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PRESCRIPTION OF THE CRIMINAL OFFENSE IN THE LAW

ABSTRACT: The prescription of a criminal offense in the law is one of the constitutive elements of a criminal offense. In addition to being legally justified, this element represents a logical method of incriminating specific behavior as a criminal offense. It legally embodies the well-known Latin legal saying *nullum crimen, nulla poena sine lege*, which in translation means there is no crime or punishment without the law. The necessity of prescribing a criminal offense in the law is rooted in legal certainty, which is unattainable without prior knowledge and a clear distinction between permissible and prohibited (incriminated) behavior. Although it has a distant origin, the prescription of a criminal offense in law has often become a convenient tool for political manipulation, particularly through the criminalization of verbal delicts or other offenses against the people and the state. *Stricto sensu*, authoritarian regimes have applied this principle to secure the appearance of legitimacy and legality for their rule. Consequently, it is essential to examine the prescription of criminal offenses in the law from the perspective of our legislator.

Keywords: *prescription of the criminal act/offense, objective condition of incrimination, personal grounds for exclusion of criminality, social danger.*

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1.Introduction

The criminalization of different types of behavior can be found across old legal monuments. They clearly prescribed behavior that was prohibited and severe punishments for the perpetrators. Although the absence of modern criminal law institutes is noticeable, this did not hinder the legislators of the time to clearly determine the limits of illegal forms of behavior. Hence, even in the first legal monuments, the prescription of a criminal offense in law was established as a formal condition for the existence of a criminal offense. In other words, in order to declare certain behavior that injures or endangers individual and social interests as a criminal offense, it is necessary that such is prescribed in the law. In this way, it contributes to the legal certainty and security of every person, because the catalog of criminal acts is determined in advance.

In our criminal legislation, prescription in law is considered a formal element of a criminal offense. First of all, it is necessary to determine whether a certain behavior is criminalized by law as a criminal offense. If this is not the case, then we cannot go on to determine the other elements of its essence. In addition, prescription in law contains a material element denoting societal danger. That is why it is necessary that the criminal offense belongs to the scope of socially dangerous behavior. However, in current criminal law, social danger has lost its status as an independent element of a criminal offense. In fact, it is reduced to the material component of prescription.

The prescription of the criminal offense in law has, as its starting point, the criminal law norm that consists of two elements: disposition and sanction. Disposition describes behavior that is contrary to positive law. In the case of a particular criminal act, disposition specifically specifies the zone of the incriminating behavior by which the offense is realized. Therefore, it cannot exist outside the established incriminating zone contained in the provision. In criminal doctrine, there are different ways of dividing dispositions. Here we can distinguish the division of dispositions into simple and complex. In addition, dispositions are distinguished according to how a particular legal command is formulated (as an order, prohibition, or authorization). All three forms of this disposition formulation are present in criminal legislation.

2. The term and elements of a criminal offense

The essence of every criminal act is a set of basic elements without which it could not exist. The relationship between special elements and general elements are materialized through the relationship of the special to the general.

Special elements specify the action or consequence of criminal acts, thereby distinguishing them. In the theory of criminal law, there are disagreements in determining the type of elements that make up the essence of a criminal offense. According to some, objective elements enter into its composition, while according to others, it is necessary to introduce subjective elements that are related to the personality of the perpetrator. Therefore, the characteristics of the criminal offense can be divided into: objective and subjective.

a) The objective characteristics of a criminal offense include the following elements: action, consequence, object of the action, means, method of execution, personal property, personal relationship and personal status of the perpetrator, place and time of execution of the criminal offense. On the basis of the aforementioned elements, one criminal offense is distinguished from another. In the legal description of certain criminal acts, it is required to undertake a specific action (for example, giving a false statement) or the occurrence of a certain consequence (for example, the death of the victim in the crime of murder). In the case of some criminal acts, it is necessary to use specific means or a specific method of perpetration (serious theft through burglary). The personal characteristics, personal relationship and personal status of the perpetrator can be features of the essence of a criminal act (mother in the case of child murder during childbirth, etc.).

