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ENDANGERING THE PUBLIC TRAFFIC – CRIMINAL LAW REGULATION AND PRACTICAL DOUBTS

ABSTRACT: Due to their frequency and importance, traffic crimes are an important subject of theoretical study. Violation of traffic regulations is sanctioned by the norms of misdemeanor and criminal law, which makes this area complex, but also leads to certain difficulties in the interpretation and application of law. The authors thorougly analyze the legal description of the criminal offense of endangering the public transport and its qualified forms. A particular attention is paid to the the interpretation of certain subjective and objective elements of this criminal offense (consequence, mens rea and objective conditions of incrimination). The authors point out certain inconsistencies in the court practice and propose legislative changes to improve criminal protection and establish a more legitimate and pragmatic distinction between criminal and misdemeanor acts.

Keywords*: endangering the public traffic, criminal offenses and misdemeanors, objective condition of incrimination.*

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1. Introduction

Crimes against public traffic safety justifiably attract a lot of attention. Public transport is an area that deserves criminal law protection, not only because of the great importance that traffic has in the modern world, but also because of the potentially serious consequences of violating traffic regulations for the safety, life, health and property of people. The number of criminal convictions for this crime is traditionally high in our country (Stojanović & Perić, 2011, p. 232).

Crime of Public traffic endangerment is proscribed by Article 289 of the Criminal Code of the Republic of Serbia (Penal Code of the Republic of Serbia; hereinafter: CC). Although criminal protection against endangering public traffic is indisputably necessary, the question arises as to whether the current legal solutions are optimal, ie whether the boundaries of the criminal zone have been correctly determined.

Law on Road Traffic Safety (Law on Road Traffic Safety, 2009; hereinafter: Traffic Law), defines basic concepts, sets traffic principles and rules, and is an indirect legal source for blanket norms of Criminal law. Also, this law prescribes a whole series of traffic violations, which sometimes leads to a dilemma – whether a certain action fulfills the characteristics of a traffic crime or a traffic misdemeanor. Therefore, a proper understanding of the crime under Article 289 is not possible without a proper interpretation of the relevant provisions of the Traffic Law.

2. Legal framework

The basic form of a criminal offense under Article 289 of the CC is present when a participant in road traffic fails to comply with traffic regulations and thus endangers public transport, which results in the endangerment of life or body of people or property of a large extent, and, consecutively, leads to minor bodily injury or property damage exceeding the amount of two hundred thousand Serbian dinars (Article 289 paragraph 1 of the CC). The most important features of the basic form of the crime are action, consequence and objective condition of incrimination.It is also worth paying attention to the notion of a participant in traffic, as a subject of a criminal offense, ie a perpetrator (Delić, 2021; Vuković, 2021).

A participant in the traffic can be any natural person, because this term is very broadly defined in Article 7, paragraph 67 of the Traffic law (“traffic participant is any person who participates in traffic in any way”). A traffic

participant may be in the role of driver of a motor or other vehicle, co-driver, passenger or pedestrian, or in the another conceivable role, as long as he/she is the part of the traffic on the road, or is in any way physically present in it (eg a person that is being worn by other person, or the one who is lying down, sitting or standing in the middle of the road). A participant in traffic is also a driver of an electric scooter or other means of transport whose use is not explicitly regulated by the relevant regulations.

The objective element of this crime is the place of execution. It can be committed only on the road, which means that the realization of the actus reus elsewhere would be another crime (as a rule, the crime of causing general danger or an aggravated act against the general security of people and property) (Đorđević & Kolarić, 2020, p. 185).

The actus reus of the criminal offense consists of non-compliance with traffic regulations, as a result of which a prohibited consequence occurs (Delić, 2021; Mrvić-Petrović, 2019). Although the action is linguistically formulated as inaction, it manifests itself in both forms: commission (eg drunk driving, violent driving, speeding) and omission offense (example – disobedience of the priority pass rule, failing to respect the right of pedestrian to pass the pedestrian line without obstruction). The action is of a blanket character because it refers to other regulations. This means that we assess the fulfillment of the action by applying the Traffic Law and bylaws, because they determine certain traffic rules.

