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Problems of the General Part of the Somali Penal Code

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Abstract

The Somali Penal Code [PC] came into force in 1964, almost 60 years ago. Over this period of time new crimes and complex forms of criminal activities appeared. This PC is expected to remain the main legal instrument in fighting crime. This situation dictates modernization of the Somali PC.

This article is focused on the General Part of the PC as more difficult, challenging and applicable to special penal laws as well. Improvement of some key provisions is proposed. The conservative nature of penal law has been taken into consideration. This is why abrupt changes are not recommended, as they might be counterproductive, especially in the current situation.

Keywords: Somalia, law, penal code, criminal offence, guilt, justification.

Introduction

The Penal Code of the Somali Republic [PC] was approved by Legislative Decree in December 1962, but came into force on 3 April 1964 when it replaced the 1930 Italian Code, then applicable in Somalia, and the Indian Penal Code of 1860, which was applied in Somaliland. This PC has been in force for almost 60 years. Over this period of time significant changes occurred. Penal law theory made remarkable progress. Also, new crimes and complex forms of criminal activities appeared. In response, the international community recommended and many foreign countries introduced a number of new penal provisions to oppose them.

The current situation dictates modernization of the Somali PC as well. It is expected to remain the main legal instrument in fighting crime. The de-codification policy, which has been followed lately[1], should not be encouraged, as it is likely to create difficulties to both lawmaking and application of the law. The innovation of the Somali penal law through special laws, though acceptable under Article 14 of the PC of Somalia, shall be truly exceptional and individually justified. In general, the necessary new penal provisions should be inserted in the Somali PC[2].

This article is focused on the General Part of the Somali PC as more difficult, challenging and applicable to special penal laws as well. Improvement of some key provisions is proposed. They concern the application of the PC, the criminal offence in general and the main justifications for crimes.

The conservative nature of penal law has been taken into consideration. This is why abrupt changes are not recommended, as they might be counterproductive, especially in the current situation. The aim of the recommendations is to ensure a smooth improvement of the Somali PC

which will not create serious difficulties to the judicial actors who shall apply this Code.

I. Application of the Penal Code

A. According to Article 3 (1) of the Somali PC, "*(Persons to Whom the Penal Law Is Applicable). Except as otherwise provided by national or international law [6' Const.], the Somali penal law shall be applicable to all, citizens or aliens, who are in the territory of the State [4 Const. 4' P.C.]*".

The initial words of this Paragraph "*except as otherwise provided by national or international law*" are hardly justifiable. They are misleading and it would be wise to delete them. Persons who seem to be excluded from the operation of the penal law in the territory of the State are those who enjoy procedural immunity until withdrawn[3]. They cannot be subject to any criminal repression: be prosecuted, tried, punished and/or detained, e.g. by the virtue of Article 31 of the 1961 Vienna Convention on Diplomatic Relations (Somalia acceded thereto on 29th March 1968).

However, this is not sufficient to conclude that the PC is not applicable to the persons who enjoy immunity. On the contrary, because the PC is applicable to their offences also, the accepting country, incl. Somalia, may expel such persons by declaring them *persona non-grata*. Otherwise, the accepting country would hardly have a solid legal basis to argue that their acts or omissions constitute unacceptable conduct deserving expulsion. Finally, such persons may be held criminally responsible when the sending party (country or international organization) decides to withdraw their immunity. If in such cases the sending party's withdrawal causes also the applicability of own penal law to the crimes of these persons, it would mean that the action of the PC is dependent on individual foreign decisions, which is absurd.

Actually, the immunity of the aforementioned persons makes sense only if the PC is applicable to them; otherwise, they do not need any immunity. Therefore, immunity presupposes the applicability of the PC. It is true that, after all, there would be no criminal repression against such persons. However, this is not an argument in support of the non-applicability of the PC to them. Children under fourteen years of age are also free of any criminal repression. This does not mean, though, that the PC is not applicable to them. If it were not, they cannot benefit from its Article 59 (Persons under Fourteen Years of Age): "*Whoever, at the time he committed an act, had not attained fourteen years of age [177 P.C.], shall not be liable [47 P.C.]*." The fact that only one provision exists, this favourable one, does not change anything. The PC, nevertheless, is applicable to such children as well.

This is why the PC needs a much simpler provision than the existing Article 3 (1); it should be a provision without any conditions in its text. Good examples are the corresponding German and French penal rules. Thus, pursuant to Section 3 of the German PC, "*German criminal law shall apply to acts committed on German territory"*. Likewise, Article 113-2 (1) of the French PC reads: "*French Criminal law is applicable to all offences committed within the territory of the French Republic"*.

