

# Gravity of the Act as an Effective Tool for Differentiation between Traffic Crimes and Offences or Just Another Stumbling Stone\*

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## Abstract

After refreshing basic knowledge about the states right to punish and to define when and how it will be the particular conduct punished and then through well known different approaches in the delimitation between crimes and offences, our efforts in this article are focused on question, how to establish prior mentioned distinction in cases where the road safety is on the line. Namely if the weight of some individual act is by prevailing quantitative delimitation its main distinctive sign, there must be taken into account not only its outcome, but also perpetrators conduct, which could be more or less risky. On the one hand this simple fact helps us in delimitating serious acts from less serious, but on the other, when the conduct and its outcome are not proportionate, takes us to a new areas, where the prior delimitation becomes quiet uncertain. In such cases it is necessary to seek additional criteria by which to get a scale with most and less serious traffic delicts and thereby separation between traffic delict as a crime and offence. Without that trespassing the prohibition of dual criminality is difficult to prevent. Designing two major crimes against the road safety in Penal code, slovenian legislator did not go down this path . Criminalization of the first act by weight of the effects and the second by weight of conduct, gravity of the particular

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act as a whole becomes unclear and internally inconsistent, while in the light of discussed delimitation demands special judicial attention toward dual criminality prohibition, which could be obstructed.

**Keywords:** right to punish, criminality, categorisation, differentiation, crimes, offences, road safety, incriminations, conduct, effects, dual criminality, legality principle, functionality.

## I. Introduction

To make my task easier, for a starting point I've borrowed some general remarks from theory of law and the state about states right to punish (*ius puniendi*). As we are all aware this is one of the corner stones of the state sovereignty as a factual and effective power over territory and its residents.<sup>1</sup> Without that right, state power can not be effectively executed, because there is no other guarantee, that the residents will voluntarily obey the orders of that state<sup>2</sup> and even less that will be respected from other surrounding states (outer sovereignty). In last case, if not from other reasons, than at least to prevent the expansion of damaging consequences, caused by ineffective power of one state, to another.

If the right to punish is by itself somekind of urge, the states in particular are rather free in decision in which cases and in which manner, this right should be accomplished. Decision depends upon the importance of interests, followed by the state or its expectations, what should be with the right to punish effectively achieved.<sup>3</sup> Greater the interests are, more likely the states right to punish shall be activated and *vice versa*. Similar situation is by expectations, which are after the majority treshold is reached, determing the goals and its number, with wich this right is justify. But the importance of interests and determined expectations could not be identify just through establishing right to punish on general, but also how this is in particular state further lawfully developed.

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<sup>1</sup> Pitamic L., *Država (The State)*, Cankarjeva založba, Ljubljana 1996 (1927), p.37.

<sup>2</sup> Robert S. Summers, *Form and Function in a Legal Sistem, A General Study*, Cambridge University Press, Cambridge, 2006, p.283.

<sup>3</sup> *Ibid.* p. 305.

## II. Categorisation of Criminality

When the decision about the importance of interests once is achieved or when the selected expectations are so justify, that they should be secured by punishment which is in its core still causing someone's harm, next step is in defining acts with which those interests or expectations are endangered and in finding proper response to those acts which should not repeat anymore. The first part of a mission is a kind of mixture between crime policy concepts about possible damaging effects of certain behavior and its formal positioning in different normative frames (incriminations), while the second part is more or less focused on setting counterweight to abolished inbalance caused by these behavior. After the mission is completed, we receive normative act, usually legal code, which already by its text, points on legislator attitude toward interests or expectations, standing behind the legal incriminations. Sometimes even layout of chapters in special part of particular code can lead to assumption that the legislator prefer one interes instead of another. For example in Slovenian Penal Code (*Kazenski zakonik*), with small exception of crimes against humanity, first chapters of its special part are reserved for crimes somehow connected with individual and his rights and after that crimes considering community as a whole. Even more such legislature's attitude shows the type and level of penalties, where Slovenia is probably just one of the countries where defence power of the state is more valuable or in bigger interest than individual honor and good name. The difference between penalties, like for the Evaiding from defence duties as crime under Article 361 of the penal code and the crime of Defamation under Article 158 of the same Penal Code, although not huge, is still such that any other interpretation could probably be excluded. Finally, the legislature's diversified attitude toward crimes according their weight may be manifested even in the field of criminal proceedings. In Slovenia, for example, by significantly expanded possibilities of resolving cases by consensus (diversion), and within the various reductions of criminal procedure, which intentionally should be faster and less complicated than the regular criminal procedure, which deals with serious crimes.

