https://doi.org/10.22364/iscflul.9.2.07

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PENAL POPULISM AND (AB)USE OF CRIMINAL LAW[1]

Key words: criminal justice, (over)criminalisation, trust, juveniles, criminal response

Summary

Over the last decades, it has been recognized that criminal law in some jurisdictions is used by governments in response to crises with a view to regain citizens' trust. COVID-19 pandemic required prompt reaction, and many governments resorted to the criminal law to implement restrictive measures, to define new crimes within the legislation in order to combat pandemic, and to endanger the procedural rights of defendants to ensure fast-track procedure. Similarly, the mass shooting in Belgrade primary school in May 2023 triggered discussion on amending criminal legislation to prevent minors from committing similar crimes in the future, but also to provide an immediate response to public request. The discussions included the possibility of lowering the age of criminal responsibility from 14 to 12, restricting civilian gun ownership and introducing stricter sanctions for violation, but also introducing death penalty or more severe penalties for certain crimes.

The subject of this paper is the effectiveness analysis of the overcriminalisation, especially as the prompt reaction to crises. Discussion will include comparative experience, especially from European countries, such as reaction of Norwegian authorities after the Utoya attack and response to crimes committed by juveniles.

Bearing in mind the aforementioned previous experience, the authors start from the assumption that rapid changes of the criminal law, without proper identification of needs and impact assessment lead to failure of reforms. In order to give recommendations for reducing the risks, the authors analyse the comparative response to crises and the extent of criminal law revision.

[1] This paper is a result of the research conducted by the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2023 registered under No. 451-03-47/2023-01/200049 and the Working Plan and Program of the Institute of Criminological and Sociological Research for 2023 (based on the Contract No. 451-03-47/2023-01) with Ministry of Science, Technological Development and Innovation of the Republic of Serbia.

Introduction

Tim Newburn in his book "Criminology" has stated that penal populism is a term that refers to the rise of new crime control policies that emerged in the 1990s. It consists of the increased politicisation of crime control and the increase in efforts by politicians to adapt decision-making in the area of crime suppression to public attitudes. This is a political strategy, whereby politicians advocate for tough-on-crime policies and implement them to gain popularity and public support. This often involves advocating for harsher penalties[2], stricter law enforcement measures, increased incarceration rates, and overcriminalisation.[3] This results in an expansion of criminal law in size and scope.[4]

Penal populism tends to prioritise punitive measures over more nuanced and evidence-based approaches to criminal justice. According to the authors, the development of criminal populism is influenced by numerous factors, such as socio-economic changes, the media, the public attitude towards crime, which is formed mostly on the basis of media reports, as well as the politicization of criminal law. Socio-economic changes and the transition to a market economy contributed to social insecurity, while new technologies exacerbated physical insecurity in various social areas.[5] It seems that the focus has shifted from determining the risk of criminal behaviour and taking preventive measures towards controlling crime through application of retributive measures.

As stated by Ignjatovic, penal populism usually begins with panic legislation, increasing the severity of the respective sanctions, imposing restrictions on the freedom of courts in sentencing, introduction of a ban concerning mitigation of sentences for some criminal acts, as well as a ban on granting conditional release to the perpetrators of certain crimes. This usually results in the public calling out of the courts for decisions that are not in accordance with the perception of crime presented in the media. This approach can lead to the implementation of policies that may be popular in the short term, while not necessarily being effective or just in addressing the complexities of crime at its causes. Furthermore, this has a negative impact on the increase in the prison population, thereby exceeding the capacity of penal institutions, although according to research results, it can be observed that there has not been a large increase in crime, which would justify penal expansionism.[6]

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[2] Ignjatovic D. Kazneni populizam [Criminal populism]. In: Kaznena reakcija u Srbiji [Punitive reaction in Serbia], Ignjatovic D. (ed.), Belgrade: University of Belgrade, Faculty of Law, 2017, p. 12.

[3] Husak D. Overcriminalization: The Limits of the Criminal Law. Oxford: Oxford University Press, 2008, p. 3.

[4] Matic Boskovic M., Nenadic S. Impact of COVID-19 Pandemic on Criminal Justice Systems Across Europe. EU and Comparative Law Issues and Challenges Series (ECLIC), 2021, No. 5, p. 271.