The place and time of perpetration are important in the case of criminal acts that contain these characteristics in their essence. The criminal offense of violation of state border security (Article 408 of the CC) can be committed at a specific place or territory (state border). The time of perpetration is a characteristic of the criminal act of war crime against the civilian population (Article 372 of the CC). It can be carried out during war, armed conflict or occupation.[1]

[1] In this sense, Krivokapić states that the essence of the influence of the environment on the commission of criminal acts is contained in the following: 1) the physical environment can have a preventive effect on criminals, by reducing their possibility of committing a criminal act by setting up certain barriers that will make it difficult for the perpetrator to achieve his/her goals; 2) the physical environment can prevent the offender by depriving him/her of the possibility of safe escape via safe routes; 3) the physical environment can increase the probability that the offender will be observed while committing a criminal act or escaping; 4) the physical environment can improve the social character of the environment by having a stimulating effect on social interaction and association of citizens in a certain area, with the aim of more effective crime control (Krivokapić, 2002, p. 62).

b) Subjective characteristics of a criminal offense contain specific intentions or motivations for which the specific criminal offense was committed. So, the elements are the ones that drive the perpetrator to commit a crime. They differ in each individual criminal case. That is why it is not possible to find two criminal acts that were committed with the same (specific) intentions or motivations. Thus, for example, the criminal offense of theft (Article 203 of the CC) requires the existence of a specific (acquiring goods) intention on the part of the perpetrator. This criminal offense consists in confiscating someone else's movable property with the *intention* of obtaining an illegal property benefit by appropriating it to oneself or another.[2]

Additional features of the criminal offense constitute its special forms. We can divide them into qualifying and privileging. Qualifying features of the criminal offense are supplementary in nature. They determine the more serious forms of the basic criminal offense that make up its qualified forms. Privileging features of a criminal offense determine its lighter forms on the basis of which we get privileged criminal offenses. Thus, for example, the criminal offense of Theft (Article 203 of the CC) is given a qualified form, i.e. it becomes Aggravated theft (Article 204 CC) if, among other things, it was committed by a group (paragraph 2). There is a strikingly lower number of privileged crimes. Thus, for example, the criminal offense of theft, embezzlement and fraud, if the value of the stolen or embezzled item does not exceed the amount of five thousand dinars, and the perpetrator went after it to obtain a small property benefit, i.e. cause a small damage, constitutes their privileged form (Article 210. CC).[3]

[2] The same intent is required for the criminal offense of Fraud (Article 208 of the CC). For example: *When the defendant receives goods from the damaged company on the basis of a total of 29 delivery notes-invoices for resale, and does not pay for the goods, or pays a negligible amount, i.e. when it does not record all delivery notes-invoices in its business books, and when a significant difference between the accounting balance and the actual balance of the stock in the defendant's store is present, then it can be determined beyond doubt that the defendant had fraudulent intent, i.e. direct intention to commit the criminal offense of fraud* (Judgment of the Basic Court in Sombor No. K.1362/12 dated 07.03 .2013 and the judgment of the Court of Appeal in Novi Sad No. 1-2212 of 21.06.2013).

[3] In the case of privileged murder of this type, the criminal legislation of Croatia, North Macedonia, Germany, Italy, etc., provide almost the same special maximum prison sentence of five years in prison, with the exception of Switzerland, where a fine or a prison sentence of up to three years is prescribed for this crime. In the criminal legislation of Italy, a prison sentence of up to twelve years is prescribed. The special minimum prescribed sentence for this privileged case of murder is most often set at six months in prison, except in Poland where the minimum is three months, i.e. Romania where the prescribed minimum is one year (Jovašević, 2020, p. 111).

In the context of discussing the prescription of a criminal offense in criminal law, we must point out the conditions of punishment. Hence, we must distinguish between the objective condition of incrimination and the personal grounds for exclusion of criminality.

3. Objective condition of incrimination

The objective condition of incrimination, as a legal feature, is outside the nature of the criminal act. However, without the objective condition of incrimination, a criminal offense cannot exist. This feature influenced the prescription of a certain criminal offense and is therefore considered the reason for its existence. A human behavior, which was previously considered a criminal offense without any conditions, can now be so only if the objective condition of incrimination determined by law is met (Atanacković, 1995, p. 55). Hence, a criminal offense can exist only when there are these special circumstances that are outside the subjective relationship between the perpetrator and the criminal offense. However, the objective condition of incrimination does not have to be covered by the guilt of the perpetrator of the criminal act.