B. Article 3 (2) of the PC reads as follows: *The Somali penal law shall also be applicable to citizens or aliens [4 P.C.] who are outside the territory of the State [4 Const.], within the limits established by the said law [6, 7, 8, 9 P.C.] or by international law [6' Const.]*[4].

The last words in the text "or by international law" might be deleted. They mean that international law may directly determine the extraterritorial application of the PC. However, this is not true. Actually, it is the other way around.

Contemporary international law and, particularly, multilateral conventions require from Parties to produce criminal law provisions through their parliaments for the purposes of criminalizing certain conducts in their PC-s (acts and/or omissions) and/or expanding the extraterritorial application of their PC-s to such conducts. This is the only way to make the own PC applicable "*outside the territory of the State*" as only the national law can yield such a result – on its own or through the implementation of the respective international convention. If such a convention exists, it solely puts in motion the national legislative mechanism for the production of the result.

For example, Article 15 (a) of the UN Convention against Corruption reads: "*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties…*" Obviously, until the adoption of the said measures by the national legislation, the respective criminalization cannot occur. Also, pursuant to Article 42.1 (b) of the same Convention, "*Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when ... The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed*". Obviously, until the adoption of the said measures by the national legislation, the respective criminal jurisdiction cannot be established.

Moreover, when it comes to the extraterritorial application of national criminal laws, conventions, often, give only recommendations for

establishing extraterritorial jurisdiction. Thus, Article 105 of the UN Convention on the Law of the Sea stipulates that

> *"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed..."*.

Therefore, the country which apprehends the pirates may (not shall) establish own extraterritorial jurisdiction over the piracy crimes in this situation. Hence, the duty of Somalia as a Party to this Convention is to solely consider the option of expanding its national criminal law to acts of piracy in the aforementioned situation. It is unthinkable that the Somali legislator would state in general that it unconditionally accepts in advance whatever such multilateral conventions may recommend by converting it in advance into mandatory law.

Actually, it might be only the other way around; Somalia is not obliged to follow recommendations, such as the one in Article 105 of the UN Convention, let alone accept their direct application by making them mandatory legal provisions without any the legislative approval of each by the Parliament. The acceptance of Article 105 depends on the national penal law provisions, which govern the territorial application of the penal law as the recommendations might be materialized only through their texts. In view of thereof, the parallel reference to international law in Article 3 (2) of the PC is redundant and misleading. This is why it should be abandoned.

II. The Criminal Offence

A. The *Actus Reus* (the punishable conduct)

When does any punishable conduct (act or omission) exist? As preparation has not been criminalized [see Articles 18.1 and 76 of the PC], the attempted crime (the attempt) is the first act/omission to indicate the existence of punishable conduct.

According to Article 17 of the PC, "*(Crimes Attempted) A crime shall be considered attempted where the act or omission on the part of the offender, unequivocally directed towards causing the event [19 P.C.], has not been entirely completed, or where the event has not resulted [125 P.C.]*".

To define attempt the text resorts to the so-called 'material criterion'. Essentially, this criterion means that the interest (value), protected by the criminalization of the respective act or omission, is in some immediate danger. This danger to the object of the crime has not yet amounted to any direct negative consequences on it. This criterion successfully distinguishes attempt from accomplished crime.

However, the bigger problem, usually, is to distinguish between preparation (unpunishable under this PC) and attempt rather than attempt and accomplished crime. If this is valid also for Somalia, the attempt should be delineated more clearly in the text of this Article. It is to be particularly highlighted that, unlike, preparation, attempt is a part of the respective accomplished crime (this is why the latter consumes the former), "*a commencement of the performance"* – Article 53 (1) of the Indonesian PC, "*perpetrating all or part of"* its constitutive acts– Article 16 (1) of the Spanish PC. It, more or less, contains the ingredients of the accomplished crime provided by the legal description of the crime, consumes them being "*a beginning of its execution"* –

Article 121-5 of the French PC. An attempt is the undertaking of the initial perpetration of the crime; the start of its consummation. It is an activity which, more or less, fulfils the legal description of the respective crime and in particular, the specific *conduct* (the 'executive conduct') of the crime outlined in the legal description – Article 13 (1) of the Polish PC. Unlike attempts, preparation, though also an overt act, does not go that far to begin satisfying the legal indications of the executive conduct of the crime[5].

