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Dr. Damjan Korošec,
Full Professor (Criminal Law),
University of Ljubljana, Faculty of Law

FAILURE TO PROVIDE INFORMATION OF CRIME OR PERPETRATOR AS A PROBLEM OF CRIMINAL LAW

Synopsys

At least in Europe there are several legal systems incriminating the omission of providing formal information of crime or perpetrator (to provide a report of crime or perpetrator) to certain state authorities (police, public or state prosecutors). A typical such incriminative norm is a combination of a so-called long-term crime and objective condition of punishability. This combination rises rather complex dogmatical problems and endangers as a final consequence the legal safety of citizens as potential perpetrators of such omissive mass crimes. The author shows the example of Slovenian substantive criminal law and calls for more effective comparative criminal law cooperation between legal systems especially in deciding about abolishing the more and more controvert institute of objective condition of punishability altogether.

Key words: Substantive criminal law, Omission, Slovenia, Objective condition of punishability.

Introduction

Slovenia[3] is one of those countries, where traditionally criminal law (that is in form of a special incrimination inside of the criminal legislation, typically in the special part of a law, called Penal Code or Criminal Code) is dealing with the omission of providing formal information of crime or perpetrator (that is to report) to certain state authorities (police, public or state prosecutors). In the present Criminal Code of the Republic of Slovenia[4] *(KZ-1-UPB2, OJ Nr.: 50/12 from 29th of June 2012),* hereafter CC-1 RS, in the chapter of the special part with the title *"Criminal Offences against Administration of Justice"* (Art. 280 to 293) one can find an incrimination in Art. 281, titled *"Failure to Provide Information of Crime or Perpetrator"*. The full text of it is as follows: *"(1) Whoever knows of a perpetrator of a criminal offence for which the sentence of at least fifteen years' imprisonment or life imprisonment is prescribed by the statute, or whoever knows of the committing of such a criminal offence and fails to inform the competent authorities thereof whereby such information is decisive to the on-time discovery of the perpetrator of the crime, shall be sentenced to imprisonment for not more than three years. (2) An official who knowingly fails to submit a report of a criminal offence of which he comes to know during the performance of his official duties and for which the punishment of three or more years' imprisonment is prescribed under the statute, the perpetrator whereof is prosecuted ex officio, shall be sentenced to imprisonment for not more than three years. (3) No punishment shall be imposed on whoever fails to submit information about a crime, provided that they are either the spouse, extra-marital partner or partner in a registered homosexual partnership, lineal relative, brother, sister, adoptive parent, adopted child, defence counsel, doctor or confessor of the perpetrator. If any of these persons, except the defence counsel, doctor or confessor, is not to be punished for failure to submit information about the crime under the first paragraph of the present article, neither shall his spouse or extra-marital partner be punished for committing such an offence."*[5]

This incrimination is very stable through the history of Slovenia after the second world war: the text did not change significantly in the evolution of

[3] As known, Slovenia, after being partly victim of severe disintegrative processes in the former Federal Yugoslavian state (SFRY) and partly playing an important active role in this processes reached in 1991 the international legal status of an independent state. From May 1, 2004, Slovenia is a member of the European Union (EU); it was accepted into the called Shengen area and accepted the Euro. It is one of the smallest states of the world; its population is around 2 million.

[4] In Slovenian language: *Kazenski zakonik (KZ).*

[5] Translation: *Damjan Korošec.*

substantive criminal law in Slovenia in the past decades.

Similar incriminations are used in other countries, evolved as successors from former common Yugoslavia. According to known information, no special efforts are made to change these incriminations from neither the side of legislators nor the jurisprudence of the states, who know and use them. But at least in Slovenia in the past months some interesting criticism about the given incrimination arouse in criminal legal theory. This article should show some of the main problems of this incrimination, as they seem to be rather intriguing from the viewpoint of the dogmatic of the general part of substantive criminal law as well as from the viewpoint of modern crime policy.

Introduction to the Phenomenon of a Long-Running Crime with a so called Objective Condition of Punishability[6]

The given incrimination is already in its title declared as omissive. It grounds on a criminal norm, that demands activity, action to avoid criminal responsibility (in contrary to the crime not being reported to authorities, which can be comissive or omissive). In the general form of Par. 1, the crime is *delictum commune,* every imaginable perpetrator is foreseen, while in the special form of Par. 2 the crime is *delictum proprium,* only specially qualified perpetrators are covered here: officials.

Because the legislator installed in Art. 281 an omissive incrimination, per definition there are two points of finalization of this crime: the so-called formal finalization, when the perpetrator sets up the forbidden state and the later substantial formalization, sometimes called also material finalization, when the forbidden state ends. As known, the maintenance, the preservation of the forbidden state is the essence of the unlawfulness of such types of crimes. They are called in theory long-term crimes (in German: *Dauerdelikte,* in Slovenian: *trajajoč delikt)*. Because the acting of perpetrator in such crime-types is closely bound with the forbidden result of these crimes, the (omissive) acting and the forbidden result are uniquely layered in time and place. All this makes such crimes specifically complex regarding the recognition of time of crime *(tempus criminis)* and the chronological applicability of law and some other institutes of general part of criminal law, above all the attempt and participation in crime.[7]

The crime, not being reported to the authorities on the other hand, can be every known crime type: a non-long-term crime or a long-term crime, if only it is severe enough, to be covered by the incrimination from Art. 281 CC-1 RS.

