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**Prof. dr Sadmir Karović**

*Associate Professor, Faculty of Law, University in Travnik, employed at the State Investigation and Protection Agency,*  
*karovic.s@hotmail.com*

**Prof. dr Marina M. Simović**

*Secretary of Ombudsman for Children of the Republika Srpska, Full-Professor, Faculty of Legal Sciences of „Apeiron“ University Banja Luka;*  
*marina.simovic@gmail.com;*  
*https://orcid.org/0009-0008-3330-4023*

## The Criminal Offense of Possession and Enabling the Enjoyment of Narcotic Drugs in the Criminal Law of Bosnia and Herzegovina - Criminal Procedure and Criminal (Substantive) Aspect

**Abstract:** In this paper, the authors focused on the concept, that is, the objective-subjective conception of the criminal offense of possession and enabling the enjoyment of narcotic drugs in the criminal law of Bosnia and Herzegovina, with a special emphasis on the detection and proof of this criminal offense. When considering the definition of the concept and abuse of narcotic drugs, the general social context was taken into account in order to properly understand the criminal law (substantive) and criminal procedural nature of this incrimination. In the criminal law (substantive) context, this criminal offense is specific for the reason that the legislator prescribed the actions of incitement and assistance, which are, by their nature, the actions of complicity, in this case, that is, in the case of this criminal offense - as independent actions. In addition, an analysis of the legal text and a brief comparative review is made. According to the above, the paper points out uneven or different legal solutions in the entity criminal laws and the law of Brčko District of Bosnia and Herzegovina.

In the discovery phase, the complexity of gathering the initial information that indicates the existence of grounds for suspicion as a substantive legal condition for initiating and conducting an investigation, was emphasized. With regard to the implementation of certain criminal procedural actions, an update of the collection of necessary evidence, as well as the burden of proving this criminal offense and guilt, has been given.

**Key words:** narcotic drugs, incitement, aiding, criminal offence.

### 1. THE ABUSE OF NARCOTIC DRUGS - CONCEPT AND GENERAL SOCIAL CONTEXT

The abuse of narcotic drugs is not a social phenomenon that is new in our society, region or internationally, considering that the roots of this phenomenon can be found far in the past. Historical findings and data confirm that man, even from the most primitive form of human action and existence, has

shown a certain tendency to use, or abuse, various intoxicating agents. Within the area of the first human communities (Mesopotamia, Egypt and Greece), for the first time, the type of poppy used to obtain opium (a white liquid, a natural product from unripe poppy calyces) was grown<sup>1</sup>. Opium arrived in Europe from the Middle East as early as the 13th century, but it is believed that the wider use of narcotic drugs in Europe began in the 19th century, in intellectual circles prone to experimentation with substances that came from Egypt and India<sup>2</sup>.

In the context of the presence of narcotic drugs, it is necessary to establish and emphasize a clear differentiation between the use and abuse of narcotic drugs in different socio-historical periods. Narcotic drugs are also used for certain justified medical and veterinary purposes, scientific experiments and certain research, but under strictly prescribed or restrictive legal conditions and supervision by authorized entities. Additionally, for the purposes of simulated purchase and supervised delivery - police officers work under prescribed conditions to discover the crime and the perpetrator<sup>3</sup>.

On the basis of signed and ratified international documents of universal character, in modern Bosnia and Herzegovina, in addition to health (medical) laws and the State Strategy, criminal legislation also deals with the problem of combating the abuse of narcotic drugs<sup>4</sup>. In the catalog of basic terms, the legislator standardized, that is, prescribed the meaning of the term narcotic drug. This term means medical drug or a dangerous substance with addictive and psychotropic properties or a substance that can easily be transformed into such substance, if it is subject to control according to the international convention ratified by Bosnia and Herzegovina, or a substance that has been declared as narcotic drug by the competent institution of Bosnia and Herzegovina or the competent institution of its entities<sup>5</sup>.

An identical definition is also recognized in the Law on Prevention and Suppression of the Drug Abuse, according to which a narcotic drug is any substance of natural or artificial origin that is included in the list of narcotic drugs in accordance with international conventions on the control of narcotic drugs, or based on the decision of the competent authority in Bosnia and Herzegovina. The term narcotic drug, as used in this law, also includes psychotropic substances that are included in the list of psychotropic substances, if psychotropic substances are not specifically mentioned<sup>6</sup>. In addition, another significant law in Bosnia and Herzegovina that deserves special attention is the Law on Production

<sup>1</sup> Jovanović, M. (2016). Heroin - od lijeka do zloupotrebe, *Bezbjednost*, 58(2). Beograd: Ministarstvo unutrašnjih poslova Republike Srbije, 75.

