great criminal procedure systems – European-continental and adversatorial, with summary analysis of to typical representatives of these systems: 1) criminal procedure of Germany, as a state with classical continental European criminal procedure and 2) criminal procedure of the USA, that characterized typical adversatorial criminal procedure.

Author specially explains and analyses new Code of Criminal Procedure of Republic of Serbia from 2011. That Code is criticized very seriously, because of it consists many technical mistakes and besides the completely conception of the new CPC is wrong.

Elimination of the principle of the truth in criminal procedure, i.e. in the new Criminal Procedure Code of Serbia, is very negative solution. It is without doubt that the truth is not a "holly cow" in Serbian valid criminal procedure and also in criminal procedures in other states in continental Europe which legal systems know this vital principle. The truth is not achieving at any price and when it is objectively not possible, the principle *in dubio pro reo* has to be applied. It is not more the case in the new Criminal Procedure Code of Serbia, which is very bad solution that must be seriously criticized. Completely adversatorial construction of the main trial is not adequate for Serbian criminal procedure and that could be in the practice the cause of many serious problems. In this type of procedure the parties would be equal only in formal point of view. In the practice that could be very inconvenient and bad for the defendant, especially when he/she has not a defense counsel and in Serbian criminal procedure is mandatory defense counsel provides only for limited number of criminal offences.

Completely elimination of the principle of the truth in criminal procedure is in a contradiction to many other vital criminal procedural rules. It is completely senseless and nonsense, that the new Code of Criminal Procedure provides appeal against the verdict because erroneous or incomplete finding of fact, i.e., when the judgment is ground on the incorrect or incomplete finding of fact or when the court has determined a relevant fact incorrectly and besides, the court officially does not have a duty to determine a truth.

Elimination of the principle of the truth in criminal procedure is essentially unmoral, because the truth in criminal procedure can not be divided from general connectivity criminal law and moral. The majority of citizens expect the truth in and from criminal procedure. This truth

has often historical significance too. If the fact is, that criminal offence principally is unmoral and if only in criminal procedure can be determined if the crime was committed, then this kind of question can not be only the mater of so called evidential duel between prosecutor and defendant with no active role of independent and impartial court. Author explained too, that the key provisions of the new CPC of Serbia are **unconstitutional,** while in accordance with the article 32 of the Serbian Constitution, the citizen has a right on the more active court in criminal procedure (the court has a duty to discuss the indictment and it is not the right of the discussion of the parties before the court); and on the another side, the court must decide of the suspicion which is the ground for the initiating the criminal prosecution.

Key words: Code of Criminal Procedure, Comparative Criminal Procedure Law, European-Continental Criminal Procedure, Adversatorial Criminal Procedure, the Principle of Truth.