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## THE EVOLUTION OF THE SERBIAN CRIMINAL LEGISLATION: FROM THE BEGINNING OF THE TRANSITION UNTIL THE NEW CRIMINAL CODE

**Abstract:** *The transition process that ensued following the changes of 2000 has intensified legislative activity in the field of criminal legislation. There are a number of reasons for such an intensification of activity. Following long-term isolation, the country has been greatly lagging behind in relation to other countries in transition, and in that sense, has been striving to become involved in European integration, fulfill commitments of international agreements, combat an ever stronger and more aggressive organized crime, all the more frequent tendencies of crime and other negative social phenomena. The criminal laws have been amended numerous times and a new Criminal Code has been enacted. In this paper, we will focus on the key novelties in the development of criminal legislation in the period of transition and the new Criminal Code.*

**Keywords:** *Criminal legislation, transition, Criminal Code, Serbia.*

### I. A short history of the criminal legislation

In the first segment of the paper we shall focus on the development of criminal law in Serbia from the beginning of the transition process up to the enactment of the new Criminal Code. The second segment is devoted to the new Serbian Criminal Code.

In order to fully grasp the nowadays situation regarding legislative competence in Serbia, a short historical overview is necessary.

Significant decentralization was carried out in the former Socialist Federative Republic of Yugoslavia (SFRJ) with the Constitution of 1974. This was

also reflected in the distribution of legislative competence in criminal law. Criminal law, which was previously solely in federal competence up to that time, was divided between the federal legislature, the republics, and the provinces. General criminal law and small segments of the Special Part remained under the jurisdiction of the federation<sup>1</sup>, while the rest was transferred to the republics and provinces.

After the collapse of SFRJ, the Federal Republic of Yugoslavia (SRJ) inherited this divided competence in criminal law. Its criminal law was also not codified into a single uniform legal act, but was instead composed of a number of elements: the Criminal Law Act of SRJ, which was actually the former Criminal Law Act of SFRJ, the criminal laws of the Member Republics and criminal acts regulated by secondary legislation.

General criminal legislation contained practically the entire criminal law of SRJ<sup>2</sup>. While regarding the Special Part, this Act only regulated crimes of importance to the State as a whole (e.g. crimes against the constitutional order, humanity and international law, etc.), while other crimes were regulated by the criminal laws of the Republic of Serbia and the Republic of Montenegro.<sup>3</sup> Additionally, other laws regulated a certain number of crimes.

This process of particularization continued under the State Union of Serbia and Montenegro. The Constitutional Charter of the State Union did not, under the common functions of the State, *mention legislative competence in the area of criminal law*. SRJ federal laws, which were not listed to be under the competence of the State Union, were implemented as laws in the Republics (Art. 64 of the Constitutional Charter). Consequently, the former federal Criminal Law Act of SRJ has become a segment of the internal law of the Member Republics. In accordance with this, the National Parliament of the Republic of Serbia changed the name of the former federal Criminal Law Act, from Criminal Law Act of SRJ to Basic Criminal Law.<sup>4</sup> Therefore, the criminal legislation in Serbia was composed of the *Basic Criminal Law Act* (that contained General Part and a segment of the Special Part), the *Criminal Law Act of the Republic of Serbia* (a small segment of the General part and the bulk of the Special part) and the

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<sup>1</sup> In Serbia the body of Criminal Law is divided on General and Special Part. General Part contains different general definitions like what a crime is, the system of sanctions, rules related to rehabilitation and limitations of actions, etc. The Special Part contains the elements and sanctions for specific crimes. But it has to be noted, the two parts co-exist, they cannot be used independently.

<sup>2</sup> Official Gazette of SRJ, No. 35/1992, along with later amendments: 16/1993; 31/1993; 37/1993; 24/1994; 61/2001

<sup>3</sup> By that time, real autonomy of the autonomous provinces had been revoked. Their criminal laws were no longer in effect and criminal-legal and other legislative was lost.

<sup>4</sup> *Službeni Glasnik Republike Srbije* (Official Journal of the Republic of Serbia) br.39/2003

*crimes regulated by separate acts without any distinct systematization.* This was also the case with Montenegro.

On May 21, 2006 as a result of the Referendum held in Montenegro, the State Union of Serbia and Montenegro ceased to exist and both Serbia and Montenegro become independent states.