<sup>2</sup> Bajović, V. (2017). Zloupotreba opojnih droga i legitimnost krivičnopravne zaštite, *Crimen*, VIII(3). Beograd: Pravni fakultet, Univerzitet u Beogradu, *Revija za kriminologiju i krivično pravo*, br. 2-3, 2017, Institut za kriminološka i sociološka istraživanja, 519.

<sup>3</sup> Herceg Pakšić, B., Kovač, N. (2020). Prekršajno pravo u službi suzbijanja zlouporabe droge u Republici Hrvatskoj: posjedovanje droge bez namjere stavljanja u promet, *Pravni vjesnik*, 36(1). Osijek: Pravni fakultet, Univerzitet u Osijeku, 88.

<sup>4</sup> Simović, N. M., Simović, M. M., Simović, M. V., Karović, S., *Zloupotreba droga u krivičnom pravu Bosne i Hercegovine*. Banja Luka: Grafomark, 141.

<sup>5</sup> Article 1(33) of the Criminal Code of Bosnia and Herzegovina, Article 2(35) of the Criminal Code of the Federation of Bosnia and Herzegovina, Article 2(34) of the Criminal Code of Brčko District of Bosnia and Herzegovina.

<sup>6</sup> Article 3 of the Law on Prevention and Suppression of Drug Abuse.

and Trade of Drugs of the Republika Srpska, which defines the meaning of the term narcotic drug in the same way<sup>7</sup>.

However, the very concept of narcotic drug in the public, mainly or most often, refers to or associates with its destructive role and significance, which is practically operationalized through various forms of abuse directed, primarily, against the most important good, and that is human health. Accordingly, criminal offenses in the field of drug abuse are not new, nor are they characteristic only for modern times. Namely, intoxicants and ways of operationalization of criminal activities have changed, modified and adapted to certain destructive intentions and needs in different historical periods. The general development of society, science, economy, information and communication technology, as well as prosperity in other areas, in addition to the undeniable positive side, directly or indirectly, have also influenced the possibility of easier, faster and simpler perpetration of criminal offenses. The situation is identical with the criminal offense of possession and facilitating the enjoyment of narcotic drugs, considering that this incrimination has existed since the first forms of drug abuse appeared.

The legislator recognized with reason justified and expedient need to prescribe criminal law protection against the drug abuse. Drug abuse is unambiguously one of the most complex problems of the contemporary policy of suppressing punishable behavior (the so-called criminal policy) and criminal law today in the world and in our country<sup>8</sup>.

However, criminal offenses in the field of abuse of criminal offenses, therefore this criminal offense as well as its incrimination, is linked to organized crime, more precisely, to specific forms of organized crime, taking into account the clear conditionality and mutual connection of socio-pathological phenomena. In addition, the practical experiences of authorities, entities and law enforcement agencies (police, prosecutor's office, court, social protection service, etc.) confirm the connection and conditioning of drug abuse with various socio-pathological phenomena (other forms of criminality, prostitution, vagrancy, alcoholism, begging, gambling). It appears that criminology is most called upon to provide a complete picture of the relationship between organized (but also of other forms of) crime and drugs. It is rightfully expected to indicate how to respond to the challenges these phenomena represent for modern societies<sup>9</sup>.

What is a constant or a common determinant when it comes to drug abuse is the acquisition of illegal profits by individuals and (or) groups as an ultimate goal, given that numerous studies confirm that these are enormously high gains (profits) that are very difficult to determine, specify and quantify on a national, regional or international level. Unfortunately, despite all the efforts of the international community, which has recognized a long time ago the international (planetary) component, i.e. dimension of this phenomenon that goes beyond national geographical borders, but also the intentions of preventive - protective actions of competent authorities, entities and law enforcement agencies at the national level, as well as of other available illegal capacities and resources in terms of strengthening the awareness of the harmfulness of narcotic drugs, this legal and social

<sup>7</sup> Article 3 of the Law on Production and Trade of Drugs of the Republika Srpska.

<sup>8</sup> Mitrović, Lj., Grbić-Pavlović, N., Tomašević, S. (2023). *Opojne droge u kaznenom zakonodavstvu Republike Srpske, Zbornik radova Centra za edukaciju sudija i tužilaca Republike Srpske*, 14(14). Banja Luka: Javna ustanova za edukaciju sudija i tužilaca u Republici Srpskoj, 8.

