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AN OFFENCE OF MINOR SIGNIFICANCE IN SERBIAN CRIMINAL LAW AND MACEDONIAN CRIMINAL LAW

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Abstract:
Under the Criminal Code of the Republic of Serbia, an offense of minor significance is not to be considered a criminal offence if the degree of culpability is not high, if the harmful consequences are absent or insignificant, and if the general purpose of criminal sanctions does not require imposing a criminal sanction. It may also be applied to criminal offenses which are punishable by a term of imprisonment of up to three years or a fine. These are the general conditions which have to be met to establish the existence of this offence. Such an offence does not constitute a criminal offense, either in the Serbian criminal law or in the Macedonian criminal law. In this paper, the authors analyze this criminal law institute in Serbian and Macedonian law, with specific reference to the judicial practice in the Republic of Serbia. One of the main aims of this paper is to examine how legal provisions are applied in judicial practice.

Keywords: *offense of minor significance, criminal law, judicial practice, legislation.*

Introduction

An offence of minor significance is one of the grounds for excluding the existence of a criminal offense in the sense of criminal law in most modern criminal legislation. It should be emphasized that the existence of an offence of minor importance excludes formal and substantive unlawfulness and, thus, the existence of a criminal act. In the former Yugoslav criminal legislation, there was a criminal law institute of "insignificant social danger" which was replaced by the institute of "an offense of minor significance" during the reform of the criminal legislation of the Republic of Serbia. It is a general objective condition for the exclusion of the existence of a criminal offense. Under the Serbian Criminal Code[1], a criminal offense shall not be considered a criminal offence if, despite having elements of a criminal offence under the law, it represents an offence of minor significance. Such a situation can be solved by applying the principle of opportunity of criminal prosecution. The existence of this legal ground requires the cumulative fulfillment of three conditions: 1) that the degree of guilt of the perpetrator is low; 2) that the harmful consequence of the criminal act is insignificant or reprehensible, which is a factual question and the fulfillment of this condition is determined by the court in each specific case; 3) if the general purpose of criminal sanctions does not require imposing a criminal sanction. This institute can only be applied to criminal offenses which are punishable by a term of imprisonment of up to three years or a fine (Jovašević, 2006, pp. 79-80). These offences refer to petty crimes. The need for such an institute in criminal law stems from the fact that the legislator cannot always establish (based on the essential elements of a crime) whether inconsequential behaviours injure

[1] The Criminal Code of the Republic of Serbia, *Official Gazette of the RS,* no. 85/05, 88/2005, 107/2005, 72/2009, 111/2009, 121/12, 104/13, 108/14, 94/16, 35/19 and 94/24 (hereinafter: the Criminal Code RS).

or endanger the protected object to the extent that justifies the criminal law reaction (Stojanović, 2024, p.114). In the paper, the authors analyze this criminal law institute in Serbian and Macedonian law, with specific reference to judicial practice in the Republic of Serbia. One of the main goals of this paper is to examine the application of this institute in to judicial practice.

1. An Offence of Minor Significance in the Serbian Criminal Code and the Macedonian Criminal Code

Chapter 3 of the Criminal Code of the Republic of Serbia envisages the general provisions on the criminal offense and guilt as the fundamental principle in criminal law. Establishing guilt for the committed crime is the principal goal in most legislations, including Serbian criminal law. However, in some legislations, the basic goal is punishment, for which reason this branch of law is designated as penal law.

A criminal act is a committed by a human being which is prohibited by the legal order under the threat of criminal sanctions, or human behavior that produces a harmful consequence for society, which reacts by applying criminal sanctions to the perpetrator (Jovašević, 2006, p.61). Under the Serbian law, a criminal offense is an offense that is prescribed by the law as a criminal offense, which is unlawful and committed with guilty mind (mens rea). Thus, there is no criminal offense without an unlawful act or culpability, notwithstanding the existence of all essential elements of a criminal offence stipulated by law (Article 14 of the CC).

It follows from the legal definition that a criminal offense consists of several different elements that are divided into general and special elements. The general (basic or essential) elements are contained in every criminal act; in case any one of them is absent, there is no criminal act at all. They are the essential elements of the crime (actus reus). The term criminal offense consists of four basic (essential) general elements. These are: the act is committed by a human or a consequence is caused by human action the act is unlawul (illegal): the act is prescribed by the law; and there is the guilt of the perpetrator.