On October 6, 2005 the new Criminal Code of the Republic of Serbia<sup>5</sup> was enacted and come into force on January 1, 2006. Today, the body of criminal legislation in Serbia is comprised of the Criminal Code from 2005, and crimes that are embedded in separate acts, regulating primarily some other fields of law. However, the number of these incriminations has now been reduced significantly; a lot of provisions that were previously contained in the separate laws are now incorporated into Criminal Code.

## **II. The evolution of criminal legislation in Serbia following the beginning of transition up to the enactment of the new Serbian Criminal Law Act**

### **1. Changes of essentially importance up to the enactment of the new Criminal Code**

Despite many amendments to criminal laws *only one* seems to have been of principal importance: the long-awaited elimination of the death penalty from the criminal law of Serbia on March 1, 2002.<sup>6</sup> By revoking a type of punishment, which is considered to be archaic and outdated in modern Europe, one of the most significant obstacles for bringing the Yugoslav criminal law closer to that of Europe's was removed. The elimination of the death penalty also carried great political consequences, as failure to do so would have prevented Yugoslavia from joining the Council of Europe. The abolition of the death penalty also served to fulfill international treaty obligations, namely to ratify The Second Optional Protocol to the International Covenant on Civil and Political Rights.<sup>7</sup>

From the standpoint of legal practice, the removal of the death penalty was not of a particular importance. According to the Criminal Law Act of the Republic of Serbia, death penalty could only be pronounced for two crimes: first-degree Murder and Aggravated Robbery and Theft.<sup>8</sup> The SRJ Constitution of 1992 prohibited the death penalty for crimes regulated by Federal Law (Art.

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<sup>5</sup> Official Gazette of the Republic of Serbia, No. 85/2005.

<sup>6</sup> *Službeni Glasnik Republike Srbije* (Official Journal of the Republic of Serbia) br.10/2002.

<sup>7</sup> Ratification Law of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, *Službeni list SRJ\_Međunarodni ugovori*, br.4/2001

<sup>8</sup> Art. 47 (2) and Art. 169 (2) Criminal Law Act of the Republic of Serbia

21(2)). For this reason, capital punishment, which was once the penalty for a great number of crimes<sup>9</sup>, was removed from the federal criminal law in 1993<sup>10</sup> and replaced by a twenty-year prison sentence. Interestingly enough, the lawmakers back then were more prone to listen to arguments from professionals who pointed to the significant shortcomings of long-term or life prison sentences; therefore they replaced the death penalty with a twenty-year prison sentence. This was an exception to the general maximum of fifteen years (therefore, there could be no sentence between fifteen and twenty years, e.g. seventeen years).

When the SRJ Criminal Law Act was enacted in 2001<sup>11</sup>, lawmakers no longer wished to take professional advice into consideration, but succumbed to pressure from the public, which demanded harsher sentences. Specifically, the twenty-year prison sentence was replaced with a forty-year sentence with the general maximum prison sentence remaining fifteen years (no sentence between fifteen and forty years was possible).

However, the Criminal Law Act of the Republic of Serbia *retained* the death penalty for qualified types of murder and robbery. On March 1, 2002, with the previously mentioned amendments, lawmakers also removed the death penalty for these crimes and replaced it with a forty-year prison sentence. Thereby, the lawmakers removed a truly absurd and unacceptable legal dilemma. As previously mentioned, the SRJ Constitution of 1992 prohibited the death penalty for crimes regulated by federal law. However, the Constitution of the Republic of Serbia, which was passed *before* the SRJ Constitution and with which it *was never brought into accord*, did not *regulate* any such prohibition. According to this, the death penalty could be pronounced for crimes regulated by the Criminal Law Act of the Republic of Serbia. This did not contradict the Constitution of the Republic of Serbia but did evidently contradict the Constitution of the SRJ. We should also mention that up until the democratic changes of 2000, there were conflicts between numerous key segments of the legal system. (One can even pose the question as to whether under such conditions one should even use the term “system”.)

In Montenegro, the death penalty was removed from the criminal law on June 26, 2002.<sup>12</sup> The death penalty for crimes of first-degree murder and aggravated forms of robbery and theft<sup>13</sup> was replaced with a forty-year prison sentence.

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<sup>9</sup> However in practice this punishment was no longer in use. It was in a state of factual abolishment.