<sup>9</sup> Ignjatović, Đ. (2020). Organizovani kriminalitet i narkotici. *Crimen*, XI(2). Beograd: Pravni fakultet, Univerzitet u Beogradu, 250.

phenomenon is still present today and is an integral part of our everyday life with more expressed destructive consequences. The total number of drug users in the world is estimated at 185 million people, which is approximately 3% of the world's population, or 4.7% of the world's population if we look at the age group between 15 and 60 years<sup>10</sup>.

When it comes to the preventive - protective function of modern criminal law with regard to the prescription of certain criminal offenses and their sanctioning (qualifying circumstance), the focus of interest are young people, i.e. juveniles and children who deserve special attention for a reason, in order to achieve the adequacy of legal norm and its application in practice. In addition to family, which undoubtedly has a first-class preventive and protective role and function, it is necessary to emphasize the importance of other entities in terms of prevention, such as educational institutions, the media, sports teams, religious communities, the non-governmental sector, as well as individuals as authorities who, through their actions, can provide a significant contribution in terms of prevention<sup>11</sup>. Juveniles, i.e. children, are passive and active actors or participants in certain events related to drug abuse, so the legislator has rightly expressed a special sensitivity and a specific attitude towards this age category in terms of actions of competent authorities, entities and law enforcement agencies. In the criminal law, but also in the context of victimology, the availability of various intoxicants on the illegal market and lowering the age limit for young people or addicts, as well as for those who are exposed to narcotic drugs for the first time, is of particular concern. Most often out of curiosity and "cool" young/adolescent destructive patterns and trends of behavior they enjoy or abuse drugs and, thus, gradually, over time, they become addicts and enter the vicious (dark) world or social pathology and the circle of drug addiction, which is very difficult to get out of.

## 2. CRIMINAL PROCEDURE ASPECT - DETECTION AND PROVING

The complexity of detecting, researching and proving criminal offenses in the field of drug abuse refers, primarily, to the complexity of gathering initial information about the existence of a criminal offense as a starting point for criminal prosecution, i.e. for initiating and conducting an investigation, but also to the difficulty of collecting the necessary evidence for efficient conduct and conclusion of criminal proceedings, ultimately aimed at establishing, or proving the existence of a criminal offense and guilt<sup>12</sup>. With regard to the stages of the criminal proceedings in Bosnia and Herzegovina, the preliminary proceedings begin with the initiation and conduct of the investigation by the competent prosecutor, if the substantive law requirement is met, which is manifested in the existence of grounds for suspicion that a certain criminal offense has been committed. The grounds for suspi-

<sup>10</sup> Petković, Ž. (2019). Fenomenologija zloporabe droga u Republici Hrvatskoj s osvrtom na trenutnu situaciju u svijetu, *Kriminologija i socijalna integracija*, 17(2). Zagreb: Edukacijsko-rehabilitacijski fakultet, Sveučilište u Zagrebu, 118.

<sup>11</sup> Orlić S., Karović, S. (2020). Kaznenopravni aspekti zaštite maloljetnih lica od zloupotrebe opojnih droga u Bosni i Hercegovini. *Zbornik radova Pravnog fakulteta u Tuzli*, VI(1-2). Tuzla: Pravni fakultet, Univerzitet u Tuzli, 116.

<sup>12</sup> Karović, S., Simović, M. M. (2020). Kompleksnost otkrivanja, istraživanja i dokazivanja krivičnih djela iz oblasti zloupotrebe opojnih droga. Međunarodni naučni skup: *Droga i narkomanija: pravni, kriminološki, sociološki i medicinski problemi Palić*. Beograd: Institut za kriminološka i sociološka istraživanja, 245-259.

cion can be defined as the minimum probability based on specific circumstances<sup>13</sup>. In this first procedural phase of the preliminary proceedings, more precisely during the investigation, the necessary evidence relating to the characteristics of the specific criminal offense, is collected.

The legislator prescribed the competent prosecutor a managerial role in the investigation, but also a supervisory role over the work of authorized officials. Therefore, the prosecutor entrusts the enforcement of certain and various general and special investigative actions to authorized officials, including the questioning of the suspect. During the investigation the competent prosecutor has the possibility, i.e. the autonomy and independence, to decide which criminal procedural actions he himself will undertake, and which ones he will entrust for enforcement to authorized officials, or, possibly, to other law enforcement agencies - depending on the very nature and other specifics of the criminal offense.