Special elements are specific features of each individual criminal offense. These specific elements are the distinctive features that enable making a clear distinction among criminal acts that contain general elements (Jovašević, 2006, p.62). Special elements of a criminal offense occur only in some criminal offences and they are absent in other offences, so that each criminal offense has its own special elements that distinguish it from other criminal offences. Special criminal offences are envisaged in a separate part of the Criminal Code.

One of the general institutes expressly envisaged in the Serbian Criminal Code is an offence of minor significance or an insignificant act which exists if the degree of guilt is not high, if harmful consequences are absent or insignificant, and if the general purpose of criminal sanctions does not require imposing a criminal sanction. The provisions related to the offense of minor importance can be applied to criminal offenses which are punishable by a term of imprisonment of up to three years or a fine. The legislator expressly states that an offence shall not be considered a criminal offence, if despite having elements of a criminal offence, it represents an offence of minor significance (Article 18 of the CC).

In the criminal law theory, an act of minor significance is considered to be the first objective ground for excluding the existence of a criminal offence. These are crimes whose quality is such that they are insignificant for the criminal justice system. (Jovašević, 2006, p.88). Prior to the adoption of the Serbian Criminal Code, in the earlier Yugoslav criminal legislation, this institute was designated as "insignificant social danger". Although the Serbian Criminal Code classifies it as a ground that excludes the presence of a criminal offense, in some foreign criminal legislation (such as the Austrian Criminal Code) it is considered as a ground that excludes the criminal punishment for the perpetrator.

An offence of minor significance exists if the act does not consritute an attack on some good (asset), value or interest that has a greater importance for society. In this regard, the implementation of this institute requires cumulative fulfillment of the following conditions: a) it is a criminal offense which is punishable by a term of imprisonment of up to five years or a fine; b) the degree of guilt is not high, the harmful consequences of the act are absent or insignificant; and c) the general purpose of criminal sanctions does not require imposing a criminal sanction.

In the Republic of North Macedonia, the Criminal Code of the North Macedonia[2] provides an identical definition of this institute. Under Article 8 of the CC RNM, an act of minor significance is not a crime, even though it contains characteristics of a crime, if there is a lack of harmful consequences or there are insignificant harmful consequences and a low degree of criminal responsibility. The condition for establishing an offense of minor significance is that the committed act is punsihable by a term of imprisonment of up to three years or a fine.

The difference in the definition of this institute in these two criminal codes is reflected in the linguistic legal construction of the definition of an act of minor significance. In the Serbian criminal legislation, the degree of the perpetrator's culpability is defined as "a degree of guilt that is not high". In the Macedonian criminal legislation, it is defined as a "low degree of criminal responsibility".

In the former Serbian criminal legislation, the general institute of crimes of minor importance included the provision that "the degree of guilt of the perpetrator is low"; now, it is formulated as "the degree of guilt is not high". This different linguistic construction indicates that the legislator saw a problem in the application of this institute, especially in case of crimes that cannot be committed negligently, such as the crime of theft and other crimes against property. In previous legislation, the direct intent could not be applied in terms of establishing the highest degree of guilt. The question that arises is how practice will interpret the condition that the degree of guilt is not high, and whether this will mean that possible intention is not a high degree of guilt, bearing in mind that negligence is certainly not (Stojanović, 2021, p.111).

A significant change that was introduced in the Serbian criminal legislation concerns the the limit of the threatened punishment to which it can be applied. Namely, the 2009 Act amending and supplementing the Criminal Code[3] envisaged that the provisions on the offenses of minor significance, which were until then applicable to criminal offenses punishable by a term of imprisonment of up to three years, were to be replaced by the provision on the term of imprisonment of up to five years or a fine (as an alternative penalty). In the subsequent legislative change, the 2016 Act amending the Criminal Code reinstated the previous legal solution, prescribing that this institute was to be applied only to offenses which are punishable by a term of imprisonment of up to three years or a fine.

An offence of minor importance is one of the grounds for excluding the existence of a criminal offense. Its application enables resolving the problem of petty, inconsequential crimes through a substantive legal provision. Its purpose is essentially reflected in the waiver of criminal prosecution for trivial, negligible and petty crimes.