<sup>10</sup> Official Gazette of SRJ, No. 37/1993

<sup>11</sup> Official Gazette of SRJ, No. 61/2001

<sup>12</sup> Official Gazette of the Republic of Montenegro, No. 30/2002

<sup>13</sup> Art. 30 and Art. 148 Criminal Law of the Republic of Montenegro

## 2. Other important changes

2.1. Among the amendments to the *Criminal Law Act of SRJ* in 2001, it is worth mentioning that the overall minimum prison sentence was raised from fifteen to thirty days. From a technical-legal standpoint, this was done in a rather poor manner, as regulations from the General Part regarding this issue were not harmonized with this change. Therefore, by applying the rules of mitigation of penalty, one could still pronounce a fifteen-day prison sentence, which is **less** than the overall minimum.

2.2. With the March 1, 2002 amendments to the *Criminal Law Act of the Republic of Serbia*, besides the removal of the death penalty, a number of other significant changes to the special Part were made. Numerous new crimes and a completely new chapter was added.<sup>14</sup> The *new* crimes were: Infringement upon Free Movement and Settlement, Internecine Violence, Transmission of Especially Contagious Diseases, Pharmaceutical Fraud, Failing to Prevent Disorder at Sporting Events or Other Public Gatherings, and Failing to Undertake Measures in Order to Prevent Sexual Abuse of Persons Deprived of Freedom.

The most significant change was the introduction of the completely *new Chapter 21A*, which regulates crimes concerning corruption. It included the following crimes: Corruption in Administrative Bodies, Corruption in the Judiciary, Corruption in the Public Health System, Corruption in the Educational System, Corruption of Privatization Procedure, Corruption of Public Purchase, Unrestricted Management of Public Funds, Abuse of the Function of Defendant or Holder of Power of Attorney, and Fixing the Results of Sports Competition.

This type of casuistry in our criminal legislation is unusual to say the least. Furthermore, there is an evident lack of systematization and harmonization, as in certain cases the newly regulated crimes overlap with the already existing ones. This issue also came across during the adoption of the new Criminal Code and this chapter, was therefore, erased.<sup>15</sup>

2.3. During the state of emergency following the assassination of the Prime Minister Zoran Đinđić, an intense campaign against crime (particularly organized crime) was initiated. On April 11, 2003 the National Parliament passed the Amendment to the *Criminal Law Act of SRJ* (which is a Republic law by this time) and the *Criminal Law Act of the Republic of Serbia*. The amendments served to strengthen the *punishment policy*. However, this was to be expected considering the circumstances under which they were passed.

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<sup>14</sup> These changes were added to the Criminal Law of the Republic of Montenegro on June 26, 2002, Official Gazette of the Republic of Montenegro, No. 30/2002

<sup>15</sup> Because of the overlapping of these crimes, with the erasing of this chapter, does not entail the decriminalization of certain types of behaviour.

a) The Criminal Law Act of SRJ was renamed to the *Basic Criminal Law Act* and certain changes were made.<sup>16</sup> Two legal institutes *which served to strengthen punishment policy and which were previously abolished in 1990*<sup>17</sup> since even then they were thought to be unsuitable and were not used by the courts, *were re-implemented* into the General Part of the criminal legislation. The practice of *confiscating property* was reinstated. It could be pronounced for persons who committed crimes that include elements of organized crime and who received a prison sentence of four years or more.<sup>18</sup> This new sanction *did not carry supplementary provisions*, which were necessary considering its severity and the consequences for families or persons supported by the convicted person. Furthermore, one could legitimately pose the question as to why confiscation was only being applied to this category of perpetrators and not to any others. The category of *‘the particularly aggravated case,’* which enabled severe penalties to be pronounced, was reinstated as well. These two particularly repressive institutes were left out from the new Criminal Code.

In addition to these “changes,” lower requirements for the classification of “repeating offenders” were introduced into the *General Part*, thereby harshening the punishment policy. In the special Part, harsher penalties were introduced for numerous offences. As an indication of a tougher crackdown on Drug Abuse, the *Unauthorized Production and Trafficking of Narcotics* was renamed to *Unauthorized Production, Possession and Trafficking in Narcotics*. A complete description of the offense is given as if a new offence was introduced, even though it was basically formulated in the same way as the previous, except for one new paragraph that criminalized drug possession. It is also worth mentioning that harsher penalties were introduced for these offenses. For example, with prison sentences ranging from one to ten years in the original form, the minimum sentence for the same crime was five years (Art. 245 (1)).