The part of incrimination from Art. 281 CC-1 RS, defined with words *"whereby such information is decisive to the on-time discovery of the perpetrator of the crime"* under all possible known explanations of this norm (linguistical, systematical, logical, historical and others) show very clearly, that we are not dealing with a forbidden result. In such a case, the wording would be typically: *"who […] delays the discovery of the perpetrator of the crime")*. But no, the Slovenian legislator decided to use a clearly functional different wording. Closer analysis shows, that the legislator introduced a so called proper (true) objective condition of punishability (in German: *echte objektive Bedingung der Strafbarkeit,* in Slovenian: *pravi objektivni pogoj kaznivosti)* here. What exactly are we dealing with here?

Objective conditions of punishability are special conditions of punishability outside of standard elements of the general notion of crime, as we know them at least on the European continent. It is a circumstance in direct connection with the crime, but outside the elements of the general notion of crime. We usually say, that it is a substantive prerequisite of punishability and the textbooks of the general part of substantive criminal law around the world usually stress, that it is especially outside the concept of guilt. The legislator does not request, that the perpetrator *tempore criminis* develops any actual knowledge on the unlawfulness of such an objective condition. He further does not request any perpetrator's potential knowledge on the unlawfulness of such an objective condition. Above all he does not request any subjective relation of the perpetrator to this circumstance in the form of intent or negligence in any of their known forms. The objective condition of punishability is because of this a very special feature of the description of the crime

[6] This chapter is the author's translation and adaptation of a part of his article: *Korošec 2015.*

[7] In newer Slovenian criminal legal theory see: *Korošec 2008.*

in the incriminative norm of law, in fact incompatible with the idea of guilt.

The modern theory of substantive criminal law in general divides two main forms of objective conditions of punishability: proper (true) and improper (false). A proper (true) objective condition of punishability is part of an incriminative norm of law, which according to its unlawfulness covered is – criminal-politically speaking – a natural part of criminal law and does not call for any additional argumentation of unlawfulness to divide it from lesser forms of forbidden behaviour (like misdemeanours or disciplinary offences) in the form of special prerequisites of punishability like objective condition of punishability. If used in such norms, an objective condition of punishability can play only one role: narrowing the punishability. As an example usually the explicit condition of reciprocity of criminal legal prosecution of some verbal attacks on state is given in theory. When state A limits punishability of insulting of a foreign state (B) with the punishability of insulting state A according to criminal legislation of the state B, than such a condition doesn't add to the unlawfulness of insultment of foreign states in state A as such, but exclusively limits such a punishability in state A. That is why such an objective condition of punishability is called proper (true) objective condition of punishability. Such objective conditions of punishability are very rare in European legislative practice.

In the case of improper (false) objective conditions of punishability the circumstances regarding setting up the punishability are opposite: they add to the punishability, they set the punishability up. The incrimination would be without such an objective condition of punishability not unlawfull enough to be – criminal-politically speaking – a natural part of criminal law and calls urgently for an additional argumentation of unlawfulness to divide it from lesser forms of forbidden behaviour (like misdemeanours or disciplinary offences) in the form of special prerequisites of punishability like objective condition of punishability. A typical example is a grave bodily harm or death of a person, involved in a mass-fight. Taking part in mass fights per se is not a crime in most states, but if in such a fight a person was killed or at least severely wounded, than the sole (intentional) taking part in this fight becomes a crime in most known states. This is regulated by an objective condition of punishability, dividing this crime for less severe similar misdemeanours by adding to the unlawfulness of it.[8] Because of the combination of being outside and even incompatioble with the guilt as an element of the general notion of crime and adding crucially to the punishability of a human act, it is obvious, that this form, the so called improper (false) objective condition of punishability is heavily criticised as incompatible with constitutional prerequisites of the guilt principle in criminal law. Newertheless, this form of objective condition of punishability is throughout the world still used, and even far more common than the above described proper (true) objective condition of punishability.