The discovery of the existence of a criminal offense, but also the undertaking of criminal procedural actions in the investigation, in terms of collecting the necessary evidence, is primarily aimed at satisfying the evidentiary standard of reasonable suspicion. It also incorporates numerous, diverse and complex investigative and evidentiary activities of competent criminal procedural entities (competent prosecutor, authorized officials, professionals, expert, etc.). In this context, each specific criminal case, despite certain similarities and coincidences, is also specific and special in a certain way, so that the dynamics, choice and type of criminal procedural actions are conditioned by the nature and method of execution of the specific criminal offense, the personality of the potential perpetrator, the place and time of execution, as well as other determinants, that is, conditions and circumstances that determine the criminal matter.

With the general development of society in all areas of human activities, criminality also improves, with the aspiration of always making a step forward in relation to the real detection, investigative and evidentiary capacities, possibilities and resources of the criminal justice system<sup>14</sup>. Authorized officials who directly carry out certain criminal procedural actions, i.e. evidentiary actions and special investigative actions have a special role and importance in the stage of detection and collection of evidence in the investigation, in accordance with restrictive legal requirements, on the plan of implementing the orders and requests of the competent prosecutor who supervises their work after establishing the grounds for suspicion that a criminal offense has been committed.

### **2.1. Detection of the existence of a criminal offense**

Detection of the existence of the criminal offense of possessing and facilitating the consumption of narcotic drugs begins with the collection of primary or initial information that indicates the existence of grounds for suspicion that this criminal offense has been committed. That initial doubt is characterized by a low differential reach<sup>15</sup>. The sources

<sup>13</sup> Simović, N. M., Simović, M. V., Govedarica, M. (2021). *Krivično procesno pravo II (Krivično procesno pravo - posebni dio), Peto izmijenjeno i dopunjeno izdanje*. Istočno Sarajevo: Pravni fakultet Univerziteta u Istočnom Sarajevu, 30.

<sup>14</sup> Karović, S. (2023). Savremeni izazovi u krivičnom pravu Bosne i Hercegovine - očekivanja i stvarnost. In: *Upporednopravni izazovi u savremenom pravu – in memoriam dr Stefan Andonović*. Beograd: Institut za uporedno pravo, Pravni fakultet Univerziteta u Kragujevcu, urednik Jovana Rajić-Čalić, 641.

<sup>15</sup> Modly, D. (1998). *Priručni kriminalistički leksikon*. Sarajevo: Fakultet kriminalističkih nauka,

of the initial information, that is, the ways of finding them out that indicate the existence of this criminal offense are numerous and diverse, considering their nature, the phenomenological aspect of manifestation of this criminal offense, the type and origin of narcotic drug and other specifics by which this criminal offense is recognizable, valuing its criminal law autonomy and independence arising from the legal description of the criminal offense. Criminal work on detection of drug crimes and providing evidence on committed crimes depends primarily on the level of the drug market, which appears as the primary target of criminal investigation<sup>16</sup>.

In connection with the discovery of the existence of this criminal offense, in addition to other ways of finding out about it, it is necessary to apostrophize the discovery, but also the preventive role of citizens in terms of timely reporting to competent authorities, entities and law enforcement agencies (police, prosecutor's office). Most often, these are citizens who, in essence, have a real possibility to directly or indirectly recognize or notice certain behaviors or to gather certain information indicating the existence of this criminal offense. In this sense, citizens can also report available knowledge or information of an operational nature about the existence of a specific criminal offense anonymously (in writing, via an anonymous telephone line or in another way).

With regard to the legal nature of the prosecutor's concept of investigation in Bosnia and Herzegovina, in the discovery phase it is necessary to meet the requirement of the existence of grounds for suspicion that a criminal offense has been committed (as a substantive legal requirement) in order to initiate and conduct the investigation. In addition, authorized officials, by the nature of their jobs and tasks, have the real possibility to directly or indirectly gather certain initial knowledge or information indicating the existence of this criminal offense: 1) through an anonymous or pseudonymous report, 2) through operational work of authorized officials themselves, 3) by being caught at the scene, 4) through bodies, entities and law enforcement agencies (e.g. health/medical services, inspection services, social protection services, etc.), 5) through a collaborative network in the field (informant etc.), 6) through information and communication technologies (e.g. media, internet - social networks, etc.), 7) public information, as well as in other convenient ways by which it is possible to gather initial knowledge. In addition to the above, the competent prosecutor has the possibility to collect certain initial information directly, which obliges him to undertake certain activities in term of establishing the existence of grounds for suspicion and issuing an order to conduct an investigation.

