Vol. 2 / 2011 No. 1

Journal of Criminal Law and Public Prosecution

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STS Science Centre

VOL. 2 / 2011 NO. 1

JOURNAL OF CRIMINAL LAW AND PUBLIC PROSECUTION

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JOURNAL OF CRIMINAL LAW AND PUBLIC PROSECUTION

Issued once a year.

Printed in the EU.

ISSN 2045-9246

The Subordination of the Prosecutor's Office to the Executive Power is in Conflict with the Slovak Constitution

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1. Mutual Relations among State Authorities

In recent months, a proposal of the Ministry of Justice for an amendment of its legal position in relation to the Prosecutor's Office has become one of the discussed themes on our expert and political scene. The possibility of the Minister of Justice to issue statements that would be binding for all prosecutors, including the Prosecutor General is considered as its most eminent feature. The aforementioned proposal is in contrast not only with the current tendencies of the prosecutors' status in the European democratic states, but it is also in contradiction with the Constitution of the Slovak Republic (hereinafter referred to as "the Constitution").

The Constitution does not allow one state authority to interfere with constitutional competencies of another state authority. This limitation applies not only to the relationships among the legislative, executive and judicial power but also to the relationships among state authorities within one particular power, for instance to the relationship between the President and the Government as well as between the Government or its member and the Prosecutor's Office. If our conception of the Constitution is taken into account, an attempt of the Minister of Justice to issue statements binding for public prosecutors, including the Prosecutor General, could be compared to his or her potential attempt to issue statements binding for activities of the President of the Slovak Republic. It makes no difference whether the author of these statements would be solely the Minister of Justice, a commission consisting of three prosecutors and three officers of the Ministry of Justice—as it is constructed in the aforementioned proposal, or even a commission consisting only of prosecutors. According to the Constitution, the Minister of Justice may not issue statements binding for prosecutors.

It is apparent from the decisions of the Constitutional Court of the Slovak Republic (hereinafter referred to as "the Constitutional Court") that a rule analogous to the one concerning the separation of powers into the legislative, executive and judicial powers, applies to the relationships among the state bodies within particular branches. For instance, the Constitutional Court has, in the reasoning of the finding Pl. ÚS 8/97 [2], pronounced that: "*The President of the Slovak Republic is a state authority, namely an organ of executive power. By a definite division of powers and competencies among the Government and the President, the Constitution has expressed the internal separation of authority within the executive power.*" The Constitutional Court has deduced a specific rule from the principle of the separation of powers among the particular state authorities. This rule indicates that it is not possible to transfer, by a statute, competence from the President to the Government, even though they both pertain to the executive power.

The finding of the Constitutional Court Pl. ÚS 29/95 [3] explicitly states that: "*The Constitution of the Slovak Republic defines proportions and boundaries of the separation of powers among the particular state authorities. If the National Council of the Slovak Republic intends to define certain social relations as legal relationships, it may do so only in the scope and in the manner which is in conformity with the Constitution.*"

In accordance with the principle of the rule of law which, in its essence, provides legal regulations of mutual relations to all significant public authority structures within the Constitution, the Constitution has defined proportions and boundaries of the separation of powers among the particular state authorities. A one-sided extension of powers to a sole constituent of the state authority might violate the constitutional relationships between the organs themselves as well as in relation to citizens.

2. Constitutional Competencies of the Minister as a Member of the Government

The Government of the Slovak Republic is the supreme body of the executive power.[4] It consists of the Prime Minister, Deputy Prime Ministers and Ministers.[5] On the proposal of the Prime Minister, the President of the Slovak Republic appoints and recalls other members of the Government and entrust them

[1] Doc. JUDr. Ivan Gašparovič, CSc. – the President of the Slovak Republic, the former Prosecutor General of the Czech and Slovak Federal Republic.

[2] Finding of the Constitutional Court of the Slovak Republic File Ref. PL. ÚS 8/97 of 24 June 1998, published in the Collection of Findings and Rulings of the Constitutional Court of the Slovak Republic (hereinafter referred to as "Collection of Findings"), under No. 1/1998, p. 145.

[3] Finding of the Constitutional Court of the Slovak Republic File Ref. PL. ÚS 29/95 of 29 November 1995, published in the Collection of Laws of the Slovak Republic (hereinafter referred to as "Coll."), Title 1, under No. 2/1996.

[4] Article 108 of the Constitution.

[5] Article 109 of the Constitution.

with the administration of Ministries.[6] The Minister of Justice is thus a member of the Government on one side and the head of the central body of the state administration – the Ministry of Justice, on the other.

The Constitution does not determine powers of all constitutional officers. Nevertheless, the Constitutional Court has pronounced that: "*Members of the Government of the Slovak Republic (Ministers) belong to the group of those constitutional officers of the Slovak Republic (along with the President, Deputies of the National Council of the Slovak Republic and the Prosecutor General) whose powers have been determined directly by the Constitution of the Slovak Republic.*[7]"

The competence of the Minister, as a member of the Government, has been defined exclusively in the Constitution.[8] None of these defined Minister's **"constitutional powers"** constitutes his or her competence in relation to the Prosecutor's Office.