Thus, attempt exists if the offender's activity has begun satisfying the legal indications of the specific conduct of the respective crime. This is the so-called formal or technical criterion for the existence of attempt. If, however, the executive conduct is outlined too broadly or/and unclearly, e.g. as in the case of murder (Article 434 of the PC), then the material criterion under the present text of the Article 17 comes into service as an auxiliary one. This material criterion, actually, indicates the satisfaction of the 'formal' one. It assists the interpreter of law in finding whether or not a given activity has begun fulfilling the legal description of the specific criminal conduct. The fulfilling of this legal description occurs and therefore, the attempt takes place, whenever the activity produces an immediate danger to the interest (value), protected by the criminalization of the respective act or omission. Otherwise, if such danger has not yet been produced, no attempt takes place.

B. The *Mens Rea* (the Forms of Guilty Mind)

Article 24 (1) of the PC reads that "*A crime:*
a) *is with criminal intent, where the harmful or dangerous event which is the result of the act or omission is foreseen and desired by the offender as a consequence of his act or omission, and where the law makes the crime dependent upon such event [f. ex.: art. 434 P.C.];*

b) *is preterintentional or beyond the intent, where the harmful or dangerous event arising from the act or omission is more serious than the one desired by the offender [f. ex.: art. 441 P.C.]* ".
c) *is with culpa, or against the intent, where the event, even if foreseen, is not desired by the offender and occurs as a consequence of negligence, imprudence, lack of skill, or non-observance of laws, regulations, orders or instructions.*

Only *dolus directus* (the direct intent, commission with purpose) has been defined: in letter "a" of the text. *Dolus eventualis* (the indirect intent, committed knowingly) is missing. It is neither in letter "b", as the description there of "preterintentional (beyond any intent)" does not fit in any way what is meant by indirect intent, nor in letter "c", as its text envisages imprudence (recklessness), which is quite different, and negligence. Obviously, this gap should be filled in with a definition of indirect intent.

This intent, on the one hand, occurs where the offender does not desire the detrimental consequences of his act or omission as it is the case with the direct intent. On the other hand, indirect intent differs from imprudence (recklessness) as well. It is true that the two sorts of guilt (or the two *mens rea* forms/the two guilty minds) look alike. The common peculiarity of both, the indirect intent and the imprudence, is that the offender does not want the probable detrimental consequences of his act or omission although he knows that they are likely to occur.

However, when it comes to the indirect intent, the offender, in contrast to the case with the imprudence, is not against the occurrence of the detrimental consequences of his act or omission. Actually, he is indifferent to them, agrees with their occurrence as a probable additional (or side) result to what he wants to achieve through his conduct. In the case of indirect intent, the offender realizes that the probable

additional/side result is not excluded in his individual situation. The offender wants a specific outcome but knows that his action could also result in another outcome: some detrimental consequence(s). Nevertheless, he chooses to proceed with this conduct leading to the desired outcome.

For example, somebody wants to shoot a particular person in a crowded restaurant. The perpetrator would be aware that in shooting a particular person, he also runs a very real risk that other people in the restaurant are likely to be harmed, but, nevertheless, proceeds to shoot. If someone else dies as a result of the shots being fired, the court will find that the perpetrator had the indirect intent and will convict that person for murder (i.e. although the accused did not have the intention to kill that particular individual). The offender, therefore, is aware of the concrete probability of the occurrence of specific detrimental consequence(s) as an additional/side result of his planned conduct but being indifferent to it, proceeds with his activity.

The imprudence (recklessness) has quite a different meaning. Hence, it cannot cover indirect intent. The imprudent/reckless offender (the road traffic offences are the typical examples) is not any indifferent to the detrimental consequences of his act or omission. Actually, he is against their occurrence. The sole reason to perform his act/omission, which eventually led to them, was his conviction that they, though possible, would not occur in his individual situation. The offender was in his mind unfoundedly sure that (thanks to his own abilities or another excluding factor, the reliability of which was grossly overestimated) the likely detrimental consequence(s) would successfully be prevented from occurring. This is why, contrary to the case with indirect intention, the offender is not aware of the concrete probability of their occurrence.

III. Justifications (The Precluded Wrongfulness)

A. Private Defence

As per Article 35 of the PC, "*Whoever has committed an act, having been compelled by the necessity of defending his own or another person's right against the actual danger of an unlawful injury, shall not be punishable provided that the defence is proportionate to the injury [37 P.C.]*".