The initiation and conduct of the investigation by the competent prosecutor directly depends on the timely detection of the existence of this criminal offense, i.e. the collection of initial information about the existence of the criminal offense, as well as timely and efficient conduct of certain criminal procedural actions (general evidentiary actions, special investigative actions) on the plan of collecting the necessary evidence. Most often, it is necessary to preliminary check the primary or initial knowledge from several sources at the operational level, in terms of validity of allegations, and to collect additional information, with the aim of establishing and complying with the existence of evidentiary standard - the grounds for suspicion that a criminal offense has been committed. After determining the existence of grounds for suspicion that a criminal offense has been committed, autho-

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Univerzitet u Sarajevu, 484.

<sup>16</sup> Feješ, I., Lajić, O. (2014). *Kriminalistička metodika*. Novi Sad: Pravni fakultet, Centar za izdavačku djelatnost, 218.



rized officials are obliged to inform the competent prosecutor's office, within the deadline prescribed by the law, in writing or orally, depending on the nature of the matter and the urgency of the actions<sup>17</sup>.

The essential problem relating to the (im)possibility and complexity of detection of the existence of this criminal offense arises from the very nature of this criminal offense, primarily from conspiracy, and the two-way interest relationship of the persons involved, on one hand of the person who undertakes a certain action of execution (e.g. a person who rents premises for this purpose) and the person who enjoys or abuses narcotic drugs. The aforementioned two-way interest, which is based on conspiracy, significantly complicates and limits the collection of initial knowledge, and thus the initiation and conduct of the investigation. In addition, it is necessary to state that it is possible during the application of certain investigative or evidentiary actions during investigation, i.e. detecting and gathering evidence for another criminal offense, to collect initial information relating to the possession and facilitation of enjoyment of narcotic drugs, considering the intertwining (combination) of incriminations, their mutual phenomenological and other conditionality and connection (e.g. very often human trafficking and drug abuse, etc.). With regard to this, in order to collect initial information about the existence of this criminal offense, in the investigative phase, it is necessary to establish a cooperative relationship with citizens, more precisely with certain persons who can realistically obtain, that is, establish a cooperative relationship and transfer useful intelligence information to authorized officials, respecting legal acts and by-laws that normatively regulate the collaborative relationship and direct actions of authorized officials (work with informants, etc.).

One of the ways of collecting additional information, in the field of discovering the existence of a criminal offense, is also the collection of useful information when conducting special investigative actions. With regard to the investigative function of authorized officials, it is noted that this function is extremely engaged and burdened with the conduct of numerous and diverse criminal procedural actions in the investigation in term of implementing the orders of the prosecution and the court, which is why they objectively do not have enough time to devote to their primary activities, which is revealing the existence of criminal offenses.

## **2.2. Conduct of criminal procedure actions - collection of evidence**

After issuing an order to conduct an investigation, the competent prosecutor also issues an order to authorized officials in order to conduct certain criminal procedure actions, more precisely general evidentiary actions and special investigative actions, depending on the nature of the criminal offense, the way in which criminal activities are operationalized, the profile of the potential perpetrator, i.e. the suspect, and other specifics that affect the decision of the competent prosecutor regarding the implementation of investigative and evidentiary activities. Given the restrictive legal requirements, authorized officials can perform certain evidentiary actions on the basis of the prosecutor's order (e.g. investigation, hearing of witnesses, questioning of the suspect), while for the implementation of certain evidentiary actions (e.g. search of the apartment, premises and person, temporary confiscation of objects), as well as for all special investigative actions, it is necessary to obtain

<sup>17</sup> For more details see Article 218 of the Criminal Procedure Code of BiH which stipulates the supervision of the prosecutor over the work of authorized officials. The entity laws and the law of Brčko District of BiH on criminal procedure contain the same provisions.

an order from the competent court. Special investigative actions deserve a special attention when it comes to efficient proof of criminal offenses which by their nature, method of execution, perpetrator and other criminal law and criminal procedure specifics, go beyond the application of classic (traditional) evidentiary actions in terms of efficient and legal detection and prosecution of perpetrators<sup>18</sup>.

Therefore, during the implementation of certain criminal procedure actions, it is very important to emphasize the legality of the collected evidence, given that the court's decision cannot be based on illegal evidence. In this context, the actions of competent criminal procedure entities, i.e. investigative and evidentiary activities, must meet restrictive legal requirements (court order, provide witnesses during the conduct of evidentiary actions, proper seizure, packaging, preservation and storage of collected evidence, issuance of a certificate of temporary confiscation of objects, preparation of record etc.).