[5] Sokovic S. The Contemporary Penal Populism: The Global Trends and the Local Consequences. In: Law in the process of globalisation. Collection of papers contributed on the occasion of 40th anniversary of the Faculty of Law of the University of Kragujevac, Kragujevac: Faculty of Law of the University of Kragujevac, 2018, p. 158. DOI: 10.46793/LawPG.155S.

[6] Ignjatovic D. 2017, p. 28.

Critics argue that penal populism can contribute to the overuse of imprisonment, disproportionately affect marginalised communities, and undermine efforts to implement more rehabilitative and restorative justice practices. It is important to balance public safety concerns with evidence-based policies that address the root causes of criminal behaviour and promote a fair and just criminal justice system.

1. Criminal law expansionism

Although the concept of restorative justice began to develop since the 1970s through various practical programmes, international documents, campaigns and projects, it seems that it is often neglected in practice. However, it should be remembered that the aforementioned concept represents a constructive response to criminality, whereby the main goal is not to punish the perpetrator and retaliate, but to compensate for damage and repair relationships that have been damaged by the commission of a criminal act. At the centre of the concept of restorative justice is the victim and her/his needs, as well as seeking a way to eliminate harmful consequences by "returning justice to the social community".[7]

Instead of finding the most adequate solution by applying not only retributive measures, but, above all, by employing preventive measures, it seems that modern criminal law is characterized by criminal expansionism, which results in prescribing a large number of new criminal acts and, as the authors state, deviating from some basic principles of criminal law, as well as using criminal law as a *solo ratio,* instead of *ultima ratio*.[8] Criminal law expansionism refers to an approach in which lawmakers, policymakers, or legal system progressively broaden the scope of criminal laws, increasing the range of behaviours that can be classified as criminal offenses. This expansion can occur in terms of the types of conduct considered criminal, the severity of penalties, or the introduction of new criminal offenses.

Several factors may contribute to criminal law expansionism, including changes in societal values, responses to perceived treats, political considerations, and public opinion. Policymakers may enact new laws or amend the existing legislation to address emerging issues, public concerns, or changing social norms. However, the expansion of criminal law can have significant implications for individuals, communities, and the overall criminal justice systems.

Critics argue that criminal law expansionism may lead to overcriminalisation, where individuals can unintentionally and unknowingly violate laws due to their complexity or ambiguity. This trend may also result in disproportionate penalties

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[7] Copic S. Restorativna pravda i krivičnopravni sistem: teorija, zakonodavstvo i praksa [Restorative justice and the criminal justice system: Theory, legislation and practice]. Belgrade: Institute of Criminological and Sociological Research, 2015, p. 17.

[8] Grujic V. Z. Life Imprisonment as an answer to Contemporary Security Challenges. The (IN) Adequacy of the Retributive Approach. Teme, 2019, Vol. XLIII, No. 4, p. 1110, DOI: https://doi.org/10.22190/TEME191018066G.

for certain offenses and contribute to the overburdening of the criminal justice system.

Amendments to the Criminal Code of the Republic of Serbia from 2019 introduced the sentence of life imprisonment into the Serbian legislation, and at the same time the sentence of long-term imprisonment of 30–40 years was abolished.[9] The aforementioned changes were preceded by harsher penalties for existing crimes, tightening of requirements for conditional release of convicted persons, but also general expansion of the retributive approach to punishment. Amendments from 2019 within the framework of the general provisions stipulate the prohibition of parole for the crimes of aggravated murder, rape, abuse of a vulnerable person, abuse of a child and abuse of position, and there is also a narrowing of the number of crimes for which it is possible to impose a suspended sentence, as well as prescribing restitution as mandatory under aggravating circumstances.[10] It should be highlighted that abovementioned amendments were introduced on the initiative of a foundation established by the fighter on behalf of a sexually abused and murdered teenager in 2014. The public pressure was high and the requirements for stricter punishment were advocated. As a result, the Criminal Code was amended in 2019, without proper assessment whether stricter sanctions would have a deterrent effect and result in general prevention of this type of crime.