In the above case as said legislature's attitude is recognizable indirectly, directly this attitude is recognizable when the acts are formally demarcated by their weight. As we know, the French Penal Code (*Code Penal*) from 1810 divided all criminal acts into crimes, misdemeanors and offenses. A similar tripartite division was followed by the Austrian Criminal Code (*Strafgesetz ueber Verbrechen, Vergehen und Uebertretungen*) from 1852, while today, for example in Germany we will meet the bipartite division of criminal acts in those which are *Verbrechen* and those that are *Vergehen*. Foundation of the division is in Article 12 of the Germans Penal Code, where the level of the sentence is proscribed. Notwithstanding between the legislations with the unitary system of criminal acts and legislations in which those acts are divided, for a sake of transparency warning should be noted, that we are dealing with categorizations of criminality within the same *species* as the epistemological unities. Why is this wrapped findings important?

Because of the general social development and development of state organization especially with an increased impact on relationships between individuals, which bursts out offences as violations of administrative law, spread through all areas of social life (French approach) or as infringements originating in a specific law of offences which, similarly as Penal Code for crimes, lays down the basic conditions for their criminality, as well as the basic pillars of its procedure (German approach).<sup>4</sup> Notwithstanding the differences in approaches, single fact is, that somekind of parallel criminality was obtained. Its nature was for a long time under disput, whether criminality for offences is a special one or is it just a part of criminality for crimes, without any differences that make possible separation justify.

### III. Differentiating Criminality and its Significance

Attempts to make the crimes and offences qualitatively delimited are several and well known. Following with one, it was necessary to

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<sup>4</sup> Šelih A. Prekrški v primerjalno pravni perspektivi (Offences in Legal Comparative Perspective), Zbornik 1. dnevi prekrškovnega prava, GV Založba, Ljubljana 2006, p. 176-177.

look for differences in the very purpose of penal law in the protection of legal interests, such as the foundations of social peace, while offences protect the missions of public administration in providing social welfare. On the other is the difference in outcomes when with crimes legal goods are damaged, while with offences, they are only under an abstract threat. According to other authors, and these are in the majority, the difference is in unlawfulness, where everyday offence has no concrete content. They are pure breaches of the law without its substrate.<sup>5</sup>

The present state in penal theory shows that the above attempts are about to be exceeded. Social peace and social prosperity are especially in cases of crimes *malum mere prohibitum* often two sides of the same coin. The same applies to the effects, where it is clear that even in the case of crimes merely abstract endangerment is possible like by Transporting or carrying explosives or dangerous goods in contravention of the regulations under Article 319 slovenian penal code and when it is not clear why the legal interest by perpetrating offence could not be damaged as by any other crime. Qualitative delimitation between crimes and offences is even more ambiguous by unlawfulness, where it is impossible to know, when exactly the legislator was led by the substance and when he was already satisfied with the form in achieving its goals or why in fact in such cases the particular incrimination is necessary. In short, anything would seem that crimes and offences could be qualitatively delimited, after the above condensed presentation turned out to be unreliable. Such as the necessary distinctive character (*differentia specifica*) of deferred income is simply not sufficient and could not be accepted.

Having in mind the upper failure, quantitative distinction between crimes and offences works logical. If these do not differ according to species, the difference between them, could only be within the same species. But even in that case we have to register the

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<sup>5</sup> For overview see *Karakaš A.*, Vprašanje upravičenosti gospodarskih prestopkov kot samostojne kategorije kaznivih ravnanj in problem prekrškov z vidika načela zakonitosti (The Question of Justification of Economical Contraventions as an Autonomous Category of Criminal Acts and Problem of Offences from the Standpoint of Legality Principle *Pravnik* 6-8/1996, p. 393-395.

characters with which this new distinction is justified. The most common character which could be met is the weight of the act. By itself, the weight is not something uniform, but rather the circumstance, which could be estimated by the amount of the penalties for the act at the normative level and in the next stage at practical level, after a series of other circumstances related to the actual conduct, unlawfulness, guilt and in particular to the effects, caused in the outside world.<sup>6</sup> As smaller as possible are, the greater the likelihood that the individual conduct constitutes an offence and *vice versa*. The problem in this case is that the assessment is by definition not precise, so that the distinction between crimes as graver acts and offences as lesser one is actually uncertain. Probably therefore the classification of offences in the so-called penal law in its broader sense,<sup>7</sup> which implies their criminal nature and at the same time that they should not be equated with the crimes which are a core element of penal law in the strict sense.