"Given that the objective condition of incrimination, as an element of the legal entity of a criminal offense, is not part of the illegal act of the criminal offense, nor is it a consequence of the criminal act in the sense of criminal law, it does not have to be included in the consciousness of the perpetrator" (Đurić, 2011, p. 241). Here, the existence of a criminal offense requires the fulfillment of additional features, which in a specific case represent the objective condition of its incrimination. In this way, the incrimination zone for certain criminal acts is narrowed. However, there are several forms of the objective condition of incrimination, namely: the action of a third party that followed under the influence of the perpetrator of the criminal act, as a legal presumption for the existence of a criminal act, and as a condition that fulfills some kind of additional consequence (Mrvić Petrović, 2009, p. 95).

1) The first situation contains the action of a third party initiated by the perpetrator of the criminal act. It is, for example, the criminal offense of Inducing suicide and aiding in suicide (Article 119 of the CC). The action of the perpetrator of this criminal offense consists in inciting or helping another to take their own life. Here, the objective

condition of incrimination is considered fulfilled when suicide was committed or attempted.[4]

2) The second situation includes the presence of a legal presumption for the existence of a criminal offense. We find it, for example, in the criminal offense of Failure to report the criminal offense and the offender (Article 332 of the CC). The legal obligation to report the perpetrator or criminal offense applies only to offenses punishable by thirty to forty years in prison. Here, the threatened punishment is an objective condition of incrimination, which means that it does not have to be covered by the intention of the perpetrator. However, the perpetrator must be aware of not reporting the serious crime and its perpetrator.
3) The third situation contains a condition that fulfills some kind of additional consequence that constitutes an objective condition of incrimination. In literature, there is an example of the criminal offense of Brawling (Article 123 of the Criminal Code), where a participant in a fight in which someone is killed or is seriously injured is held responsible. This is not about the consequence of the criminal act, but the objective condition of incrimination, which is manifested in an additional condition that must be fulfilled for this criminal act to exist. Therefore, death or grievous bodily harm are beyond the intent of the perpetrator of the criminal act, because otherwise it would be murder or grievous bodily harm (Lazarević, 2011, p. 491). It is important to emphasize that in relation to these circumstances, there must be no fault of the perpetrator (participant in the fight), i.e. his intention or negligence. This criminal offense exists regardless of whether it is known which of the participants in the fight took someone's life or caused serious bodily injury. In that case, the one who caused someone's death or injury is responsible for murder or grievous bodily harm, and all others are responsible for participating in the fight. Finally, in relation to grievous bodily harm, as an objective condition of incrimination, the legislator does not specify anything about the type of grievous bodily harm, so it can be grievous bodily harm in any form (Đelić, 2020, pp. 260–261).

[4] "As Roxin illustrates, a surviving victim of an attempted killing per request would have to be punished for incitement, because they induced another (perpetrator) to commit an unlawful act provided by law. It is indisputable, however, that the instigator cannot attack their own property" (Marković, 2023, p. 487).

In criminal theory, the objective conditions of incrimination can be divided into: true and untrue. The true objective conditions of incrimination determine the incrimination zone. Untrue objective conditions of incrimination are the hidden characteristics of the criminal act itself. In this way, the principle of subjective responsibility in criminal law is violated (Stojanović, 2006, p. 127).

4. Personal grounds for exclusion of criminal liability

Personal grounds for the exclusion of criminal liability are additional conditions that exclude the punishment of a specific person. At the same time, personal grounds for the exclusion of criminality is not a legal feature of a criminal offense. Our legislator has prescribed criminal acts, the perpetrators of which will not be punished even though all the elements of the act have been fulfilled. These are persons with special characteristics due to which their punishment in criminal law is excluded. This practically means that, if this were the case, there is no criminal offense (Article 112, paragraph 29, CC). In the case of the criminal offense of Accessory after the fact (Article 333 of the Criminal Code), it is prescribed that a person to whom the perpetrator is a consort, a person with whom the perpetrator lives in a permanent extramarital union – common law spouse, lineal blood relative, brother or sister, adopter or adoptee, as well as the spouse of one of the aforementioned persons, i.e. a person who cohabits with any of the former will not be punished (paragraph 5). In the case of the mentioned criminal act, the perpetrator does not have to know that he is the brother, sister, adoptee, or spouse of the person whose criminal act he/she did not report. However, we have exceptions with the application of personal grounds of exclusion of criminality in the preparation of a criminal offense for which a prison sentence of forty years can be imposed. Although personal grounds for the exclusion of criminality are beyond the features of the criminal offense, they are included in its legal description.