b) The *Criminal Law Act of Serbia* was further modified during the same session of the Parliament. In addition to *harsher* penalties relating to numerous crimes, a certain number of *new crimes* were introduced into the special Part, along with *a completely new chapter*, which finally enabled the eradication of

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<sup>16</sup> Official Gazette of the Republic of Serbia, No.39/2003

<sup>17</sup> Official Gazette of SFRJ, No. 38/1990

<sup>18</sup> Confiscation of property could be justified on the grounds of various manoeuvres of money laundering, whereby it is very difficult to prove the origin of property acquired through organized crime. However, in all likelihood, we are dealing with something else. International acts on organized crime have more than on one occasion mentioned the practice of confiscation, but in actuality referring to the taking away of instrumenta cleres and illegally acquired property and confiscation itself. This was perhaps misinterpreted by the lawmakers and perhaps serves to explain why there are no supplementary provisions on confiscation, since the taking away of objects and property-use is regulated by the Criminal Code.

certain new forms of crime by criminal-legal means. The *new crimes* were: Taking of human organs or body parts by force, Exploitation of minors for pornography, Trafficking in human beings, Destruction of or damaging specially protected natural resources, Damaging dikes, barriers or any other objects intended for preventing the emission of mining or industrial wastes, and Damaging or destruction of objects or devices intended for the protection of the environment.

Two already existing crimes were *redefined*. A new title, Vehicle Theft, and a new definition of this offense was given under Article 174. In addition to the basic *Taking of vehicles* for the purpose of driving, this provision now also criminalized vehicle theft and instituted a considerably harsher penalty of three to five years (instead of the previous one-year prison sentence). This new crime was not entered into the new Criminal Code.

A new description and title was also given for Article 183, now titled Unauthorized Use of Copyright or Other Related Rights. Criminalization has been extended to the distribution or renting of copyrighted work, which the perpetrator was aware, was copyrighted and by so doing gained illegal property benefit. Harsher prison sentences were also introduced: from one to five years instead of the previous maximum of one year.

A completely new Chapter *XVIA*, entitled *Crimes against the Security of Computer Data*, was added to the specific part with seven new crimes: Unauthorized Use of a Computer and Computer Network, Computer Sabotage, Creation and Spreading of Computer Viruses, Computer Fraud, Hindering the Processing of Data or Network Data Transfer, Unauthorized Access to a Restricted Computer or a Computer Network, and Preventing or Limiting Access to a Public Computer Network.

### **III. The New Criminal Code of the Republic of Serbia**

#### **1. Introduction**

Besides the change of criminal laws, already during the existence of SRJ, a new Criminal Code was in preparation. In February 2000, after years of work, the Draft Criminal Code of SRJ was completed. However, the FR Yugoslavia ceased to exist, and the new criminal code was subsequently never adopted.

Nevertheless, due to significant changes in society, the appearance of new forms of crimes, the hypertrophy of supplementary legislation and the fulfillment of obligations of international agreements,<sup>19</sup> as well as the need to replace

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<sup>19</sup> See: Z. Stojanović, *Osnovne koncepcije u predlogu krivičnog zakonika Srbije I krivičnom zakoniku Crne Gore* (Basic Conceptions in the Draft Criminal Code of Serbia and the Criminal Code of Montenegro), *Revija za kriminologiju i krivično pravo*, No. 1/2005, pp. 5.

the two existing criminal laws with one uniform criminal code, the work on codification continued, and on October 6, 2005, the new Criminal Code of the Republic of Serbia<sup>20</sup> was enacted that come into force on January 1, 2006.

## 2. The foundations of the new Criminal Code

The new Criminal Code aims first and foremost to protect individual rights, while from the sphere of universal rights, protects only those upon which the realization of individual property depends. Nevertheless, the Criminal Code is not consistent in this regard. The criminal-legal protection of certain rights endemic of socialist criminal law (military, state, etc.) has not changed much.

Serbia has in the past few years witnessed a growing tendency towards the strengthening and broadening the criminal-legal repression. The Criminal Code is not significantly more liberal in that sense.<sup>21</sup> The number of new crimes has surpassed the number of abolished ones. Despite the fact that the contemporary criminal law is all-encompassing and often has difficulties in functioning, there is an evident domination of the idea to protect more and more rights. One of the main reasons for this is the widely accepted (but incorrect) notion that only criminal-legal measures can protect rights of social importance.