Some of the newly introduced criminal acts reflect the harmonization of criminal legislation with the legal standards of the European Union and relevant conventions of the Council of Europe. However, the change in legislation was not influenced only by international legal acts, but also, as Professor Stojanović states, by some (un)justified reasons and needs at the national level. However, it seems that they even approached the fulfilment of obligations stipulated by international documents without reviewing the criminal-political justification of the new solutions.[11] Therefore, we agree with the opinion of those authors who point out that during every amendment of the criminal legislation, it is necessary to re-examine the border between the excessive spread of incrimination and the need for the state to react in an effective way to new forms of crime.[12]

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[9] Grujic V. Z. 2019, p. 1121.

[10] Bodrozic P. I. Kontinuirani krivičnopravni intervencionizam na raskršću politike i prava [Continuous criminal law interventionism at the intersection of politics and law]. Srpska politička misao [Serbian Political Thought], 2020, Vol. 68, No. 2, p. 389, DOI: https://doi.org/10.22182/spm.6822020.17.

[11] Stojanovic Z. Da li je Srbiji potrebna reforma krivičnog zakonodavstva [Does Serbia need criminal legislation reform]? Crimen, 2012, Vol. 4., No. 2, p. 120.

[12] Stojanovic Z. & Kolaric D. Savremene tendencije u nauci krivičnog prava i krivično zakonodavstvo Srbije [Contemporary tendencies in the science of criminal law and the criminal legislation of Serbia]. Srpska politička misao [Serbian Political Thought], 2015, Vol. 49, No. 3, p. 113, doi. org/10.22182/spm.4932015.

2. The role of the media and criminal law reaction

The relationship between the media and criminal law reactions is complex and multifaced. Media plays a significant role in shaping public perceptions, influencing legal proceedings, and even impacting the development and enforcement of criminal laws. Sensationalised or biased reporting can contribute to the amplification of certain crimes, creating an atmosphere of fear and anxiety.

Sometimes, the choice of news and the way crime is reported serves to divert public attention from real social problems, such as unemployment, poverty, economic crisis or other important topics. The tactic often involves emphasising or sensationalising crime stories to draw attention away from other, potentially more pressing issues. Mainly in this way, certain political elites strive to maintain social peace and realize the interests of those who possess social and political power.[13]

Based on the research of media reports, the authors conclude that the media does not operate in a vacuum. Creation of various information is primarily influenced by many interest groups and lobbying groups, and to the greatest extent – by members of the political elite, to justify their policies and create certain convictions among citizens.[14] Media attention to specific cases can lead to calls for criminal justice reforms, such as changes in sentencing laws, parole policies, or the handling of certain offenses.

Stewart Hall and his colleagues analysed the creation of moral panic from street robberies in Great Britain in the early 1970s. Their conclusion was that it was no coincidence that this panic occurred at a time of severe economic crisis and lack of employment, which contributed to social horrors being taken as a justification for police actions against the unemployed, the young poor and blacks to distract the working class from the common actions. According to the conclusion of Hall and his associates, the moral panic was used by the ruling elite to divert attention from the crisis of British capitalism.[15]

The authors believe that the exaggeration of the crime problem is characteristic of all world media. However, they are only a means to realize different, and most often, political interests that often collect political points by advocating for zero tolerance of crime and propose solutions whose effectiveness and reasoning can be justifiably doubted.[16] The same authors state that one of the common pre-election promises of various political options is the fight against crime. An integral part of

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[13] Ilic A. Mediji i kriminalitet – kriminološki aspekt [Media and crime – criminological aspect]. Doctoral thesis, Belgrade: University of Belgrade, Faculty of Law, 2017, p. 42. Available: https://nardus.mpn.gov.rs/handle/123456789/9158 [viewed 03.12.2023.].

[14] Philo G. (ed.). Message Received: Glasgow Media Group Research, 1993-1998. New York: Wesley Longman, 1999, cited according to: Suput J. Mediji i kriminalitet [Media and crime]. In: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja [The State of Crime in Serbia and legal means of response], III part, Ignjatovic D. (ed.), Belgrade: University of Belgrade, Faculty of Law, 2009, p. 450.

[15] Tompson K. Moralna panika [Moral panic]. Belgrade: Clio, 2003, p. 25.

[16] Ilic A. 2017, p. 46.

the campaign is the story about the necessity of strong opposition to various forms of criminality. In this sense, the interests of the authorities can be presented as the interests of the people, with the increase of crime and citing 'alarming' data to argue their position. This is precisely the factor that can influence individual judges to make certain judgments that would please the representatives of the current political elite.[17] Furthermore, intense media coverage can create trial by media scenario, potentially influencing the fairness of legal proceedings.