A.1. According to the text of this provision, the conduct of the actor may be qualified as a 'private defence' only if s/he "*has committed an act having been compelled by the necessity of defending his own or another person's right*". **Per argumentum a contrario**, if the defence was not necessary, e.g. the actor or the other assaulted person had the chance to run away from the assailant, no private defence may exist and no one is authorized to harm the assailant even to stop him/her. Hence, if the assailant is guiltily harmed, the act would constitute a crime. Nowadays, though, such necessity is not required; it is sufficient that the assault is contrary to the law to have the right to harm the assailant.

Therefore, the defence is also allowed when the actor or the third person can run away and if they harm the assailant within the boundaries of private defence, the act would be justified and would not constitute any crime. As per Section 22 (4) of the Hungarian PC, "*the person assaulted shall not be liable to take evasive action so as to avoid the unlawful attack*"; s/he is always allowed to defend him/herself against any such attack. This is why the words, indicating the subsidiarity of defence (when there are no other means to protect the endangered interest), should be deleted.

A.2. As everywhere, the defence shall be proportionate to the assault, which it repels. The text of Article 35, however, requires that *the defence is proportionate to the injury*.

Obviously, the word "injury" should not be used as it wrongly implies that the defending actor or the third defended person, if any, should be harmed to some extent before starting the defence; the harmful consequences of the assault should have begun occurring. This is not necessary, though; the start of the activity constituting the assault is sufficient. Either way, it is not possible to compare one activity, such as the defence, with the result of another, namely: the consequences of the assault. Actually, the opposing forces of defence and assault and the opposing values, targeted by defence and assault, are comparable.

For many years, until a century ago approximately, the private defence was seen as a defensive war, which had to be 'successful'. This is why only the opposing forces of defence and assault where compared: the stronger the assault, the stronger the defence might be. The private defence could be as strong as it is necessary to repel the assault. As a result, in 1920, the Supreme Court of Germany accepted that an apple thief might be killed if no other means exist to protect the apples from being taken away[6].

To avoid such conclusions nowadays the opposing values, targeted by defence and assault, are also compared. The contemporary concept is that private defence shall be 'successful' but to the extent, it is 'just'. The comparison of both the opposing forces and the opposing values as well has been made in the text of the law in Azerbaijan (Article 36.3 of the PC), Bulgaria (Article 12.2 of the PC), Uzbekistan (Article 37.2 of the PC). The private defence laws of these countries do not require any strict proportionality at all. As a result, the rule of the boundaries of private defence has the following general meaning:

- the force of the defence shall not be strikingly out of proportion compared to the assault force and
- the value of the interest harmed by the defence shall not be strikingly out of proportion compared to the value of the interest endangered by the assault as well.

The alternative option is to generally state in the text of the applicable law that the defence shall be carried out in accordance with the circumstances, e.g. "*to ward off the attack by means that are reasonable in the circumstances*" (Article 15 of the PC of Switzerland). Such text, containing no comparison criteria, is less specific but provides more freedom for its interpretation, both adequate and inadequate, regretfully.

B. Necessity

Article 36.1 of the PC reads as follows: "*Whoever has committed an act, having been compelled by the necessity of saving himself or others from actual danger of serious bodily injury, and where such danger has not been voluntarily caused by him or could not otherwise be avoided, shall not be punishable provided that the act is proportionate to the danger, and the person is not legally bound to expose himself to such danger"*.

According to this text, the conduct of the actor may be qualified as a necessitous act only if the danger "*has not been voluntarily caused by him*". P**er argumentum a contrario**, if the danger has been caused by him, the unlawfulness of his saving action shall not be precluded. It is unjustified and therefore, a prohibited action.

The Penal Codes of a limited number of foreign countries also contain such a 'no provocation' requirement. For example, Article 54 of the Italian PC and Article 25 of the PC of Bosnia and Herzegovina also prescribe that the state of necessity shall not have been deliberately

created by the actor to produce permission for himself to cause the harm, which occurred, under the disguise of a rescue operation.

However, any such deliberate creation of the danger together with the causation of the necessary final harm by the same person is regarded as an intentional crime everywhere. It is a crime even in countries where the 'no provocation' requirement does not exist at all. Therefore, the non-compliance with this requirement is not needed to make a crime out of such person's conduct. It follows that the 'no provocation' requirement (if it exists at all), does not contribute in any way to the criminalization of the person's conduct.