It should be borne in mind that traffic participants are obliged to adhere to the principle of trust, but also to reasonably adapt to the circumstances, thus annulling the improper behavior of other participants in public transport. Therefore, "the defendant was obliged to adjust the speed to the extent that he could stop it before the place of collision with the cyclist as a foreseeable obstacle on the road, which the defendant did not do, but continued to move his vehicle with unadapted and illegal driving speed".[1] The driver is obliged to adjust his driving to the circumstances, regardless of the possible absence of warning or warning signs.[2]

Traffic participants are obliged to behave reasonably and properly, but if one notice the unusual behavior of another participant, he has to adapt to that fact (eg if he sees a pedestrian running across the street outside the pedestrian crossing, he must slow down or brake regardless the fact vehicle is moving at

[1] Presuda Okružnog suda u Subotici Kž. 209/09, od 21. aprila 2009. godine.
[2] Presuda Okružnog suda u Kraljevu Kž. 431/06 od 25. januara 2007. godine.

the prescribed speed and in the allowed way) (Lazarević, 2011; Delić, 2021; Stojanović, 2020).

Some authors argue that the principle of trust has a limited effect in relation to certain categories of traffic participants (eg children, alcoholics or the mentally ill persons, the elderly and disabled, etc.). Also, if the improper behavior of another participant in traffic was predictable, the driver is obliged to adapt to the situation. If a pedestrian showed an intention to cross the road outside the prescribed crossing, the driver would have to adjust his driving to avoid an accident (Stojanović & Perić, 2011, p. 234; Lazarević, 1995).

It is important to consider how, in the terms of Criminal law, the fact that the participant in the traffic was under the influence of alcohol or psychoactive substances at the time of the crime is treated. Two important issues arise.

First, if the perpetrator, due to the consumption of alcohol, drugs or similar means, has brought himself into a state in which he could not understand the significance of his act or manage his actions, or into a state in which his reasoning and decision-making abilities have been significantly reduced, the conditions for application of the institute of *actiones liberae in causa* are fulfilled (Kokolj, 1981; Milošević, 2009; Ćorović & Turanjanin, 2017; Vuković, 2021). The condition for the application of this institute is that the perpetrator in the time immediately before bringing into a state of insanity, ie significantly reduced sanity, had psychological relation (in the form of intention, recklessness or negligence) towards future criminal event (Article 24 CC; in relation to misdemeanors – Article 19 paragraph 4 of the Law on Misdemeanors 2013; see: Vuković, 2021a).

For example, the perpetrator drove himself with a car to a party with a friend. He consumes large amounts of alcohol there, as a result of which his ability to manage his actions has significantly decreased. Being in such a state, he refuses the suggestions of a friend to call a taxi, gets out angrily, drives his car with about 4 per mille of alcohol in his blood and causes a car accident in which another person is killed. In this hypothetical example, in the time immediately before being brought into a state of significantly reduced sanity, the perpetrator had a negligent attitude towards a traffic crime that would occur later (he could and was obliged to be aware that he would commit a crime out of unconscious negligence), and that constitutes a legitimate base for determining his guilt. Therefore, there is no legal ground for mitigation of sentence, in accordance with Article 24 para. 1 CC. However, the institute of actiones liberae in causa is very complex and challenging and also very rare in court practice (Milošević, 2009; Grujić 2020).

The situation in which the consumption of alcohol, certain drugs or narcotics leads to a reduction but not a complete exclusion (or significant reduction) of sanity is more common. Regarding the question of how to treat the mere decrease in sanity due to alcohol use, the Supreme Court of Serbia took an interesting position: "the court may treat a low level of alcoholism (0.71 gram per mille of alcohol) as a mitigating circumstance".[3] It is surprising that the court considers alcohol consumption a mitigating circumstance, because driving in a state of even mild alcoholism (if the analysis of an appropriate blood sample determines an alcohol content greater than 0.20 mg / ml) is an offense (Article 187 para. 3 of the Traffic Law). Also, the interpretation of Article 24 of the CC does not indicate that the will of the legislator was to hold the reduction of sanity that was caused by perpetrator blame as a mitigating circumstance.

However, the application of the institute of actiones liberae in causa requires that the perpetrator had a psychological attitude towards the future crime before he brought himself in state of reduced or excluded sanity, which can sometimes be disputable. In any case, there is no explicit legal provision that would prevent the consumption of alcohol that has led to reduced but not significantly reduced sanity as a mitigating circumstance. Therefore, the conclusion of the Supreme Court of Cassation is not *contra legem*, but it seems to us that it does not completely coincide with the will of the legislator, which can be indirectly inferred from the provision of Article 24 of the CC.

On the other hand, in previous court practice, there were decisions that took the perpetrator's alcoholism as evidence of *dolus eventualis*, which cannot be considered justified if there are no other circumstances to determine this form of guilt (Stojanović & Perić, 2011, p. 236; Mrvić-Petrović, 2019, p. 307). In the case law, there is also a decision that emphasized the use of alcohol cannot be seen as a mitigating circumstance even when the perpetrator, at the time of consuming alcohol, was not aware that he would later drive a motor vehicle (Simić & Trešnjev, 2008, pp. 191–192). Obviously, it is necessary to unify court practice by building clear and non-contradictory views on the use of alcohol by the perpetrator as a circumstance of a criminal event.