3. (Ab)use of criminal law in the crisis situation

Criminal law is often perceived as a tool for showing that state is taking initiative and responding to crises in the society. During the pandemic caused by the COVID-19 virus, in many countries criminal law was (ab)used by public authorities. In the Republic of Serbia, at the time of the pandemic, judiciary conducted trial via video conference. Although the Code of Criminal Procedure of Serbia did not prescribe a trial via video conference, except in certain cases (Article 104 of the Criminal Code), the Government of Serbia issued a decree according to which, during the state of emergency, the judge could decide that the participation of the accused could be secured through video links (Regulation on the manner of participation of the accused in the main trial in criminal proceedings held during the state of emergency declared on 15 March 2020). Apart from the lack of legal basis, this measure is compatible with the practice of the European Court of Human Rights. According to the jurisprudence of the aforementioned court, telephone and video conference as an alternative to hearing and other procedural actions can only be used, if they are based on the law, time-limited and proved to be necessary and proportionate to local circumstances. In addition, the use of the aforementioned methods must not prevent the confidential communication of a person with their lawyer.[18]

Apart from this example, in the Netherlands there was also concern about the possibility of jeopardizing the right to a fair trial and the quality of justice during the pandemic, because the prosecution announced the intention to increase the use of its powers to decide on certain criminal cases itself.[19] This could have a negative impact on the right to a fair trial, if citizens are not adequately informed.

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[17] Ilic A. 2017, p. 183.

[18] Kostic J. & Boskovic Matic M. How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe. In: Regional Law Review, Reljanovic M. (ed.), Belgrade: Institute of Comparative Law, 2020, p. 87, DOI: https://doi.org/10.18485/iup_rlr.2020.ch6. See: ECHR judgment of 10 January 2012 in Case Vladimir Vasilyev v. Russia (application No. 28370/05); ECHR judgement of 14 February 2001 in Case Riepan v. Austria (application No. 3511/97 and ECHR judgement of 5 October 2006 in Case Marcello Viola v. Italy (application No. 45106/04).

[19] 2020 Rule of Law Report – Country Chapter on the rule of law situation in Netherlands, Brussels, 30.09.2020, SWD(2020) 318 final, p. 6.

In France, during the pandemic, certain measures started a discussion. Those measures related to the functioning of the judicial system and included early release of certain categories of detainees and automatic extension of the duration of pre-trial detention.[20] The application of the measure of automatic extension of detention could threaten the realization of the right to freedom. Based on the lawsuit challenging the legality of the extension, the Court of Cassation decided that the court that would otherwise decide on the extension of custody should urgently review the validity of the decision regarding the extension.[21]

In the Republic of Serbia, after the mass murder of nine students and a security guard in an elementary school by a thirteen-year-old boy in May 2023, the idea of lowering the limit of criminal responsibility from 14 to 12 years appeared in public, whereas in comparative legislation, the position on decreasing or considering to lower the threshold of criminal responsibility is influenced by international standards and the views of the United Nations Committee on the Rights of the Child. The Handbook published by the United Nations Children's Fund in 2007, which is substantial for interpretation of the provisions of the Convention on the Rights of the Child, contains a position that invoking the limit of criminal responsibility below 12 years of age is not acceptable at the international level, and countries are invited to raise this limit over 12 years, while those with a higher age limit of criminal responsibility should not lower that limit. Furthermore, according to the position expressed in the aforementioned document, it is recommended that no exceptions be prescribed at the national level regarding the limits of criminal responsibility, even for perpetrators of very serious criminal acts.[22] No country that has ratified the Convention on the Rights of the Child should lower the threshold of criminal responsibility to 12 years of age. In the same document, the solution that exists in England and Wales, according to which the lower limit of criminal liability is 10 years, has been criticized, and it is recommended to raise it.[23]

In Finland, the Juvenile Offenders Act of 1940 defined that children under the age of fifteen cannot be held criminally responsible, taking into account the level of their intellectual, emotional and social development at that age. Moreover, there is also an attitude that a child can be considered sufficiently mature to assume criminal responsibility when he is capable of establishing an employment relationship. Any child who commits a criminal offense and is younger than that age, enters the social protection system. Therefore, the authors state that Finnish children are perceived as 'victims' of their own social circumstances in need of help, and not as criminals or immoral persons. In Finland, the persons who commit crimes between the ages of 15 and 17 are considered young offenders.