5. Social danger as a material component of prescription of the criminal offense in law

Social danger represents an important segment of the prescription of the criminal offense in law. It precedes the existence of a criminal offense because a behaviour must first be socially dangerous in order to be incriminated by the norms of criminal law. If we start from the fact that the social role of criminal law is reflected in the protection of society from crime, then socially dangerous behaviors must be at the top of the punishment scale. Atanacković

considers social danger to be the only measurable legal feature of a criminal offense that can be graded. Hence, it can be smaller or larger, which affects the smaller or larger social danger of criminal acts (Atanacković, 1969, p. 207).

Social danger is the legislative motive for criminalizing certain behavior as a criminal offense. Therefore, the issue of determining the danger of certain behavior is a very complex issue that every legislator faces (Stojanović, 2012, p. 78). However, social danger has its spatial and temporal dimensions. What is considered punishable in a certain space and at a certain time may not necessarily be punishable in another place and in some past or future time. An obvious example, which supports what has been said, can be found in the once punishable group of criminal offenses against self-government. It was decriminalized when self-governing ceased to be a model for organizing the economy and society. Hence, this group does not exist in any criminal legislation of the republics of the former Yugoslavia. As a reminder, in the criminal legislation of the SFRY, social danger was a legal feature of a criminal offense. According to the provisions of Article 8 of the Criminal Code of the SFRY, i.e. the Criminal Code of the FRY, a criminal offense is a socially dangerous offense that is defined by law as a criminal offense and whose features are determined by law. The concept of a criminal offense determined in this way was based on its material and formal conception. Social danger was an element that had to be contained in every specific criminal act. "Since individual characteristics of a criminal offense can be determined by law more or less generally, there is a possibility that a specific behavior of a person, even though the legal characteristics of a certain criminal offense have been realized through that behavior, does not contain the level of social danger that the legislator determined as the necessary minimum, establishing a certain behavior as a criminal offense and determining the punishment for the perpetrator of that offense" (Bačić et al., 1978, pp. 36–37).

In our criminal legislation, social danger is reduced to the material side of prescribing the criminal offense in law. This does not call into question the importance of social danger because the criminal offense must be socially dangerous. In addition, social danger is important when determining the object or property that will be the object of criminal protection. By escalating the social danger, what is achieved is that a certain act of a person takes on a heavier or lighter form. In the case of criminal offenses against property, the manner and circumstances of their execution indicate greater or lesser social danger. In a word, social danger represents the content and essence of every criminal act, without which they could not exist (Babić & Marković, 2009, p. 182).

In criminal doctrine, social danger is differentiated as general and specific. General social danger refers to individual criminal acts (murder, environmental pollution, theft, etc.). These criminal acts harm both general (social) and individual (specific) interests. Hence, they contain different degrees of social danger. However, the criminal offense of Insult (Article 170 of the Criminal Code) harms general (social) interests incomparably less. That is why a significantly lighter punishment is provided for the perpetrator. Specific social danger refers to the danger that one type of criminal offense has in a specific case. Ordinary theft differs in its severity from aggravated theft, which was committed by breaking into closed spaces (Radovanović, 1966, pp. 109–110).