Some new solutions aim to change the punishment policy. They are geared towards lessening the frequency of probations, which is the most common sanction, and increasing the number of fines. This clearly takes into consideration the fiscal interests of the state. The tendency now is to broaden the scope of application of fines, as opposed to probation, as well as to, in regulating punishment in the Special Part, take into account proportionality along the lines of strengthening retributivism reflected by a certain amount of neo-classical influence. Still, considering *regulated punishments*, it cannot be said that the new Criminal Code is any more repressive, but is certainly not more lenient than the previous legislation.<sup>22</sup>

One of the main features of the new Criminal Code is that it contains numerous solutions that have been proven as good. Therefore, there is continuity with the previous criminal law legislation.

## 3. Structure of the new Criminal Code

The classical division of criminal law into General Part (Chapters I-XII, Art. 1-112) and Special Part (Chapters XIII-XXXVI, Art. 113-432) has been maintained.

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<sup>20</sup> Official Gazette of the Republic of Serbia, No. 85/2005.

<sup>21</sup> This is in accordance with the continuous trend of expansion of contemporary criminal law.

<sup>22</sup> Z. Stojanović, *op.cit.*, pp. 10

#### 4. The most important novelties in the General and Special Part

The content of the General Part is by its very nature the more stable segment of criminal law. Generally speaking, the previous solutions have been maintained. Despite the lack of revolutionary changes, there are still a few important novelties.

4.1. The general concept of a crime is defined differently. This is a crime “*that is pursuant to the Law prescribed as a crime, that is illegal and perpetrated*” (Art. 14 of the new Criminal Code<sup>23</sup>). Such a definition more consistently implemented the *objective-subjective comprehension* of the concept of a crime. Previous solutions, pursuant to which objective elements of the concept of a crime (“Crime” – Art. 8 of the old Criminal Law) and subjective elements (“Criminal Responsibility” – Art. 11 of the old Criminal Law) were singled out and defined separately gave grounds for a crime to be understood from a purely objective standpoint, which although present in judicial practice, is not supported by theorists. The general definition lacked the element of *social threat* as an *independent* element. The possibility of exception of a crime because of significant social threat still remains, although the title has been changed (Act of minor importance – Art. 18), as well as the conditions for its application. Now it is possible to pronounce a prison sentence of up to three years or a fine.

4.2. The provisions on *Force* and *Threat* are also new. Absolute force excludes the existence of a crime as there is no subjective element (Art. 12). A person who applies force is an indirect perpetrator (Art. 21(3)). Relative force or threats give grounds for a lesser sentence.

4.3. The approach regarding *legal error* is new as well. An irremovable error excludes the existence of a crime, while a removable can be a base for a lesser sentence (Art. 29).

4.4. *Preparatory Actions as general institutes* are excluded, since from the standpoint of general institutes, they do bring up significant problems. They cannot be encompassed by the general definition of the crime. Furthermore, the criminal policy justification for their sanctioning is also disputable. They were common mainly in the legislation of former socialist states. The new Criminal Code is not fully consistent in this respect, since regarding crimes against the constitutional order and security it sanctions preparation as well, albeit in a specific manner. A compromise was made somewhere in between sanctioning preparatory actions as a general institute and as a special crime.

4.5. The institute of *Organized Criminal Enterprise* as a form of complicity has been left out. This form was characteristic of socialist criminal law and

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<sup>23</sup> Hereinafter, unless otherwise expressly stated, statutory articles shall refer to the new Criminal Code.

applied particularly in cases of political crimes. This represented a violation of the *nullum crimen sine culpa* principle since the organizer was responsible for the actions of others and not his own. Punishing criminal ringleaders can be carried out without any problems by way of aiding and abetting and co-perpetration. The Organization of Criminal Enterprises is an independent crime provided for in Art. 346.

4.6. The provision on *Co-Perpetration* is more precisely defined. Until now it was disputed when co-perpetration occurs. Now it exists if more persons directly execute a crime together or with other act (not directly executing the crime) having criminal intent a person takes part in the realization of a common decision and significantly contributes in its execution (Art. 33).