The need for such an institute can be justified by the fact that the legislator cannot always make a selection at the level of the essence of the criminal act in relation to trivial behaviors, i.e. behaviors that do not injure or endanger the protected object to the extent that justifies a criminal law reaction. It is important to emphasize that the institute of an offence of minor importance entails some danger of weakening the principles of legality and penetration of arbitrariness because the court is allowed to prevail on the material criterion even when all the elements of the criminal offense have been fulfilled. However, the danger is not so extensive as in the case of its predecessor - institute of insignificant social danger. Before the 2009 amendments to the Serbian Criminal Code, this danger was limited only to minor crimes. The fact that the application of the institute of offences of minor significance was explicitly limited to acts which are punishable by a term of imprisonment of up to three years or a fine is limiting the prescribed meant that these acts were assessed by the legislator as minor crimes; thus, from a criminal law point of view, they could be considered as trivial, negligible and inconsequential behavior even though they fulfilled all the essential characteristics of criminal acts. However, extending the application of this institute to criminal offenses punishable by a term of imprisonment of up to five years raised a dilemma concerning the real goal and justification of this institute (Stojanović, 2021, p.111,112).

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[2] The Criminal Code of the Republic of North Macedonia, *Official Gazette of the Republic of Macedonia*", No. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17, 248/18 and *Official Gazette of the Republic of North Macedonia*, no. 36/23 and 188/23 (hereinafter: the Criminal Code RNM))

[3] The Act amending and supplementing the Criminal Code, *Official Gazette of the RS* no. 72/09.

The aim of the institute of the offence of minor significance should be to exclude the application of criminal law in cases where all the essential features of a criminal offense have been established but the offence is to insignificant offense that the application of criminal sanctions is not justifiable. In this regard, the legislator's stance to reinstate the maximum term of imprisonment of up to three years as an alternative to a fine when applying this institution is justified. The narrowed scope of application of this institute, pertaining only to minor crimes, is justification for a much wider use of this institute in judicial practice than it has been done so far.

When applying the former institute of insignificant social danger, there was no dispute about the significance of the prescribed punishment and about the time limit for the application of this institute. Although the goal of this institute is to facilitate the selection of criminal prosecution in the sphere of the so-called petty crimes, the absence of a precise legal requirement related to the prescribed punishment made it possible to apply this institute to serious crimes as well. This is certainly not acceptable because the purpose of this institute was to rule out the existence of a criminal offense only in those cases where the legislator did not envisage it as a criminal offense if there were other options (Stojanović, 2021, p.113).

Setting a broad time limit for the application of the offences of minor significance, which allows for the possibility of their application to more serious criminal offenses, may call into question the full implementation of the principle of legality in criminal law. In this regard, this institutes should be applied only in relation to petty and insignificant criminal offences, for the purpose of ensuring the full and adequate application of the law, i.e. the principle of legality. It has been done in the criminal legislations of Serbia and North Macedonia, which have always shared a common legal tradition.

2. The Offence of Minor Significance in Judicial Practice

In this part of the paper, we will briefly present and analyze some cases from the judicial practice related to offences of minor significane. Given the fact that the authors have no opportunity to access the judicial practice in the Republic of North Macedonia, we will examine some cases from the judicial practice in the Republic of Serbia.

Case 1: Judgment of the Appellate Court in Kragujevac, Kž1 1731/2011

An act of minor significance is the criminal offence of evading military service, committed in the period between the amnesty of persons convicted of this crime and the Government's decision to introduce a professional army. Given that the act was committed at a time when the concept of military service was fundamentally changed in a more liberal sense, this type of crime has minor social significance, which certainly contributes to the low degree of offender's guilt.

"*By the judgment of the High Court in Kragujevac, the defendant (Z.S.) was found guilty of having committed the crime of evading military service under Article 394 § 1 of the Criminal Code, and imposed a suspended sentence with a fixed prison sentence of 5 months and a probationary period of 1 year. Based on the assessment of the Court of Appeal, an appeal motion to reverse the conviction into an acquittal is well-founded because the Court of Appeal has established that the harmful conviction constitues a violation of criminal law (Article 369, point 1 of the Criminal Code in connection with Article 18 of the Criminal Code) because the offense for which the defendant was found guilty is not a criminal offense for the following reasons:*

Namely, the first-instance court correctly established the factual situation, by means of the defendant's full confession. All the presented evidence show that the defendant, on the critical occasion, did not respond without justifiable reason to the call of the Ministry of Defense to perform the military service duty in the civil service, refusing on the specified day to receive the decision and the call to military service. In view of the indisputably established factual situation and in line with the proper application of the law, the defendant should have been issued a different conviction because, a few months before and a few months after the mentioned act of the defendant's evasion of military duty, the state authorities passed regulations on amnesty and then on the professionalization of the army, which are of decisive importance for the conclusion that the prosecuted act is not a criminal act because it is an act of minor importance.