The *ratio legis* which is guided by the legislator when determining the relationship between the social danger and the prescription of the criminal act in law, does not always and necessarily have to have legal basis. History teaches us that in different circumstances there were political and ideological criteria that created legislative changes and adapted them to their own needs. Hence, it is necessary to separate the reasons that affect the content and limits of criminal protection in a country. There are criminal acts, classified into special groups, for which the upper classes in society show increased interest. These incriminating circumstances are in the function of protecting vital state interests, such as: the constitutional order and security of the country, against the army, against official duty, etc. In contrast, a significantly larger number of criminal acts are, conditionally speaking, beyond the reach of the ruling layers of society. They primarily infringe upon the individual interests and property of natural and legal persons, such as the group of criminal offenses against honor and reputation (Chapter XVII CC). This is supported by the complete decriminalization of the criminal offense of defamation in the amendments to the Criminal Code (Article 14 of the Law on Amendments to the CC).[5]

The degree of social danger directly affects the stricter or more lenient punishment given to potential perpetrators. Thus, for example, the perpetrator of the basic form of the criminal offense of Insult (Article 170, paragraph 1.) is punished with a fine of twenty to one hundred daily amounts or a fine of forty thousand to two hundred thousand dinars. On the other hand, the

[5] The chronology of attempts to abolish the criminal offense of Defamation, as well as Insult, dates back to the original text of the Criminal Code from 2005. This resulted in the decriminalization of these crimes, including the abolition of prison sentences even for their most serious forms. However, with the amendments to our Criminal Code from 2012, only the criminal offense of Defamation was abolished, which points to the conclusion that our legislator chose the middle ground resulting in medial solution (Ristivojević, 2014, p. 155).

perpetrator of the criminal offense of Compromising Independence (Article 305 of the CC) is punished with imprisonment from three to fifteen years. In the first case, the victim of a criminal act is an individual, that is, his honor and reputation, so he decides whether to initiate criminal proceedings against the perpetrator (Article 177 of the CC). In the second case, the commission of a criminal offense violates broader social interests that concern the entire society, and especially the ruling elite, who see it as a danger to themselves. In this sense, endangering the independence of the state can cause disruptions in the highest levels of government, which is made up of the ruling elite, which is why they try to protect themselves with criminal-legal means (Joksić, 2019, p. 144).

6. Conclusion

The prescription of the criminal offense in law provides the basis of legal security and certainty in the legal order of a country. Knowing what is prohibited and how such behavior is sanctioned is a prerequisite for a successful fight against crime. Based on this, the implementation of general and special prevention is ensured, without which criminal law could not fully fulfill its social role. With the adoption of the new Criminal Code in 2005 (entered into force on January 1, 2006), there were changes in terms of the conceptual definition of a criminal offense, which, in addition to the objective elements, introduces a subjective element of the criminal offense, which is guilt. In addition, these changes led to the abolition of social danger, as an independent element of the criminal offense and its classification within the scope of provisions in the law. Now social danger becomes a material component of the provision of the criminal act in the law. Such a subordinate position of social danger found itself the target of criticism from expert and professional scholars. As a result, prescription of the criminal offense in law gains particular importance because it represents an element of the criminal offense that contains several components. Hence, it is extremely important to familiarize oneself with all the specifics of the prescription of the criminal offense in the criminal legislation of our country.

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PREDVIĐENOST KRIVIČNOG DELA U ZAKONU

APSTRAKT: Predviđenost krivičnog dela u zakonu predstavlja jedan od konstituenata krivičnog dela. Osim što je zakonski opravdan ovaj elemenat je logičan način kojim se određeno ponašanje inkriminiše kao krivično delo. U njemu se zakonski opredmećuje poznata latinska pravna izreka *nullum crimen*, *nulla poena sine lege* što u prevodu znači nema krivičnog dela niti kazne bez zakona. Neophodnost predviđenosti krivičnog dela u zakona ima svoje uporište u pravnoj sigurnosti. Ona nije moguća ako se unapred ne zna i dovoljno razluči dozvoljeno od zabranjenog (inkriminisanog) postupanja. Iako ima daleku genezu, predviđenost krivičnog dela u zakonu često je postala podesno sredstvo političke manipulacije. To se dešavalo kroz inkriminisanje verbalnog delikta ili drugih krivičnih dela protiv naroda i države. *Stricto sencu autoritarni poreci* su primenom ovog načela sebi obezbeđivali navodnu legitimnost i legalnost vlasti. Usled toga, smatramo neophodnim da predviđenost u zakonu prikažemo iz ugla našeg zakonodavca.

Ključne reči: *predviđenost krivičnog dela, objektivni uslov inkriminacije, lični osnovi isključenja kažnjivosti, društvena opasnost.*

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