However successful classification into broader penal scheme still can not remedy the problems implied by the same demarcation. Namely if the boundary between crimes and offences is too loosely or too fluent, the overlap in their criminalization seems inevitable. The overlap almost by itself raises a constitutional issue of dual criminality (*ne bis in idem*), which is tangibly more acute in cases where the criminality of the crime and the offence is based on the same blanket stipulation and where the perpetrators behavior is fully included in the described crime.<sup>8</sup> Second constitutional legal question which is open after the boundaries are too fluent is the legality of such a regulation as a whole. It is quiet clear that the overlapping increases the number of criminalization and it is also clear that such an arrangement can not be transparent or thus determined that the individual is without fear knowing that his conduct in any case is not be punishable in any sense. Finally, and by no means least important

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<sup>6</sup> Selinšek L., Kazensko pravo splošni del in osnove posebnega dela (Penal Law, General Part and Basics of the Special Part), GV Založba, Ljubljana 2007, p. 284.

<sup>7</sup> Novoselec P., Opći dio Kaznenog prava (General Part of Penal Law), Sveučilište u Zagrebu, Zagreb 2004, p. 59.

<sup>8</sup> *Ibid.*

constitutional issue is equality before the law, when at high porousness is much likely that individuals will be for the similar act once treated as offenders of the crime and once as offenders of the offence.<sup>9</sup>

Besides unjustified inequalities on a broader level will be such perpetrators in the event of differences in the type and level of penalties quite specifically harmed. However, if the penalties are comparable, it will be difficult for offenders to find an excuse, that they were being dealt with faster, more streamlined, in short, with a smaller set of procedural guarantees as perpetrators of the crime.<sup>10</sup> In this regard, the recent practice of the European Court of Human Rights in case of *Maresti against Croatia*,<sup>11</sup> is unambiguous. The larger set of procedural assurances in proceedings for offences in consequence lead to a shift in the direction of the criminal proceedings, which deals with crimes and the possible transfer of jurisdiction from the administrative authorities to the courts, or at least such of their organization that the above mentioned assurances shall be fully respected.

#### IV. Delimitation of Criminality in Ensuring Road Safety

From the perspective of everyday life road safety is one of the conditions for participation in traffic. If this is not safe or if it dangerous, probability of presence in traffic is low, which in turn makes its volume can not be large. This is today during the general mobility of people, goods and information unimaginable. The first indication of the hazards of traffic, is the number of traffic accidents, but it is not the only one. For himself it is in fact insufficient, since the further informations are with particular accident blocked. Therefore

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<sup>9</sup> *Bonačić M./Rašo M.*, *Obiležja prekršajnog prekršajnog prava i sudovanja, aktualna pitanja i prioriteti de lege ferenda* (Elements of Law of Offences and its Proceedings, Actual Questions and Priorities *de lege ferenda*, Hrvatski ljetopis za kazneno pravo i praksu (Croatian Yearbook for Penal Law and Practice), p. 444. See also CASE OF TOMAŠEVIĆ v. CROATIA (Application no. 55759/07) at <http://hudoc.echr.coe.int/eng>.

<sup>10</sup> *Ibid.*

<sup>11</sup> CASE OF MARESTI v. CROATIA (Application no. 53785/09) at <http://hudoc.echr.coe.int/eng>.

we should deal with infinitiv number of traffic accidents to confirm that danger, which is rather unrealistic. From here, we have to make a shift in the time immediately before the accident to determine its etiology and to find measures to prevent it or locate conditions in which the accident would not have occurred. On such basis, together with a certain number of cases, system of measures is derived, with which the road safety should be ensured and already as a distinct concept identified. As we know, those measures are divided into three major groups. The first are measures aimed at detection and enforcement practices by which alone the transport participants achieve the highest possible safety impacts (education). The second group includes measures which prevent the behavior that traffic accidents are not directly related (prevention) and the third group are actions to eliminate those practices which are regularly behind accident. Building such a system in countries with solid social structure is pyramid whereby the bottom, the widest part illustrates education, secondary prevention, top, smallest repression as a last resort, intended for the most outstanding examples. That the last is subject of penal law in the strict sense is not likely to be any doubt, and we will not be much mistaken in supposing that the prevention of practices that traffic accidents are not directly related offences should be covered as part of the penal law in the broader sense .