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[20] 2020 Rule of Law Report. Country chapter on the rule of law situation in France, Brussels, 30.09.2020, SWD(2020) 309 final, p. 4.

[21] Ibid.

[22] Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund, 2007, p. 605. Available: https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf [viewed 03.12.2023.].

[23] Ibid., p. 617.

Such young people are subject to care and the measures ensured by the Finnish social protection system and the justice system.[24]

Criminal justice cannot achieve the reduction of violent crimes, if it is not accompanied by other measures in the area of social support, family issues and the application of adequate prevention mechanisms. Therefore, the focus should be on rehabilitation rather than retribution, and the goal should be to create a more tolerant social environment by establishing an adequate mechanism for conflict resolution.

It is important to note that despite the retributivist concept that is increasingly present in criminal law, the research results confirm the exact opposite. Thus, in the United States of America, 69% of people who were released from prison were rearrested within three years after their release. In England and Wales, 66% of young people and almost half of ex-prisoners committed a criminal offense within a year after completing their prison sentence.[25] An opposite approach is taken in Norway. An extreme example to present here is Utoya attack in 2011, where, as a result of mass shooting in the youth camp, 69 people were dead. The Oslo District Court sentenced attacker to 21 years in prison, which could be extended if he was deemed to constitute a threat to society. It should be stressed that Norwegian approach is rehabilitation, not retribution.[26] Implementation of punishment in Norway seeks to change an individual's offending behaviour with the goal of preventing a return to prison upon their release. Impact of such approach is that the rate of re-offending in Norway is among the lowest worldwide– 20 percent in comparison to 62.7 percent in Serbia.[27]

Conclusions

The differences in re-offending rate across countries (i.e. Norway, the USA, Serbia) that have diverse approaches in criminal policy confirm that criminal law and criminal justice cannot reduce violent crimes, if it is not accompanied with other measures in the area of social support, family matters, and prevention mechanisms.

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[24] Mhuirneacain O. N. The Young Offenders: A Comparison of the Criminal Justice System for Juveniles under Finnish and Irish Law, 26 June 2020. Available: https://lawreview.elsa.org/the-young-offenders-a-comparison-of-the-criminal-justice-system-for-juveniles-under-finnish-and-irish-law [viewed 03.12.2023.].

[25] Aaron B. Prisons are failing. It's time to find an alternative. World Economic Forum, 09.01.2019, cited according to Ilic A. The analysis of some problems in achieving the rehabilitation purpose of punishment. Review of Criminal Law and Criminology, 2023, No. 1, p. 94.

[26] Labutta E. The prisoner as one of us: Norwegian Wisdom for American Penal Practice. Emory International Law Review, 2016, Vol. 31, Issue 2, p. 332.

[27] Stevanovic I., Mededovic J., Petrovic B. and Vujicic N. Expert research and analysis on re-offending in Serbia. Belgrade: Organization for Security and Co-operation in Europe – Mission to Serbia, 2018.

Furthermore, expansionism of criminal law can lead to excessive criminalization, which results in legal uncertainty. Individuals may unwittingly and unknowingly break laws because of their complexity and ambiguity, while disproportionate sentences for certain crimes can overburden the criminal justice system.

Reforms of the criminal legislation should be based on review of the effects brought about by excessive spread of incriminations and the need for state to react effectively to suppress crime. One of the examples demonstrating lack of proper prior assessment of the legislative changes was the amendment of the Criminal Code of the Republic of Serbia introduced in 2019. The Code was adopted without a proper assessment of whether stricter sanctions would have a deterrent effect and result in a general prevention of the respective type of crime, but the process was driven by the public pressure to react on violent crime against children and vulnerable groups. Based on the available statistical data, there is no evidence that amendments of the Criminal Code resulted in prevention of crimes against children.

Therefore, in most cases, the focus should be on rehabilitation, instead of retribution, while, above all, efforts should be made to establish a more tolerant social environment and introduce adequate mechanisms for conflict resolution. Hence, society should, first of all, focus on precluding the causes and crime prevention, instead of repressive measures.

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