Special Problems in a Typical Omissive Crime of Non-Reporting a Crime (with Objective Condition of Punishability)

Because of the wording *"whereby such information is decisive to the on-time discovery of the perpetrator of the crime"* in the given incrimination it is clear, that there must be a pseudo causality between the omissive acting of the perpetrator and the phenomenon, called time point of discovery of the perpetrator.[9] That is why it is logically impossible, that an objective condition of punishability can occur before the formal finalizing of the crime, called Failure to provide information of crime or perpetrator according to Slovenian criminal law. But the given proper (true) objective condition of punishability can occur between the time point of formal and substantive (material) finalization or after the substantial (material) finalization of this long-term crime. Neither the Slovenian criminal legislation (including CC-1 RS) nor the Slovenian jurisprudence provide an answer,

[8] See the actual incrimination in CC-1 RS in Art. 126 *("Participation in a mass-fight"): "Whoever participates in a mass-fight resulting in the death of a person or in serious bodily harm shall be, for the mere participation, sentenced to imprisonment for not more than one year."* Translation: *Damjan Korošec.*

[9] Since the delay in discovery is obviously not the forbidden result of the act (but only an objective condition of punishability of the perpetrator), on the terminological level in Slovenian criminal law one must not speak about causality, because this term is clearly reserved for the objective vectorial connection between the acting of the perpetrator and the forbidden result of this acting, so that is why we have to speak about pseudo causality here.

haw statutes of limitations (German: *Verjährung,* Slovenian: *zastaranje)* are applied in any form of possible combination of long-term crime and objective condition of punishability: either the time counting starts with appearance of the objective condition of punishability or the substantial (material) finalization of crime.

Similar no clear answers have ever been given in Slovenia about the exact explanation of the term delay ("on time") in the objective condition of punishability in the given incrimination. When a long-term crime is not being reported to the authorities it should be clear, that any, even the shortest possible delay in informing - reporting is enough for punishability of the non-reporter. But what about other types of not-reported crimes? Why speaking of a delay in such an incrimination in the form of a proper (true) objective condition of punishability at all?

The Slovenian legal theory in recent months demands a redefinition of the given incrimination, including a proper broad discussion about the possibility or even the urgent need of abolishing this crime totally. The main argument here is the unclear right of the potential perpetrator of the omissive crime of non-reporting a crime to decide, when to report a given crime. It is obvious, that the incrimination is not clear regarding details of this right, neither the Slovenian criminal jurisprudence nor the criminal legal theory provide safe guidelines for potential perpetrators of this omissive crime how to behave in case of confrontation with an information, that a severe crime was committed.

Omissions on the Side of Comparative Criminal Legal Science?

It seems, that the idea of incriminating the failure to provide information of crime or perpetrator is a good example, how comparative criminal law can help to improve legislation in particular states. For improving the Slovenian rather problematic and controvert incrimination with the title "Failure to provide information of crime or perpetrator", it seems crucial to learn from as many legal systems as possible, if there is (still) a true demand for such incriminations, and if yes, how should they be formulated in law and used in practice to provide optimal legal safety for all potential perpetrators and at the same time contribute to the efficiency of judicial and repressive systems. Perhaps a common criminal legal scientific analysis of some Ukrainian and Slovenian scholars could be a good start in a fruitful direction, including the direction towards a scientifically founded call for abolishment of all objective conditions of punishability in future criminal law.

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Д. Корошиць

Ненадання інформації про стан злочинності та про осіб, які вчинили злочин, як кримінально-правова проблема

Сьогодні у Європі склалося декілька систем, які компенсують прогалини у наданні офіційної інформації про вчинені злочини та про осіб, які вчинили злочини. Таку інформацію зобов'язані надавати такі державні інституції як поліція, державні прокурори, а також громадські обвинувачі. Типовою формою таких звітів є інформація про вчинені злочини та про осіб, які їх вчинили, що дає можливість довгострокового прогнозування злочинності та пеналізації. Така комбінація дозволяє, по-перше, вирішувати складні проблеми догматичного характеру, а, по-друге, прогнозувати безпеку громадян та кількість потенційних суб'єктів можливих злочинів, що можуть набувати масовидного характеру. Автор аналізує словенське матеріальне кримінальне право та закликає до більш тісного співробітництва між державами з різними правовими системами з метою уніфікації питань криміналізації і пеналізації.

Ключові слова: матеріальне кримінальне право, об'єктивні умови пеналізації, криміналізація, злочинність.

Д. Корошец

Непредоставление информации о состоянии преступности и о лицах, совершивших преступление, как уголовно-правовая проблема

Сегодня в Европе сложилось несколько систем, компенсирующих пробелы в предоставлении официальной информации о совершенных преступлениях и о лицах, их совершивших. Такую информацию обязаны предоставлять такие государственные органы как полиция, государственные прокуроры, а также общественные обвинители. Типичной формой таких отчетов является информация о совершенных преступлениях и о лицах, их совершивших, что дает возможность долгосрочного прогнозирования преступности и состояние пенализации. Такая комбинация позволяет, во-первых, решать сложные проблемы догматического характера, а, во-вторых, делать прогнозы относительно безопасности граждан и о потенциальных виновниках возможных преступлений, которые могут принимать массовый характер. Автор анализирует словенское материальное уголовное право и призывает к более тесному сотрудничеству между странами с различными правовыми системами с целью унификации вопросов криминализации и пенализации.

Ключевые слова: материальное уголовное право, объективные условия пенализации, криминализация, преступность.