However, with regard to the urgency of the actions, arising from the very nature of the criminal offense of possessing and enabling the enjoyment of narcotic drugs, the method of execution, the personal profile and other specifics, it is mostly or as a rule a matter of urgent activities of authorized officials in the field, which cannot be delayed due to possible escape of the suspect, complete or partial destruction or concealment of narcotic drugs or other items originating from a criminal offense or other circumstances. According to the above, due to urgency of the actions, the authorized officials do not have enough time to make a written proposal and to deliver it to the competent prosecutor, and to obtain a court order to undertake a certain evidentiary actions. Thus, the concrete evidentiary action (e.g. search of the apartment, premises and persons) is carried out based on the oral order of the judge for the preliminary proceedings. The application of certain criminal procedure actions in the investigation (investigation, hearing of witnesses, temporary confiscation of objects, search of the apartment, premises and persons, etc.) is aimed at collecting the necessary evidence (various types of narcotic drugs, money, mobile phones, computers, etc.). It depends on the results of the investigation, that is, on the collected evidence, whether the substantive law requirement for raising the charges, that is, indictment, which is manifested in the existence of a higher degree of suspicion – reasonable doubt, is met<sup>19</sup>.

### **2.3. Burden of proving the criminal offense and guilt (main proceedings)**

After the end of the investigation, raising and confirming the indictment, including the control role of the court (preliminary objections), the procedural transformation from the preliminary to the main proceedings, or more precisely the main trial, follows. One of the problems of a procedural nature regarding proving, that is, determining the existence of a certain criminal offense and guilt, is the mistaken identification of intelligence information and data, on the one hand, and evidence, on the other<sup>20</sup>. However, in this

<sup>18</sup> Karović, S. (2012). Posebne istražne radnje u krivičnom procesnom zakonodavstvu Bosne i Hercegovine, *Civitas*, 2(4). Novi Sad: Fakultet za pravne i poslovne studije dr Lazar Vrkatić, 27.

<sup>19</sup> Article 20(m) of the Criminal Procedure Code of Bosnia and Herzegovina. The criminal procedure laws of entities and Brčko District of BiH contain the same provisions.

<sup>20</sup> Karović, S., Simović, M. M. (2022). Aktuelna pitanja procesne prirode: dokazivanje krivičnih djela i krivice u krivičnom postupku Bosne i Hercegovine, *Godišnjak Fakulteta pravnih nauka*, 12(12). Banja Luka: Panevropski univerzitet „Aperion“, 124.



procedural phase, the adversarial principle (discussion) comes to the fore in its full capacity, having regard that the right to defense of the accused is exercised in full capacity in this procedural phase. The presentation of evidence is materialized through undertaking of certain procedural actions<sup>21</sup>. The burden of proof is on the competent prosecutor who, in the evidentiary proceedings, as central and (most) important part of the main trial, has the procedural task of convincing the court, based on lawfully collected evidence, of the justification of criminal law claim. In other words, it has to convince the court of the existence of criminal matter in true sense and of the guilt of the accused, in a reliable and indisputable way. On the other hand, the accused, i.e. his defense attorney, who conducts a formal defense through the prism of contradiction, tries to challenge (refute) the charges (lack of/insufficient evidence, illegality of evidence, the role of the accused, etc.).

### 3. OBJECTIVE - SUBJECTIVE CONCEPT OF CRIMINAL OFFENSE (COMPARATIVE REVIEW)

Analyzing the legal text of the criminal laws at the level of entities and Brčko District of Bosnia and Herzegovina, certain differences in legal solutions regarding the prescription of certain criminal offenses are noted, including the criminal offense of possessing and facilitating the enjoyment of narcotic drugs. Namely, this criminal offense is prescribed under Article 239 of the Criminal Code of the Federation of BiH, Chapter XXI – Criminal offenses against human health<sup>22</sup>; Article 208 of the Criminal Code of the Republika Srpska, Chapter XVII - Criminal offenses against human health<sup>23</sup>, and Article 233 of the Criminal Code of the Brčko District of BiH, Chapter XXI - Criminal offenses against human health<sup>24</sup>.

With regard to the normative content of the basic form, this criminal offense consists of inducing another person to enjoy narcotic drug or giving narcotic drug to another person so that he or someone else can enjoy it, making a room available for the consumption of narcotic drug or otherwise enabling another person to enjoy narcotic drug. It follows from the above that the legislator thus prescribed acts of incitement and assistance, which by their nature are acts of complicity, in this case, that is in the case of this criminal offense, as independent acts. The reason for this is that the enjoyment of intoxicating drugs itself is not a criminal offense, so even those actions, according to the general provisions on complicity, would not be punishable<sup>25</sup>. In case of this incrimination, criminal law repression is aimed at those who contribute to spreading of drug addiction, that is, at those who incite others with their actions or help them to consume narcotic drugs<sup>26</sup>.