4.7. The *system of punishment* is a relatively dynamic segment of the General Part. Certain changes in the Criminal Code should be pointed out:

a) *The general maximum prison sentence* has been raised from the previous fifteen years to twenty years (reflecting the retributive orientation). Now a sentence in between fifteen and twenty years (e.g. sixteen or seventeen years) can be pronounced, which was not possible before. The general maximum sentence has been raised in a small number of crimes in the Special Part. Exceptionally, for the gravest offences, the possibility of pronouncing a prison sentence from thirty to forty years is provided for. This sentence can be given alternatively only with a prison sentence of up to twenty years. It is debatable why for the gravest crimes a sentence between thirty and forty years is stipulated<sup>24</sup> and not some other sanctions like a prison sentence for life, which many countries use instead of the death penalty. The overall minimum remains thirty days (Art. 45).

b) Two new sentences have been introduced: *labor in the interest of the public and the taking away the driving license*.<sup>25</sup> Work in the interest of the public has an important re-integrative function and stems from positive foreign experiences. Taking away driving license can be pronounced if the perpetrator utilized the motor vehicle in order to *execute* or *prepare* a criminal act (Art. 53). Conditions for pronouncing similar security measures are completely different, and thereby they cannot be pronounced together. For this reason, the codifiers considered it is justified to have an independent punishment in existence.

c) Regarding the fines, a measurement system of *daily installments* has been accepted. Still, the system of prescribing fixed amounts has been maintained as a subsidiary option. The fine is pronounced in a fixed amount if the level of daily amounts cannot be determined by the free evaluation of the court

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<sup>24</sup> In the new Criminal Code of Montenegro the most severe sentence 30 years prison sentence.

<sup>25</sup> This sentence is not provided for in the Criminal Code of Montenegro.

or if the gathering of such information would considerably extend the duration of the criminal proceeding (Art. 50(1)).

4.8. Conditions for the existence of the extended-crime have been codified (Art. 61). This construction is “invented” by the practice, claiming that it is in favor of the accused and was being applied without any basis in the law. Only the Law on Criminal Procedure mentioned the extended criminal act when regulating the re-initiation of proceedings, but without stipulating any condition for the application of this construction.

4.9. Another novelty is the possibility for *settlement between the victim and the executor of the crime*. However, even if the settlement is reached the court can acquit the executor from the sanction but not from the criminal responsibility (Art. 59).

4.10. Provisions on the *harshening the sentences*, the institute of a *particularly aggravated case and the confiscation of property*, entered into the criminal legislation in 2003, are now abolished. All these provisions were particularly problematic and served to strengthen the criminal repression.

4.11. Probation is still an independent criminal sanction. Changes have been geared towards narrowing its scope of application. Probation cannot be pronounced if a fine has already been determined. If the perpetrator commits another crime, probation can be given only once more. It cannot be given if more than five years have passed after the decision on a prison sentence for a crime with intent has been pronounced.

4.12. Another change is that the subject-matter (both substantive and procedural) relating to minors has been put in a separate law.

4.13. The responsibility of legal persons is still not regulated by the Criminal Code. Among theorists, there is a stance that this could be a separate subject of criminal law.<sup>26</sup>

## **B. Some important changes in the Special Part**

In comparison to the General Part, the Special Part is a much more dynamic area in contemporary criminal legislation. The Special Part of the Criminal Code had undergone many changes. In the second half of the previous century, crime has gone through a tempestuous development. A significant number of new forms were introduced, while the older forms underwent transformation. This has resulted in the regulation of numerous new crimes and the elimination of certain unnecessary ones. A large number of smaller changes and reformulations have been carried out, clearing up and giving precision to the de-

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<sup>26</sup> See Z. Stojanović, op. cit., pp. 20.

scriptions of certain crimes and thereby on the whole facilitating the implementation of the Criminal Code in practice. Very few crimes have retained their old descriptions.

There are some new chapters (crimes against the environment, intellectual property, security of computer information and against state bodies); some chapters have been erased (crimes of corruption). Nevertheless, with respect to the new chapters, it is necessary to point out that they contain mainly previously existing crimes. These are simply new organizational units, while there is much less substantive change. Crimes in the Special Part have been grouped differently. Their order has been altered as well. At the beginning are chapters that protect individual rights, while subsequently crimes by which universal rights are protected. This serves as a manifestation of the strive to primarily protect the fundamental human rights with the Criminal Code, as well as other values, but only in the function of exercising these individual rights. It is important to emphasize that the idea of decriminalization was not supported and was therefore implemented to a lesser extent. Proposals and opinions given during the public discussion and parliamentary procedure offered a completely different course: the introduction of numerous new crimes.

The codifiers attempted to introduce into the new Criminal Code numerous crimes from supplementary legislation<sup>27</sup>, which was regulated to a large extent without any concept or systematic approach, and more than often was of a poor legal-technical quality.