The consequence of a criminal offense is endangering the life or body of people or property of a larger value. Apart from the consequence, the legal description of this criminal offense also contains an objective condition of incrimination (Vuković, 2021, 82; Stojanović, 2018; Đorđević, Kolarić, 2020). The objective condition represents the part of the criminal event that

[3] Presuda Vrhovnog kasacionog suda, Kzz 136/10 od 26. maja 2010. godine.

is not compehended by the guilt, that is, the mental attitude of the perpetrator, unlike the objective features of the legal description of the criminal offense (Vuković, 2021, pp. 81– 82; Atanacković, 1980, p. 37).

The perpetrator should act with the appropriate form of mens rea (in this case *dolus*) in relation to the action and the consequence, while the objective condition of incrimination is not comprehended by his guilt (Vuković, 2021, p. 82).[4] The perpetrator intentionally does not respect a certain traffic rule and is aware that it causes danger (for example, cutting the road to another vehicle at an illegal speed), but he was not aware that it would cause minor bodily injury or property damage in the amount of 200,000 dinars. If he was aware of and wanted to cause someone's injury or significant property damage, that would represent another criminal offense.

It is disputable whether the current legal solution is good. Namely, it often happens that even during minor traffic accidents, one of the involved participants is slightly injured. It is not uncommon to suspect that one of them is falsifying an injury, therefore committing the crime of insurance fraud, which is, in many cases, extremely difficult to prove.

We believe that the misdemeanor law sanctions are quite sufficient in situations when the act results in light bodily injury, ie that the criminalization of the form from Article 289 para. 1 of the Criminal Code is not in accordance with the theoretical principle according to which criminal law is the *ultima ratio*. Such a solution unnecessarily burdens the criminal judicial apparatus with cases which, by their nature and degree of social danger, objectively fall into the domain of misdemeanor law. Having that in mind, we believe it would be better to link the objective condition of incrimination to the occurrence of grievous bodily harm, as done in Croatian legislation (Article 227 paragraph 1 of the Croatian Criminal Code – causing a traffic accident). Of course, in that case, the more serious form from Article 297, paragraph 1 should be abolished or significantly changed.

Also, it seems to us that violent driving, which is sanctioned as a misdemeanor in Serbia, although the legal description of the misdemeanor from Article 41 of the Traffic Law points to significant danger to other road users; should be prescribed as a criminal offense (similar as in the Article 226 of the Croatian Criminal Code – reckless violent driving in road traffic). After all, it seems clear that certain forms of violent driving, even in the abstract sense, are more socially dangerous behaviors in relation to the basic form of this crime.

[4] Rešenje Okružnog suda u Beogradu Kž. 2897/06, od 17. novembra 2006. godine.

The form of guilt (mens rea) in the basic form of this offense is *dolus eventualis* (Mrvić-Petrović, 2019, p. 308; Đorđević & Kolarić, 2020, p. 186). In court practice, it has proved to be especially difficult to distinguish between dolus eventualis and conscious negligence. To distinguish between two forms of guilt, court vastly used the notion of ruthlessness, ie where the degree of ruthlessness was high, it was assumed that dolus eventualis was present. The significant degree of ruthlessness is reflected in the behavior of the perpetrator who "does not take into account the goods and interests of other participants in traffic", and therefore deserves a social reproach (Stojanović & Perić, 2011, p. 235).

It is not uncommon that two or more traffic participants significantly contribute to the occurrence of a traffic accident. In that case, it is important to determine whose action was the predominant cause of the traffic accident. Thus, the Court of Appeals concluded that the traffic accident was caused by the accused driver of a car who was making a semicircular turn when he was hit by a motorcycle driving at an unreasonable speed, because the defendant was obliged to miss a motorcycle at an unsafe distance. His action was decisive for the accident, although the motorcyclist also violated traffic regulations and contributed to the accident.[5] However, there are situations when two or more traffic participants conduct actus reus, and everyone is liable (Mrvić-Petrović, 2019, p. 308).

The relationship between misdemeanor and criminal liability, especially in light of the *ne bis in idem* principle (Banović, 2020; Škulić, 2017; Zupančič, 2011), is often a practical problem, as in other areas (eg public peace and order, personal data protection, .production, trade, possession and carrying of weapons and explosives; violence at sports events, etc.). Issues arise due to the fact that the legal descriptions of certain misdemeanor partially (sometimes even dominantely), overlap with the legal definition of criminal offense.