<sup>21</sup> Knežević, S. S. (2023). *Krivično procesno pravo, opšti dio, Treće, izmijenjeno i dopunjeno izdanje*. Niš: Pravni fakultet Univerziteta u Nišu, Centar za publikacije, 310.

<sup>22</sup> Criminal Code of the Federation of Bosnia and Herzegovina - „Official Gazette of the Federation of Bosnia and Herzegovina“, nos. 36/2003, 21/2004 - correction, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017 and 31/2023.

<sup>23</sup> Criminal Code of the Republika Srpska - „Official Gazette of the Republika Srpska“, nos. 64/2017, 104/2018, 15/2021 and 89/2021.

<sup>24</sup> Criminal Code of Brčko District of Bosnia and Herzegovina - „Official Gazette of Brčko District of Bosnia and Herzegovina“, no. 19/2020 – consolidated text.

<sup>25</sup> Tomić, Z. (2007). *Krivično pravo II, Posebni dio, drugo izmijenjeno i dopunjeno izdanje*. Sarajevo: Pravni fakultet, Univerzitet u Sarajevu, 164.

<sup>26</sup> Orlić, S., Karović, S. (2020). Kaznenopravni aspekti zaštite maloljetnih lica od zloupotrebe opojnih droga u Bosni i Hercegovini, *Zbornik radova Pravnog fakulteta u Tuzli*, VI(1-2). Tuzla:

Execution actions are prescribed alternatively, that is, they consist of several actions of incitement or assistance. The perpetrator can be any person, while the existence of intent is required with regard to the subjective component. The offense is completed by undertaking the act of inducement<sup>27</sup>.

Through a comparative analysis of legal solutions, the basic difference is manifested in prescribed different qualifying (more serious) forms with regard to providing criminal law protection to juveniles, as passive subjects, but also in uneven, or different criminal policies. In the Criminal Code of the Republika Srpska, in addition to the basic form, two more severe and one less severe form of manifestation are prescribed, while the Criminal Code of the Federation of Bosnia and Herzegovina also prescribes the basic, more severe (qualified) and less severe, or privileged, form. First of all, in the very name of the criminal offense, in the criminal laws of the Federation of BiH and Brčko District of BiH, possession and enabling the enjoyment of narcotic drugs is stated, while the Criminal Code of the Republika Srpska prescribes the enabling the enjoyment of narcotic drugs, without possession. There are certain differences regarding the prescription of criminal sanctions, i.e. sentence of imprisonment, given that for the basic form of this criminal offense a sentence of imprisonment for a term of three months to five years is prescribed in the criminal laws of the Federation of BiH and Brčko District of BiH, and in the Criminal Code of the Republic of Srpska, for a term of one to eight years.

In addition to the above, the legislator normed the basic and qualified form in the criminal laws of the Federation of BiH and Brčko District of BiH in the same way. However, there is a difference in Article 239(3) of the Criminal Code of the Federation of BiH, in which the legislator prescribed that whoever possesses narcotic drugs without authorization – shall be punished by the sentence of imprisonment for a term of up to one year. Nevertheless, in Article 208 of the Criminal Code of the Republika Srpska, the legislator prescribed this criminal offense in a more versatile, precise and comprehensive way in case of more severe, or qualified forms. Namely, in the Republika Srpska, several qualifying circumstances are prescribed in term of criminal protection of juveniles. There is a real need to prescribe an identical legal solution in the Criminal Code of the Federation of BiH in term of prescribing a qualified (severe) form that would be conditioned, primarily, by the juvenile's age as a passive subject, then by a special place of educational character where actions of enjoyment of narcotic drugs are taken against juveniles, as well as the personal capacity of the perpetrator who, by taking advantage of his position, undertakes incriminating actions of narcotic drug abuse from the basic form of this offense against a juvenile.

In addition, in Article 239(2) of the Criminal Code of the Federation of BiH, the legislator prescribed a provision that is not precise and clearly formulated, because it is disputable what is considered as particularly serious consequences, which opens up some new questions. Following the above, in order to harmonize legal solutions, it is necessary to prescribe a qualified (severe) form in the Criminal Code of the Federation of BiH, which refers to causing death of a person who was allowed to enjoy narcotic drugs.

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Pravni fakultet, Univerzitet u Tuzli, 128.

<sup>27</sup> Govedarica, M., Petković, I. (2023). Krivičnopravna (materijalna i procesna) reakcija na zloupotrebu opojnih droga u Republici Srpskoj, *Zbornik radova Centra za edukaciju sudija i tužilaca Republike Srpske*, 14(14). Banja Luka: Javna ustanova za edukaciju sudija i tužilaca u Republici Srpskoj, 32.