But as life can not be compressed in a separate mold as well as the two courses do not have separate armors, out of which even fenomenologically they could not exist. We want to stress that, although traffic accident the worst possible outcome of the prior risk or dangerous situation is, its dimensions in all cases will not be the same. Even more, in some cases, the accident (for example, collision of cars in the shopping centers garage) will be barely perceptible event, in which participants below do not be reluctant to engage in future anymore. It is clear that this is not one of outstanding examples, which claimed the attention of the penal law in the strict sense, but again there is the question of what to do when anyone was in the upper case physically injured. The crime is still excluded, but it is already an act that exceeds the mere threat to what was originally booked for offences. On the other hand, it is difficult to exclude life



situations in which, because of participant's conduct occurrence of an accident is very likely, however, that due to some lucky coincidence will not occur. If the case is noteworthy only because of traffic accidents itself and its dimensions, then in the above collision in the garage can not be subject to penal law in the strict sense. A bit different situation is, when the excessiveness of the case is judged not only by the impact, but also by the participant's conduct which would otherwise be in another, less happy outcome resulted in an accident with serious dimensions. We are facing with the problem where the clean, pristine positions are carried out only at its extremities. If the offender's conduct is outstanding and if the effects of that conduct are also outstanding, then it is quiet obvious that we are dealing with crime. In the opposite case, when conduct and effects are not something outstanding and if the conduct is unlawful, anything other than the offence is out of our discussion. The problem sharpens when we are dealing with outstanding conduct and common effects and, in particular, when the conduct is nothing special, but the effects are on the contrary very striking. Then it is necessary to find criteria for gradualisation conducts and its effects, without which the crimes and offences in traffic as very dynamic category are difficult to distinguish.

## V. Slovenian Attempt to Solve the Problem

Hopefully I think that this is not occasion to represent the whole historical development of slovenian criminality considering traffic safety,<sup>12</sup> neither to fully discuss about the current state of our home legislation. This would be for me an impossible task and beside the topic would be unduly exceeded. Therefore, I would like to concentrate on just some fragments of that legislation which I prefer that should not be ignored. In Slovenia, the traffic safety is a part of the public safety secured through the criminalization of crimes in the penal code and through offences such as mainly are set out in the Law on road traffic rules (*Zakon o pravilih cestnega prometa*).

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<sup>12</sup> For full overview see *Dežman Z. in Korošec D. et. al. Cestnoprometno kazensko pravo (Roadtraffic Penal Law)*, GV Založba, Ljubljana 2013, p. 49-65.

Considering incriminations in penal code, the actual underlying crimes are causing an accident through negligence in Article 323 of the penal code and dangerous driving in road traffic according to Article 324. In terms of topics, we discuss, by the first crime accent is put on the effect that is caused, which is a car accident with serious injuries in basic form or in death of one or more persons in qualifying form. By the second crime in its center is list of hazardous conducts, which should result in an immediate danger to the life and body of any person in their basic form or in the qualified form injury, serious injury or the death of one or more persons. A special feature is that the part of that imminent danger is also considering a traffic accident as a change in the outside world.<sup>13</sup> Result is a kind of a formula dangerous conduct, a change in the outside world and then specific risk of further change, all of which give the prohibited consequence as a whole a so far unknown quality.

Comparison of both incriminations with problem above, appears that the first criminalization cover cases where the offender's conduct otherwise is not outstanding, while the effects are striking. In the second criminalization we have in its first part an offender's outstanding conduct and then effects, which are not outstanding as a whole, but just in part (car accident) which is identical to the previous criminalization. In the second part of this incrimination we need the outstanding effects which are completed since the damage and death without an car accident can not be caused. Anything less than the above may be subject only to offences as a result of absent direct connection with an accident or because of its milder consequences, which are generally considered to be easier to acts.