Actually, the 'no provocation' requirement criminalizes solely the provoked necessitous act of the person by excluding it from the justification under Article 36.1. It follows that the unlawfulness of such an act is not precluded. Hence, any infliction of harm for averting the danger, which has been previously provoked by the same actor, is prohibited. If nevertheless, such a necessitous act is performed, it may be repelled as unlawful through the private defence under Article 34 of the PC.

In this sense is also the provision of 3.2.2 in CHAPTER 3, Protection of Persons and Property at Sea and Maritime Law Enforcement of the US Commander's Handbook on the Law of Naval Operations. The provision allows foreign ships in distress to enter safe harbours but only if the conditioning distress is "*real and not contrived*"[7]. Otherwise, if it has been contrived (deliberately created), the foreign ship is prohibited from entering the harbour. If the ship tries to enter, it might be stopped by force…

The problem, however, is that such dangers rarely affect only the persons who have deliberately created them to misuse the state of necessity.

Usually, the danger affects third persons (solely or together with the creating person). Such persons have never participated in the creation of the danger, let alone for the purpose of opening the way to producing the final detrimental result. In view of thereof, it makes no sense to disallow the protection of the third persons. If the captain of the ship causes distress, the passengers shall not suffer: he shall be authorized to save them by entering the harbour and punished afterwards for the illegal border crossing into the country.

Exceptionally, the actor may have created such a danger, which affects him only. Again, however, it is difficult to argue that he shall be prohibited from protecting himself by excluding his necessitous act from the justification under Article 36.1. On the one hand, such exclusion may be counterproductive as it would further complicate the law on necessity. On the other hand, the civil law obligation, deriving from the situation, might be a sufficient deterrent. Because the actor was the intentional creator of the danger as well as the beneficiary of his own necessitous act for averting this danger, he shall pay the compensation to the victim of the final detrimental result, as this victim is the one at the expense of which the endangered values of the actor were rescued. This 'zero' benefit alone is likely to dissuade him from undertaking the whole operation.

Secondly, the necessitous act of the person, who provocatively created the conditioning situation, constitutes his positive post-criminal behaviour, actually. Contemporary penal law encourages such behaviour of offenders in the implementation of its growing preventive function. The necessitous act in question is such behaviour also; it is very similar to the voluntary withdrawal from attempt under Article 18.2 of the PC. Moreover, the two post-criminal acts may even coincide as the voluntary withdrawal from attempt might be performed through a necessitous act as well. For example, late in the evening, the actor has given poison to a whole family;

they are likely to die in an hour or so. The only way to save them is to break into the nearest pharmacy shop and take medicine, which would neutralize the given poison. Obviously, no one shall be allowed to stop the actor from saving the poisoned family in this only possible way.

Further on, since such a necessitous act, which constitutes a voluntary withdrawal, shall be allowed, there is no point in prohibiting other necessitous acts for the sole reason that they do not constitute any voluntary withdrawal. On the contrary, as the only peculiarity of their conditioning danger is the lack of the actor's desire to produce the respective derivative harm, this actor shall **per argumentum a fortiori** be allowed to prevent its occurrence.

Thirdly, the comparison of the provoked state of necessity with the **actio in libera in causa** [Latin: *produced incapacity*] under Article 49 of the PC also supports the conclusion that the necessitous act shall not be prohibited and repelled through the private defence. The two situations look very much alike. Both situations consist of two consecutive acts. The same actor performs them: the first act initiates a process leading to some harm while the second one materializes the existing danger by converting it into some actual harm.

However, when it comes to the *actio in libera causa*, the actor is held penally responsible only for his former act bringing himself to the situation of insanity/incapacity. He is not responsible for his latter act, although it is harmful as it does not save anything at all. This following act is unlawful and therefore, is an act, which may be stopped through the private defence. In contrast, the actor who provoked the state of necessity should not be stopped from performing his second act of saving the endangered value as this act is even socially useful. Because the criticized 'no provocation' requirement in Article 36.1 prompts the opposite conclusion, its removal from the text is strongly recommended.

This legal requirement might be a source of confusion; it signifies a bad understanding of the legal institution of necessity. It is counterproductive to require that the danger shall not have been created by the actor who averts it to protect the endangered interest. Even in such a case, he is authorized to protect the interest by causing necessary harm. As the actor saves this interest, his activity is socially useful and shall not be prevented through any private defence as 'unlawful conduct'. His rescue act is no less useful than similar acts by persons who have not caused the danger.