Owing to the great number of changes, it is not possible to cover them all, but instead we shall focus on the more important ones.

#### 1. *New chapters* in the Special Part

The new chapters are:

a) Crimes Against Intellectual Property (Chapter X, Arts. 198-202) comprised of the following: Infringement of the Moral Rights of Authors and Interpreters (Art. 198), Unauthorized use of Copyrighted Work or Objects of Other Related Rights (Art. 199), Unauthorized Removal or Alteration of Electronic Information on Copyright or Other Related Rights (Art. 199), Infringement of Patent Rights (Art. 201), Unauthorized Use of Someone Else's Design (Art. 202)

These crimes are only partially new. Most of them have been taken from the Law on Copyright and the old Criminal Law Act of the Republic of Serbia.

b) Crimes Against the Environment (Chapter XXIV, Arts. 260-277). This is one of the largest chapters of the Criminal Code comprised of the following crimes: Environmental Pollution (Art. 260), Failure to Take Measures of Environmental Protection (Art. 261), Illegal Construction or Engagement of Objects or Plants which Pollute the Environment (Art. 262), Damaging Objects or De-

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<sup>27</sup> The Criminal Code now contains crimes from 19 other laws.

vices for Environmental Protection (Art. 263), Damaging the Environment (Art. 264), Destroying, Damaging or Trafficking Protected Natural Resources (Art. 265), Trafficking Hazardous Material into Serbia and Unauthorized Processing, Holding or Storing of Hazardous Material (Art. 266), Unauthorized Construction of Nuclear Plants (Art. 267), Infringement of the Right to Information on the Status of the Environment (Art. 268), Killing or Torture of Animals (Art. 269), Transmission of Contagious Diseases Among Plants and Animals (Art. 270), Veterinary Malpractice (Art. 271), Production of Harmful Means for Animal Treatment (Art. 272), Devastation of Forests (Art. 274), Forest Theft (Art. 275), Illegal Gaming (Art. 276) and Illegal Fishing (Art. 274.)

This new chapter also contains only somewhat new crimes. Most of them existed previously and have been re-grouped from other chapters of the old legislation, while a segment stems from supplementary legislation.

c) Crimes against the Security of Computer Information (Chapters XXVII, Arts. 298-304)

This chapter is actually not new. Along with the changing of the title of one criminal act (title “Hindering the Processing of Data or Network Data Transfer” has been replaced with “Damaging of Computer Data and Programs”), the provisions of the Amendment of the Criminal Law Act of 2003 have been entered.

d) Crimes against state bodies (Chapter XXIX, Arts. 322-330)

This chapter does not contain any *new crimes*. It was created based on the re-grouping of previously existing ones.

2. The new Special Part also contains a significant number of new *crimes*, of which we shall focus on only a few:

a) A new crime is the new *privileged* form of a murder: a Mercy Killing.<sup>28</sup> There was a certain degree of resistance for the introduction of this crime by the lawmakers and theorists despite its presence in a large number of foreign criminal laws (Art. 117).

b) Torture is another new crime. The introduction of this crime is supposed to provide greater protection of fundamental human rights. Besides this, the international community has given particular significance to the prevention of torture, which was a justification in introducing it into the Criminal Code. In contrast to international conventions, the perpetrator can be any person (Art. 137).

c) The ratification of the Rome Statute has presented the obligation of introducing the institute of commander’s responsibility which is debatable from the standpoint of criminal law standards of civil law legal systems. The problem was resolved with the introduction of a new crime called as ‘*Failure to Prevent*

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<sup>28</sup> This crime is not at all new to Serbian legislation. It existed previously in the Criminal Code of the Kingdom of Yugoslavia from 1929.

*the Committing of Criminal Acts Against Humanity and Other Rights Protected by International Law.*<sup>7</sup> The perpetrators of this crime can only be military commanders who fail to undertake proper measures in order to prevent certain international crimes being committed by subordinates (Art. 384).

d) Crimes against sexual freedom contain a number of significant changes. The criminal act of *Rape* has been constructed differently. Now both male and a female can be passive and active subjects. The act has been expanded to include anal and oral sex (Art. 178).

e) The explicit repression regarding the prevention of unauthorized production, possession and trafficking in narcotics has been retained, but assuaged to a certain extent with the latest change. Now there is an *elective basis for indemnity* in case drugs are being carried for personal use (Art. 246).

f) The novelty regarding criminal acts for breach of state secrecy is that information or documents having connected with serious violations of human rights, that threaten the constitutional order or the security of the State or that relate to the covering up crimes for which a prison sentence of five years or more can be pronounced cannot be secret (Art. 316).