Recent case law of the European Court of Human Rights, in particular the cases of *Zolotukhin v. Russia* (application 14939/03, judgment of 10 February 2009), *Maresti v. Croatia* (application 55759/07, judgment of 25 June 2009) and *Muslija v. Bosnia and Herzegovina* (Application 32042/11, Judgment of 14 January 2014) (Mrvić-Petrović, 2014, p. 32), seriously shook the previous practice. In mentioned verdicts the European court of Human Rights took the stand that if the Misdemeanor court included in his decision the factual substratum of the criminal event that fall within the domain of the criminal law, the accused must not therefore suffer negative legal consequences, ie

[5] Presuda Apelacionog suda u Beogradu Kž3 3/17, od 7. aprila 2017. godine.

the procedural prohibition ne bis in idem must be applied. Judgments of the European Court of Human Rights are a clear signal to legislators that it is necessary to make more precise distinctions between misdemeanors and crimes (Ivičević-Karas & Kos, 2012, p. 581).

This also refers to a clearer distinction between traffic crimes and misdemeanors. Criminal offense under Article 289 Art. 1 of the Criminal Code differs only quantitatively from a traffic misdemeanor, which creates practical problems and leaves too much room for discretionary assessment of the police – whether to file a request to initiate misdemeanor proceedings or criminal charges (Mrvić-Petrović, 2014, p. 33).

The difference between the Serious crime against public traffic safety (Article 297 of the CC) and traffic misdemeanor is far more obvious. The position of the Supreme Court of Cassation is correct: .... "the act contains only elements of the misdemeanor from Article 332, paragraph 1, item 77 of the Traffic Law (acting contrary to the provisions of Article 187, paragraph 2 of the Traffic Law), and does not contain elements of the criminal offense ... due to which .... the misdemeanor procedure did not exhaust the causal link between the defendant's actions contrary to the provisions of Article 187, paragraph 2 of the Traffic Law – the defendant's alcoholism and the consequences – traffic accidents".[6]

The Constitutional Court reasons, similarly, emphasizing in its decision that a single life event can include two different acts – criminal and misdemeanor. When misdemeanor judgement does not comprehend the whole life event, but only partially resolves it, the ne bis in idem rule is not violated if criminal proceedings are also conducted. However, the Constitutional Court warns that this procedural prohibition may be activated in the case of acts in which the legal description of the misdemeanor and the criminal offense is mostly the same, ie very similar, as well as when certain judgement of Misdemeanor court includes facts which are part of criminal offense legal description[7] (Mrvić-Petrović, 2014, p. 34). Misdemeanor courts should take care not to include the factual substratum of the criminal part of the event (Ivičević-Karas, Kos, 2012, p. 582).

Aggravated form of this criminal offense will exist if the perpetrator "endangers railway, ship, tram, trolleybus, bus or cableway traffic by endangering the life or body of people or large-scale property" (Article 289, paragraph 2). Here, the legislator does not require the fulfillment of the

[6] Presuda Vrhovnog kasacionog suda Kzz 1189/2018, od 30. 10. 2018. godine.

[7] Presuda Ustavnog suda Srbije Už 1285/2012 od 26. marta 2014. godine.

objective condition of incrimination. Obviously, he considered actus reus of the offense to be socially dangerous enough, so other consequences are not necessary. This solution is also reasonable because of the nature of this transport means (large number of passengers can be in it at the same time, and the potential consequences are more severe) (Stojanović, 2018; Delić, 2021; Čejović, 2008). The prescribed sentence is from six months up to five years of imprisonment

The privileged form of the offense differs from the basic form solely by the subjective element, while the objective elements are identical. The privileged form, therefore, exists when the act referred to in paragraph 1 is committed out of negligence.

Apart from the aggravated form from Article 289, paragraph 2, the legislator also prescribes another form of this crime, but as an separate offense, under Article 297 CC. This article prescribes qualified forms of several criminal offenses against public traffic safety. A sentence of one to eight years of imprisonment is prescribed if, as a result of the act referred to in Article 289, paragraph 1 or 2, a serious bodily injury of a person or large-scale property damage occurs. This is a offense qualified by a more severe consequence, which means that in relation to a serious injury or large-scale damage, there should be negligence on the part of the perpetrator.[8]

Therefore, the determination of guilt is not the same as in the Article 289, because in that case guilt is not determined in relation to the objective condition of incrimination. Here, however, it is necessary for the court to determine how the perpetrator acted with intent in relation to the basic form (ie intentionally caused danger) and due to his negligence there was a serious bodily injury or property damage of great proportions.