This does not mean, though, that in this situation, the actor does not commit any crime at all. The only problem is not to confuse his act of averting the danger with his previous criminal act of creating this danger and eventually resulting in the occurrence of some necessary harm. Obviously, he would be responsible for this previous act. The complication in the causal connection cannot preclude its criminality.

C. Justified (Reasonable) Risk

C. 1. The Somali PC contains no rule of justified or reasonable risk. In part, such a justification exists in Article 41 (3) of the Iraqi PC which outlines the medical risk. Other countries have rules on the economic risk, e.g. Article 13a of the Bulgarian PC. The PC-s of third countries have provisions codifying all risks into a single justification, e.g. Article 41 of the Russian PC.

This justification might be considered for introduction in the Somali PC as well. This is why a short explanation of it follows.

C.2. The Essence of Risk

To take a risk means to stand the possibility of causing some undesired harm while in pursuit of some desired benefit. The undertaking of “risky” activities is generally encouraged in cases when the desired result could

be socially useful. For example, society accepts the risk of speeding ambulances and fire engines in order to save life and property, but it does not accept a similar risk posed by a reckless motorist fleeing the police. Hence, when some risky act is under consideration, in deciding whether it is justifiable, its social purpose is of utmost importance.

"Danger" and "risk" are not synonyms. Risk always involves some danger, but not any danger constitutes a risk. When it comes to risk, the accompanying danger is never wanted. It is solely a necessary condition that the actor must tolerate while attempting to achieve some desired result. Therefore, the risk is a combination of danger and opportunity to achieve the result. This result shall be socially useful in order to make the justification of the act possible at all.

The risky act may end up with success. This happens when its overall balance is positive: the desired result has been achieved without any accompanying harm at all, or it has been accompanied by significantly smaller harm. In such situations, the act committed is socially useful, and the actor is likely to be granted some award only. Such risky acts are not relevant to criminal law, in general.

Certainly, a risky act may be unsuccessful: the desired result has not been achieved at all, or though achieved, has been accompanied by greater harm. Such situations of an overall negative balance require checks as to whether the risk was worth taking since it might have ended up in a failure. The production of the harm caused is generally prohibited by some provision of the PC and it must be determined as to whether there are sufficient grounds to exceptionally justify the performed risky act.

Thus, risk alone is not sufficient to make the act a criminal law issue. To this end, it is also necessary that the created danger should eventually materialize by causing some loss. For example, a driver of a fire engine

rushing to a fire is justified in exceeding the speed limit. Even with sirens wailing, the speeding engine may raise the danger of a traffic accident, but the risks of harm are greater if time is lost getting to the fire. In this situation, the driver's behaviour executes special permission for fire engines to take the risk of a traffic accident. The permission excludes the applicability of the general administrative restrictions regarding the speed. At this point, though, the driver's behaviour has not yet become any criminal law problem. It may become such a problem only if some serious harm actually occurs, e.g. the driver crashes into another car and cannot reach the burning building at all. These undesired consequences make the unsuccessful risky act fall under the legal description of some crime (e.g. damage or destruction of another person's property or economic mismanagement); thus, given the harm it causes, the act corresponds to the criminal law prohibition, expressed by the legal description. Only then the act actually becomes a subject of interest to criminal justice. Hence, the act must otherwise constitute a crime, if it were not a risky one. As any other justification in criminal law, justified risk "*simply reflects a permission - extended for whatever reason - to do what the criminal law otherwise forbids*"[8].

C. 3. Conditions

It would never be possible to fully avoid the risk of failure and undesired harm in any sphere of life because it would mean to stop all expeditions, experiments, tests of new vehicles/technologies, investments, rescue operations. As almost all such activities pose some danger, it may follow that all of them shall be prohibited. However, this is not possible.

On the contrary, in the name of the progress society has to tolerate certain dangers which accompany medical interventions, military operations, production of many goods, banking activities, etc. Nowadays, with the development of complex technologies, risk became a part of the human

progress that plays an important role in financing, banking, commerce, construction works, transport, science that requires investment, undercover operations by police and other law enforcement agencies, etc. In some situations, heavy losses occur, namely: death, injuries, destruction of property, financial losses. Inevitably, they will occur in the future. Nothing can fully prevent them from occurring.