It is interesting that some recently introduced criminal acts have been evaluated as poor and unnecessary by theorists and practitioners and therefore left out from the new Criminal Code. An example is the chapter on corruption. This of course does not entail decriminalization, but simply means that the description of the act already coincided with what previously existed, along with certain other shortcomings.<sup>29</sup> Also the criminal act of car theft is omitted.

#### IV. Critical Assessment

The democratization process initiated in October 2000 has finally enabled, then Yugoslavia, the last country in the region, to embark on the difficult road of transition. This is a long process, which besides encompassing numerous social, economic and political changes also include the harmonization of its legal system with European standards. The latter particularly relates to criminal law. Nevertheless, there have been no thorough reforms in this filed. Up until the enactment of the new Criminal Code, of the previously mentioned changes, only the abolition of the death penalty is of principal significance. The rest are only of a cosmetic nature or simply to satisfy the daily needs of crime prevention policy. Amendments have often been rash, under the influence of imminent fear of certain crimes, and discordant with other regulations.

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<sup>29</sup> Introducing this chapter into the Criminal Code made evident that State was using it as an ‘alibi’, to show that it is undertaking serious measures in combating corruption.

It can be said that the new Criminal Code contains a number of new and important changes, but it also retained previous solutions which have been proven as good in practice. Therefore, there is no radical movement away from previous criminal legislation. The new Criminal Code is not a revolution in criminal legislation, but merely a step forward in its evolution. In addition to other positive changes, fortunately certain previous solutions of a particularly repressive character, which were introduced (more accurately re-introduced) under a fear of a growing organized crime, such as the institute of a particularly aggravated case and confiscation of property, have been eliminated from the new Criminal Code. The situation is the same regarding the institute of toughening the sentences. The efficiency of the fight against certain forms of crime (e.g. organized crime) cannot be an exclusive base or basic idea that leads the law-makers as it will undeniably result in the erosion of idea of the rule of law and significantly restrain the rights and freedoms of citizens. The self-restraint of the State and the notion that not every measure, no matter how efficiently it can be used for fighting against crimes, even those crimes that threatens the fundamental values upon which the society is based, represents a more important feature of the rule of law and serves the protection of human rights. In achieving the goal, an efficient fight against crime, cannot justify the application of whichever tool in its achieving.

A significant shortcoming in the new Criminal Code is the overly large system of incrimination with the ever-growing tendency for expansion,<sup>30</sup> the overly broad determination of the punishable zone and explicit repressiveness. According to general evaluation, Serbian criminal law is amongst the most repressives in Europe.<sup>31</sup>

Bringing punishability to optimal levels through the reduction of the number of incriminations, as well as optimizing the severity of criminal-legal repression has been left to the future reformers of the Serbian criminal legislation.

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<sup>30</sup> The number of new crimes is greater than the number of abolished ones.

<sup>31</sup> See Dj. Ignjatović, *Karakter i motivi izmena krivičnog zakonodavstva Srbije* (Character and motives behind the amendments to the criminal legislation of Serbia), *Revija za kriminologiju i krivično pravo*, No. 1/2005, pp. 35

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## **Rezvoj krivičnog zakonodavstva od početka tranzicije do donošenja novog Krivičnog zakonika**

### *Rezime*

Rad se satoji od četiri dela.

U prvom delu autor ukratko prikazuje proces podele krivičnopravne zakonodavne nadležnosti između nekadašnje Federacije i saveznih država i postepenog prenosa te nadležnosti na savezne države. Dat je i pregled strukture krivičnog prava do donošenja novog Krivičnog zakonika Srbije.

Drugi deo je posvećen evoluciji krivičnog zakonodavstva u Srbiji od početka tranzicije do donošenja novog Krivičnog zakonika Srbije.

U trećem delu je sažeto prikazan novi Krivični zakonik Srbije sa osvrtom na najvažnije novine kako u opštem tako i u posebnom delu.

Četvrti deo sadrži sumaran kritički osvrt na proces evolucije krivičnog prava u Srbiji od početka tranzicije i na novi Krivični zakonik Srbije.