#### 4. CONCLUSION

The abuse of narcotic drugs is not a novelty in society, given that since ancient times man has shown certain inclinations towards the (abuse) use of various narcotic drugs, and therefore society in different historical periods has tried to find adequate answers and solutions in terms of an adequate reaction to this criminality. With the development of the state, the institutional responses, that is, the reaction to this specific crime has changed and adapted to the current conditions and circumstances with the intention of prescribing adequate criminal law protection.

The criminal offense of possessing and facilitating the use of narcotic drugs, as an autonomous and independent criminal offense, is specific in its objective-subjective conception due to the fact that the legislator prescribed actions of incitement and assistance, which by their nature are actions of complicity, as independent actions in this incrimination. When it comes to the objective-subjective concept of this criminal offense, a comparative review of legal solutions in Bosnia and Herzegovina was carried out, critically pointing out certain differences, and apostrophing the need to prescribe more adequate criminal law protection.

The investigation, as the first stage of preliminary proceedings, begins with the collection of initial or preliminary information that indicates the existence of grounds for suspicion that a criminal offense has been committed. There are many and various ways of finding out about the existence of the criminal offense, in the discovery stage. Given the limitations of this paper, special attention in terms of criminal procedure is primarily focused on timely and efficient detection and proof of the criminal offense on the plan of collecting evidence necessary for the efficient conduct and conclusion of the criminal proceedings.

The transformation to the next procedural stage - the procedure of bringing charges and from the preliminary to the main proceedings, directly depends on the results of the investigation, more precisely on the evidence collected in the investigation (primarily, narcotic drugs). Appreciating the legal nature of the criminal proceedings in Bosnia and Herzegovina, the burden of proof is on the competent prosecutor who, at the main trial, i.e. during the evidentiary proceedings as its central stage, has the task of convincing the court beyond any reasonable doubt, i.e. in a reliable and indisputable manner, of the existence of a criminal case in real sense and of the existence of guilt.

Bosnia and Herzegovina, as well as the countries in the immediate vicinity, have numerous and various challenges in terms of combating the abuse of narcotic drugs, especially in the part referring to the timely and efficient detection and proof of criminal offenses in this area. In this regard, it is necessary to critically review and reconsider the existing legal solutions of a substantive and procedural nature through the prism of efficiency, with clearly expressed intention to adapt legal solutions to real needs in order to effectively and energetically fight against crime. In this sense, the general social context, the geostrategic position of Bosnia and Herzegovina and other specific social, economic, demographic and other conditions that favor the abuse of narcotic drugs in a certain way, should not be ignored.

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## Krivično djelo posjedovanje i omogućavanje uživanja opojne droge u krivičnom pravu Bosne i Hercegovine - krivičnoprocesni i krivičnopravni (materijalni) aspekt

**Sažetak:** U ovom radu autori su pažnju usmjerili na pojam, odnosno objektivno – subjektivnu koncepciju krivičnog djela posjedovanje i omogućavanje uživanja opojnih droga u krivičnom pravu Bosne i Hercegovine sa posebnim akcentom na otkrivanje i dokazivanje ovog krivičnog djela. Prilikom razmatranja određivanja pojma i zloupotrebe opojnih droga, uvažen je opšti društveni kontekst u cilju pravilnog razumijevanja same krivičnopravne (materijalne) i krivičnoprocesne prirode ove inkriminacije. U krivičnopravnom (materijalnom) kontekstu, ovo krivično djelo je specifično iz razloga što je zakonodavac radnje podstrekavanja i pomaganja, koje su po svojoj prirodi radnje saučesništva, u ovom slučaju, odnosno kod ovog krivičnog djela - propisao kao samostalne radnje. Takođe, izvršena je analiza zakonskog teksta i ostvaren je kratak komparativni osvrt, te je shodno navedenom ukazano na neujednačena, odnosno različita zakonska rješenja u entitetskim krivičnim zakonima i zakonu Brčko distrikta Bosne i Hercegovine.

U otkrivačkoj fazi ukazano je na kompleksnost prikupljanja inicijalnih saznanja koja ukazuju na postojanje osnova sumnje kao materijalnopravnog uslova za pokretanje i sprovođenje istrage. U vezi sprovođenja određenih krivičnoprocesnih radnji, aktualizirano je prikupljanje potrebnih dokaza, kao i teret dokazivanja ovog krivičnog djela i krivice.

**Ključne riječi:** opojna droga, podstrekavanje, pomaganje, krivično djelo.