In situations when serious harm occurs, competent judicial bodies shall make sure that the risky act was justifiable. For this purpose, they must find the right answer to the question as to whether it was worth taking the risk in the given conditions.If the answer is a positive one as the risky act meets the requirements for its undertaking, this risk is qualified as justified (also: permissive or reasonable). Such risk is unsuccessful but acceptable.

C.3.1. Conditions Relating to the State of Justified Risk

a. First of all, the state of risk can exist if there is some serious social need, which can be satisfied by achieving a specific result. There are two types of desired results that may justify any risk, incl. those that conclude with a failure. The first of them is to attain some significant positive change – knowledge, financial benefit, etc. through an expedition, experiment or investment, involving in any case possibility of loss. In such situations, the problem arises when and because society does not gain anything at all as the action results in inflicted losses only or it gains something but at the expense of significantly greater harm.

The other desired result that may justify a risk is to avoid some negative change – prevent damage from occurring through a rescue operation involving the possibility of losses. In such situations, the problem arises when and because the damage has not been prevented at all, as the action

resulted in inflicted losses only and the necessity rules are not applicable, or the damage has been prevented but at the expense of greater harm.

b. One is allowed to risk if there is no "non-risky" (not posing any danger) way to attain a socially useful objective that he wants. In view of this, justified risk resembles necessity as both are subsidiary in the aforementioned sense. In contrast to them, the private defence is not subsidiary since anyone is allowed to resort to it, even if he or the third person assaulted may run away.

c. The risk must be reasonable. It may be undertaken if it does not represent any pure adventure where the actor relies solely on luck to avoid failure demonstrating in this way insufficient concern for others. The actor should be aware that legal interests might be infringed, but his action is in pursuit of a socially useful goal. The risk should make sense. The planned action must be aimed at a result which is sufficiently serious and/or very likely compared to the possible harm.

The risk taken must be reasonable in accordance with two general criteria: a qualitative – how much the value of the desired result exceeds the value of the possible harm; and a quantitative criterion – the probability of achieving the desired result compared to the probability of causing greater harm. Thus, according to Article 13a (2) of the Bulgarian PC, "*In deciding the issue whether the risk was justified, taken into consideration must also be the correlation between the expected positive result and the eventual negative consequences, as well as the probability of their occurrence*". Where the risk constitutes some experiment with a physical person involved as a potential victim, his/her informed consent (for the risk assumption) is required in advance under most criminal laws regulating the risk.

It follows that, in contrast to the legal framework for necessity, risk law requires a comparison not only of the values of the two opposing results (the harms): the desired positive result and the negative result which actually occurred. Risk law also requires a comparison of the probabilities of their occurrence. Thus, the idea of the lesser evil, inherent in extreme necessity, is no longer sufficient when it comes to justified (allowed) risk. The quantitative comparison between saved and sacrificed values is insufficient to judge whether the risky act is justified or not. If solely the value criterion of extreme necessity were valid, the risky act would always be justified when e.g. one buys a lottery ticket for 10 dollars to win 10,000 dollars. However, once probabilities are also taken into account, the risky act may get the opposite evaluation, as the loss of the invested 10 dollars is inevitable (100% probability) while the probability of the gain is insignificant (1%, even less). Hence, this qualitative comparison between the probabilities of occurrence of the desired positive result and the undesired harm shall also be made to judge whether the risky act is socially beneficial justified or not.

Regardless of the insufficiency of the quantitative comparison between saved and sacrificed values, the general idea of proportionality stays as an objective characteristic of the risky act. The combination of the absolute value of the desired social result and the likelihood of its achievement must always exceed the combination of the absolute value of the harm suffered and the likelihood of its occurrence. The act would be "unjustifiable if the gravity of the foreseeable harm, multiplied by the probability of its occurrence, outweighs the foreseeable benefit from the conduct."[9]

C.3.2. Conditions Relating to the Act in Justified Risk (the Risky Act)

The leading peculiarity of risky action is that it is not successful. This makes the risk different from and even contrary to the necessity. First of

all, the risky act may be undertaken for attaining a positive change - a situation that has nothing to do with necessity and cannot, therefore, be governed by its rules. More importantly, the necessity rules always require success while the risk becomes a criminal law matter when the risky action is unsuccessful.

However, the harm to the interests affected shall not occur through arrogant miscalculation. Besides, the actor should have exercised necessary care to avoid the negative result. To this end, Article 13a (1) of the Bulgarian PC requires that the actor should have taken all necessary measures to prevent the harm from occurring or to reduce its volume, at least.