The incriminations in penal code, although individually reasonable, are rather incomplete. If is it right that any conduct, which causes traffic accident with serious injury or death is crime, than it is not clear why a particularly dangerous conduct without an accident would not be punishable. Especially, such conduct is almost regularly a kind of introduction to a car accident or because, where

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<sup>13</sup> See *Ambrož M./Jenuš H*, Kazenski zakonik, Razširjena uvodna pojasnila (Penal Code Expanded Introductory Explanations), GV Založba 2012, p. 212.

in the case of lesser dangerous conduct, car accident is likely to be an exception. The second criminalization indicated otherwise inconsistencies resolved by that particularly dangerous conduct and traffic accident with no further consequences for its participants merely exception rather than the rule. Again, on the other hand, those further consequences are without an accident, in practice very difficult to prove. According to established, it appears that incriminations lives their own life and that it would be in terms of regulatory consistency, and in particular the necessary gradualisation, more appropriate, if they were combined in one incrimination. But because of the actual gap between non distinctive and outstanding conduct and because of the differences in quality of its effects, yet is not possible. If the legislator's attention is focused on the danger of conduct then everything which is not dangerous, goes to offences, regardless of their impact and weight. This is due to possible follow-up, even fatal consequences arising from traffic accidents unacceptable, because it would be with offences as minor criminal act incriminated something, which is in effect serious. If the legislator's attention is focused on the result, then the offence includes anything that is not a traffic accident with injuries result. This as we have seen in Article 323 it is not excluded, but in the same time is not consistent, because on the one hand incorporates conduct, which rarely causes traffic accident and excludes danger conduct, with which in some case traffic accident (luckely) did not occur.

At the end offences as they are incriminated in the above mentioned rules on road traffic are left to discuss. They are not exelerrated as forms of conduct in Article 324 are. It means that each could be separated only in effect when you have one with result in an accident, but with no further consequences from the Article 323 and 324 and others that have been completed by the mere execution. In the latter case problems with overlapping incriminations from penal code and with dua criminality are not expected, while in cases of offences with traffic accident those troubles are possible. If an offence which was carried out by specially dangerous conduct causes a traffic accident, then it will, at least in most cases, overlap imminent danger for life or body from Article 324, which would, as stated by traffic

accident easiest to prove. Quite consistently correct objection is that the cases of traffic accidents without present danger, are not excluded, but then, this is subject of demanding evidentiary proceeding, similar as in the case of the above crime, where should be the present danger proved despite the fact that traffic accident was not caused. However, in any case we are considering on two levels elementary the same subject, which as such, should be in one case closed.<sup>14</sup>

## VI. Conclusion

Quantitative delimitation between crimes and offences, although now widely adopted, it still requires some caution. Order in criminal law doctrine does not guarantee the order in normative application when it is already due to their diversification difficult to control, why particular behavior was classified as offence under what circumstances was considered to be less serious and whether it was accordingly required the sanction. Latest even more, because the disproportionality in prescribed penalties for offences actually denied quantitative delimitation as a method, which mean's the fusion of all criminal activities in one form, which must be treated all the same. This is from the point of legality principle due to lack of transparency of the system outside and because inside substantive disparities, unimaginable and from the perspective of demands deriving from constitutionally protected right to judicial protection not feasible. A similar, but less extensive effects of the quantitative delimitation is denied in the case of overlap between the criminalization of crimes and offences, which almost regularly causes dual criminality problem, which is already and also from constitutional point of view inadmissible.

In present contribution I have discuss about consequences as parts of delimitation between crimes and offences which are mainly understood as smaller and less importants unlawfull acts. I have found that the consequences for themselves as an instrument for

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<sup>14</sup> See CASE OF ENGEL AND OTHERS v. THE NETHERLANDS (*Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72*).

delimitation are not sufficient because they are also as a quality so different and in the same time that they are not the only quality with its special characteristics and restrictions with which the graveness of the act is determined. Their composing in one supreme criminalization, which will then be followed by a cascade of criminalization in relation to the graveness of the acts, is a task that's Slovenia has not yet been successfully fulfilled. From the perspective of the topic, our system is based on two incrimination's in penal code which are due its differences irreconcilable. This is for legal practice not very big issue, until we remember that in combination with offence we can relatively easy slip into problem of dual criminality, which demand that we have to built the criteria for delimitation between crimes and offences in any particular case. If we fail, there is very present possibility that someone will be punished for something more that he actually committed, but also, that he could get through with lesser punishment, that he desert. In neither case justice was done and in both cases states right to punish was unfunctional.

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