In that regard, the Amnesty Act (published on 26 March 2010 in the "Official Gazette of the RS", which entered into force on the eighth day after publication) amnestied all persons who committed the criminal offense of evading military service envisaged in Article 394 of the CC in the period from 18 April 2006 until the entry into force of that Act at the beginning of April 2010, which is a period of almost four years. The defendant committed the aforesaid act of evading military service five months after the amnesty. Four months after the commission of this act, the army was professionalized by the Decision of the Government of the Republic of Serbia, which was effective as of 1 January 2011. Therefore, the defendant's act of evading military service, which was performed in the meantime, in relation to the aforesaid decisions of the state authorities, contains features of the said criminal act; however, based on the assessment of the Court of Appeal, the act was performed in the short interval from the amnesty to the professionalization of the army; considering the regulations adopted by state authorities, there are insignificant harmful consequences, the degree of defendant's guilt is low and the general purpose of criminal sanctions does not require imposing a criminal sanction. Therefore, under Article 18 of the CC, the defendant's act does not constitute a criminal offence. For the aforesaid stated reasons, and due to adopted regulations, it is an offence of minorimportance."

The appellate court stance is an example that the provisions of certain laws (in this case the Amnesty Act) can be of importance for the implementation of the institute of minor offences.

Case 2: Judgment of the High Court in Čačak, Kž 31/2018

The possibility of applying the institute of offenses of minor significance is excluded in case of a prolonged criminal offense endangering safety, given the high degree of offender's guilt.

"In the judgment of the first-instance court, the defendant was found guilty of committing a prolonged criminal offense of endangering safety envisaged in Article 138 § 1 in connection with Article 61 of the Criminal Code RS.

The defendant's claim that the committed act is an offence of minor significance envisaged in Article 18 of the CC is unfounded, bearing in mind that the threats addressed to the injured party were aimed at endangering his life and the life of his family; thus, they certainly represent serious threats aimed at generating in the injured party a feeling of greater uneasiness and fear, as well as a feeling of being threatened, especially considering that the threats were made in a period of less than two months, including a total of 22 phone calls, for which reason the act was qualified as a prolonged criminal offense. Moreover. the defendant admitted that he had sent threats to the injured party in the earlier period, for which reason prior proceedings were instituted but the principle of opportunity was applied. Therefore, in such a situation, the degree of guilt is high, and there is no place to apply the institute mentioned in the complaint." Thus, whenever there is a high degree of guilt, the conditions for applying the institute of an offence of minor importance are not met. Otherwise, the institute would turn into its own negation.

Case 3: Judgment of the High Court in Čačak, Kž 81/2022

In a family case on visitation rights, a parent violated the court decision by keeping a minor longer than it was ordered in the court decision. The higer court considers that the conditions for this act to be treated as a minor offence under criminal law have not been met becuse the defendant breached the final judgment of the first-instance court and because the act of withholding the child frustrated the protection of the rights and the best interest of the minor child, as the governing standard applied in the final judgment of the first-instance court.

"*Article 191 § 3 of the CC prescribes that whoever prevents the execution of the decision of the competent authority which regulates the manner of maintaining personal relations between a minor and a parent or another relative, will be punished... Accordingly, the perpetrator of a criminal offense can be any person, including a parent (in this case the father/defendant), whereby it is important that the person prevents the execution of the court decision that regulates the manner of maintaining personal relations between a minor and parents (the defendant in this case). Therefore, in that part, the allegations in the defendant's complaints are unfounded.*

In the opinion of the second-instance court, the provisions of Article18 of the CC may not be applied in this case because it is not an offence of minor importance, for the following reasons:

The first-instance court assessed in detail all the circumstances of the specific case, primarily the fact that minor children are under the special protection of the social community which provides them with protection whenever it is required by the children's best interests, and that parents exercise their rights and duties of child care, upbringing and education in accordance with the needs and interests of the children. It further means that they must respect the legally binding court judgments on the contact model with their common minor child. Thus, when the defendant kept the minor longer than allowed in the court decision, he committed an illegal and tortuous act which precluded the execution of the court decision."

Bearing in mind that children enjoy special protection in criminal law, the criminal act of withholding a minor child in violation of a court decision cannot be regarded as an offence of minor significance, as correctly concluded in the final judgment of the High Court in Čačak.

Case 4: Judgment of the High Court in Čačak, Kž 90/2020

Insignificant harmful consequences of the criminal offense of insult and the low degree of guilt exclude the offender's liability by applying the institute of an offense of minor importance.

"The second-instance court judgment reverses the first-instance court judgment where the defendant was found guilty of the criminal offense of insult under Article 170 § 1 of the CC. Thus, the defendant is acquitted of the charge of having committed the said criminal act.... by applying Article 18 of the CC.