Conclusions

Somali penal law should be improved but this must be done gradually and carefully. Legislative authorities are not advised to make drastic changes in the current situation, let alone introduce a new PC immediately. The PC in force should be modernized and this might be the necessary and appropriate step towards a new PC.

De-codification of penal law should not be encouraged as it produces negative results:

a. The officials who have to apply the Somali penal law would need to construe multiple legal institutions, such as extraterritorial applicability, complicity, confiscation, etc. They have to learn and understand two or more parallel set of rules rather than address a single codified set of rules in the PC. The interested officials are obliged to compare these parallelly existing rules; otherwise, they will not assimilate the meaning of any well. Thus, the interested persons must work with two laws, drafted at different times and based, more or less, on different ideas.

b. Besides, those who have to apply the Somali penal law are likely to face or/and get involved in more disputes which would not occur if there had been no special laws at all. The interested officials shall have to decide which law is the applicable one in cases of conflict. It cannot be always clear what is covered by the special penal law and what has been left for the general PC, respectively.

Therefore, as a general rule, the innovations should be made in the existing PC. Their introduction through special penal laws should be avoided as it complicates unnecessarily the criminal justice system.

Notes

[1] Somalia is probably the only country with a codified penal law (own Penal Code), where all new criminalizations are produced by special penal laws. So far, I have not come across in Somalia any law [draft or in force] for inserting new criminalizing provisions in the Penal Code. Such provisions bypass it. Regretfully, by doing this, Somalia misses the well-known advantages of the law codification. See also Codifying the Criminal Law. Expert Group on the Codification of Criminal Law, Stationary Office (Govt Publication), Nov 2004, Dublin.

[2] I would highlight that its de-codification should not be encouraged as it produces serious negative results: (a) The officials (judges, prosecutors, police investigators, etc.) who have to apply the Somali penal law would need to construe multiple legal institutions, such as justifications, complicity, etc. They have to learn and understand two or more parallel set of rules rather than address a single codified set of rules in the Penal Code [PC]. The interested officials are obliged to compare parallelly existing rules; otherwise, they will not assimilate the meaning of them well. Thus, the interested persons must work with two laws, at least, written at different times and based, more or less, on different ideas. (b) Also, those who have to apply the Somali penal law are likely to face or/and get involved in more disputes, which would not occur if there had been no special laws at all. The interested officials shall have to

decide which law is the applicable one in a case of conflict. It cannot be always clear what is covered by the special penal law and what has been left for the PC, respectively. (c) Lastly, the special law may contain some rule, pertaining to the general part of the penal law. In such cases, it might be a problem to decide whether or not this rule may be used to better interpret also the provisions of the PC as well (along with those of the special law). Such a rule in a special law (e.g. in some Sexual Offences Act) may, for example, specify the requirements for the victim's consent. No doubt, this rule is applicable to all situations within the subject-matter of this special penal law. However, it cannot be sufficiently clear whether this rule might be used also in support of the application of Article 32 of the PC [Consent of the Injured Party] to situations with victims beyond the subject-matter of the above-mentioned special penal law. The PC is subsidiarily applicable in support of special penal laws, by virtue of its Article 14, but no provision prescribes the contrary, namely: the subsidiary applicability of any special law in support of the PC.

[3] E.g. Seid, Mohammed M. (2017). Criminal Law Manual for Somalia. PDF copy. Garowe, p. 23.

[4] See also Ganzglass, Martin R. (1971). The Penal Code of the Somali Democratic Republic: With Cases, Commentary and Examples, Rutgers University Press. New Jersy, USA, p. 7.

[5] Also Fishman, M. (2015). Defining Attempts, in *Duke Law Journal*, Durham, USA, Vol. 65, p. 345.

[6] Fletcher, George and Ohlin, J. (2008). Defending Humanity: When Force is Justified and Why. Oxford Univ. Press, p. 118.

[7] US Navy, US Marine Corp, US Coast Guard. The Commander's Handbook on the Law of Naval Operations, Eddition July 2007, Washington, p. 56. Retrieved May 22, 2019 from: https://www.jag.navy.mil/documents/ NWP_1-14M_Commanders_Handbook.pd

[8] Also Eser, A., 1976, Justification and Excuse, *American Journal of Comparative Law,* v. 24, p. 621-629

[9] Dressler, J., 2005, Criminal Law, p. 15. Retrieved November 11, 2016 from: https://lscontent.westlaw.com/ images/content/DresslerCrim Law. pdf

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