The most severe form of the offense is present when due to the act from Article 289 para. 1 and 2 the death of one or more persons occured. Sentence of two to twelve years of imprisonment is envisaged.

Article 297 prescribes more severe forms of offense from Article 289, paragraph 3. If there was a serious bodily injury or large-scale property damage due to negligent endangerment of public traffic, a prison sentence of up to four years is envisaged. Here, it is necessary for the perpetrator to act out of negligence, both in relation to the basic action (causing danger) and in relation to the severe consequence. More severe form, for which a sentence of one to eight years in prison is prescribed, exists if the consequence of the negligient actus reus is reflected in the death of one or more persons.

[8] Rešenje Okružnog suda u Beogradu Kž. 2897/06, od 17. novembra 2006. godine.

For all forms, the mandatory imposition of a safety measure – prohibition of the driving of a motor vehicle is prescribed by Article 297, paragraph 5.

3. Conclusion

The criminal offense of endangering public traffic is frequently committed and domestic court practice has been relatively well developed. However, certain legal solutions are controversial, especially with regard to the distinction between misdemeanors and criminal offenses. We believe that the legal description of this crime should be changed by recomposing the basic form of the offense. In our opinion, the occurrence of a light bodily injury, which is an objective condition for incrimination of the basic form is not a sufficient reason to criminalize behavior that dominantely has the characteristics of a misdemeanor.

Practical problems, such as the possible insurance frauds, and also the fact that unnecessary burden is posed on the criminal judiciary, are not negligible. Practice shows that in these cases the institute of postponement of criminal prosecution is often resorted to (Article 283 of the Criminal Procedure Code, 2011; hereinafter: CPC; see: Banović, 2020), which leads to ilegitimate solutions. For example, if the public prosecutor orders the perpetrator who confesses the commitment of a criminal offense to "pay a certain amount of money used for humanitarian or other public purposes to the account prescribed for the payment of public revenues" (Article 283, paragraph 1, item 2 of the CPC), and then "the suspect fulfills the obligation from paragraph 1 of this Article within the deadline, the public prosecutor will reject the criminal report and inform the injured party, and the provision of Article 51, paragraph 2 of the Code will not apply" (Article 283, paragraph 3 of the CPC).

Pursuant to the procedural prohibition *ne bis in idem*, in this case, misdemeanor proceedings cannot be conducted in connection with the same criminal event, which is indisputable in the case law of domestic misdemeanor courts (Mrvić-Petrović, 2014, p. 35). Consequently, the suspect will not be imposed a security measure of prohibiting driving a motor vehicle, nor will his crime be entered in the criminal record (misdemeanor or criminal), and he will not earn penalty points, so it can be concluded that postponing prosecution is more favorable than imposing a misdemeanor sanctions.

Therefore, the para-criminal sanction imposed by the public prosecutor by applying his "quasi-judicial powers" (Mrvić-Petrović, 2014, p. 35) is more favorable than the misdemeanor one. In this way, the practice has shown that

the illogicality of the legal solution is indirectly corrected, but with criminally politically unacceptable results. Legislative intervention would also make sense in terms of (reckless) violent driving, because the degree of social danger of its individual forms exceeds the abstract danger of the current basic form of crime under Article 289.

In addition to this, we believe that it is necessary to harmonize court practice regarding the issue of treating the perpetrator's alcoholism.

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UGROŽAVANJE JAVNOG SAOBRAĆAJA – KRIVIČNOPRAVNA REGULATIVA I PRAKTIČNE NEDOUMICE

REZIME: Saobraćajna krivična dela su, zbog svoje učestalosti i značaja, važan predmet teorijskog izučavanja. Kršenje saobraćajnih propisa se sankcioniše normama prekršajnog, privrednoprestupnog i krivičnog prava, što ovu oblast čini složenom, ali i dovodi do izvesnih teškoća u tumačenju i primeni prava. Autori podrobno analiziraju zakonski opis krivičnog dela ugrožavanja javnog saobraćaja i njegovih kvalifikovanih oblika inkriminsanih u zasebnom članu. Posebna pažnja je posvećena razmatranju značenja pojedinih elemenata bića krivičnog dela (posledice i objektivnog uslova inkriminacije). Autori ukazuju na izvesne neujednačenosti u sudskoj praksi i predlažu izmene pozitivnopravnih rešenja u cilju unapređenja krivičnopravne zaštite i uspostavljanja legitimnijeg i pragmatičnijeg razgraničenja između krivičnih i prekršajnih dela.

***Ključne reči**: ugrožavanje javnog saobraćaja, krivična dela i prekršaji, objektivni uslov inkriminacije.*

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