It follows from the case file that the parties were involved in numerous criminal and civil proceedings, that there were mutual conflicts and intolerance, and that they were both subject to mutual restraining orders. Thus, on the critical day, the defendant uttered the mentioned insults while the private prosecutor was closing the lid on the well.

Under Article 18 of the CC, which refers to the institute of offences of minor significance, the offense that contains the elements of a criminal offense is not a criminal offense but is a minor offense if the degree of guilt is not high, if harmful consequences are absent or insignificant, and if the general purpose of criminal sanctions does not require imposing a criminal sanction.

Taking into account the established factual situation, the second-instance court has established that, even though both the subjective and objective elements of the criminal offense in question have been fulfilled, there is room for excluding the illegality of the defendant's action because in the specific case the degree of guilt is not high and the harmful consequences are insignificant, as it has been decided in the sentence".

Thus, in cases involving a criminal offense of insult, the conditions for the existence of an offense of minor significance may be met if there is a low degree of guilt and the absence of harmful consequences, especially if the insult is a consequence of the existence of mutual conflicts and intolerance between the parties. Thus, by applying the legal norms on the offence of minor significance, the court issued the decision on acquittal.

Case 5: Judgment of the High Court in Užice, Kž 159/2017

In this case involving the parental obligation to pay maintenance for a minor child, the defendant's payment was tardy. However, despite the delay, the defendant settled the obligation to pay maintenance even before the criminal complaint was filed by the attorney of the minor child, and continued to pay them regularly. Due to these facts, there are insignificant or no harmful consequences caused by the delayed payment in a short period of time. As the general purpose of criminal sanctions does not require imposing a criminal sanction, it is an offence of minor importance.

"*It is a fact that the defendant paid maintenance for both months with a delay, even though the enforcement judgment imposed the obligation to pay no later than on the 15th day of the month for the current month. Thus, the defendant did not provide maintenance to the minor as a plaintiff in the manner and at the time determined by the enforcement judgment. However, the circumstances are that the defendant had paid the maintenance before the criminal proceedings were initiated and before the minor's attorney filed the criminal complaint; in addition, the defendant continued to pay his maintenance obligations. For these reasons, there are insignificant or no harmful consequences of the delay in a short period of time. Bearing in mind the threatened sentence and that the degree of guilt is low, and that it is certainly not high in the sense that the amendments to the CC are more favorable for*

the defendant when it is an offence of minor importance and that the general purpose of criminal sanctions does not require imposing a criminal sanction, the second-instance court finds that it is an offence of minor importance which is not a criminal offence as stipulated in Article 18 of the CC."

In this particular case, the settlement of the financial obligation before the criminal complaint was filed indicates a low degree of defendant's guilt. It further indicates that it is an offence of minor importance and that the defendant should be acquitted, as decided by the High Court.

Based on this brief presentation of court practice in the Republic of Serbia, it may be concluded that the institute of an offence of minor importance is applied and that is the legal ground for the non-existence of a criminal offense (due to the exclusion of illegality). This is in accordance not only with the criminal law theory but also with the criminal legislations of the Republic of Serbia. The relevant provisions of the Criminal Code of North Macedonian indicate that it is also in accordance with the Macedonian criminal legislation.

Conclusion

Although an offence may contain some elements of a criminal offence, there are situations where illegality may be ruled out; in such cases, the court may acquit the defendant and establish that there is no criminal act. One such situation is regulated by the institute of an offence of minor importance. According to the criminal legislation of the Republic of Serbia, an offense of minor importance exists if "the degree of guilt is not high", if harmful consequences are absent or insignificant, and if the general purpose of criminal sanctions does not require the imposition of a criminal sanction. The legislator expressly states that the provisions related to the offense of minor importance can be applied to criminal offenses which are punishable by a term of imprisonment of up to three years or a fine. By comparison, the legislation of the Republic of North Macedonia stipulates that the offence of minor importance exists if there is "a low degree of guilt". This slight difference in the linguistic constuction essentially does not affect the legal nature and application of this institute.

Finally, it should be noted that we encountered certain difficulties during the research for the purposes of this paper. The most significant limitation was the inaccessibility of relevant judgments of competent courts of the Republic of North Macedonia. For this reason, we had to resort to observing the institute of an offence of minor significance by applying the dogmatic legal method and presenting the relevant provisions of the Criminal Code of the Republic of North Macedonia. Nevertheless, we believe that this paper will contribute to the further study of offences of minor importance by exploring criminal law theory and judicial practice.

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