The Minister of Justice, as a member of the Government, can participate only in the governmental decision-making procedures on drafting bills, the state budget, international treaties, applications to the Constitutional Court, etc., but there is no constitutional power allowing the Minister of Justice to interfere with the functions of the Prosecutor's Office in any manner. This power cannot be provided to the Minister by a statute. All powers of the members of the Government are provided directly by the Constitution and cannot be extended by a statute.

3. Statutory Powers of the Minister as a Representative of the Central Body of the State Administration

Ministers, aside from being members of the Government, are the heads of the central bodies of the state administration. Article 122 of the Constitution, according to which the central bodies of the state administration and the local bodies of the state administration are established by a statute, has been legally transformed into law adopted by the National Council of the Slovak Republic no. 575/2001 Coll., on organization of the activities of the Government and organization of the central public administration, as amended (hereinafter referred to as "the Organizational Act").

Section 3 of the Organizational Act specifies all ministries which have been formed to function in the Slovak Republic and which are headed by a member of the Government. Section 3 letter g) states that the Ministry of Justice of the Slovak Republic is also created in the Slovak Republic, and it is headed by a member of the Government.

The statutory scope of competence of Ministers has been defined by Section 4 Paragraph 1 of the Organizational Act, stating that "*the Ministry is governed by the Minister, and he or she is responsible for its functions*."

It is the administration of the Ministry (as the central body of the state administration of the Slovak Republic) by a member of the Government that is, in accordance with the above-cited statutory provision, a substance of the **"statutory powers"** of an appointed member of the Government of the Slovak Republic which are not subject to the Constitution.

According to Section 13 Paragraph 1 of the Organizational Act, "*the Ministry of Justice of the Slovak Republic is the central body of the state administration for Courts and Prison Services.*"

Pursuant to following provisions[9] of the Organizational Act, the Ministry of Justice has the following functions:

a) to prepare legal regulations within the sphere of Constitutional Law, Criminal Law, Civil Law, Commercial Law, Family Law, Bankruptcy Law, and International Private Law,
b) to exercise state supervision over activities of the Chamber of Executors of the Slovak Republic, over activities of the Notary Chamber of the Slovak Republic and, to the extent provided for by law, over activities of the Judicial Executors and activities of Notaries,
c) to control, to the extend laid down by law, the observance of the conditions for organization and proceedings of voluntary auctions,
d) to ensure the performance of the expert activities, translation activities and interpretation activities and to publish the Collection of Laws of the Slovak Republic and the Commercial Journal,
e) to ensure the representation of the Slovak Republic before the European Court of Human Rights and representation of the Slovak Republic in proceedings before the Court of Justice of the European Union, and
f) to ensure the performance of duties pertaining to membership of the Slovak Republic in Eurojust.

The Ministry of Justice is thus the central body of the state administration "*for Courts and Prison Services.*" It is not the central body of the state administration for the Prosecutor's Office which does not belong to either the System of Courts or that of the Prison Services.

The Ministry of Justice exercises the state supervision over activities of the Chamber of Executors of the Slovak Republic, activities of the Notary Chamber of the Slovak Republic, to the extent provided by law over activities of the Judicial Executors and activities of Notaries, but it does not supervise, control or ensure the performance of roles of the Prosecutor's Office. The Ministry of Justice does not possess any competence in relation to the Prosecutor's Office.

Consequently, the Minister of Justice has neither constitutional nor statutory power in relation to the Prosecutor's Office; not even as the representative of the central body of the state administration – the Ministry of Justice of the Slovak Republic. Such a competence cannot even be granted to the Minister by an amendment to the Organizational Act. The Minister of Justice has no constitutional authority over the Prosecutor's Office

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6 Article 111 of the Constitution.
7 Ruling of the Constitutional Court of the Slovak Republic File Ref. PL. ÚS 22/95 of 26 September 1995, published in the Collection of Findings under No. 1/1995, p. 191.
8 Section 2 of Title 6, especially Article 119 of the Constitution.
9 Section 13 Paragraph 2 to 7 of the Organizational Act.

and therefore cannot have any statutory ("*sub-constitutional*") authority over it either. The constitutional status of the Prosecutor General and the constitutional status of the Prosecutor's Office does not permit it.

4. Constitutional Status of the Prosecutor General

The constitutional status of the Prosecutor General and the constitutional status of Prosecutor's Office is defined in Articles 149 to 151 of the Constitution.

According to the Article 149 of the Constitution, *"The Prosecutor's Office of the Slovak Republic protects rights and the legally protected interests of natural and legal persons and those of the state."*

According to the Article 150 of the Constitution, *"The Prosecutor's Office is headed by the Prosecutor General who is appointed and recalled by the President of the Slovak Republic on the proposal of the National Council of the Slovak Republic."*

According to Article 151 of the Constitution, *"Further details on appointing and recalling prosecutors and on their rights and duties, as well as on the organization of the Prosecutor's Office, shall be laid down by law."*

This constitutional delimitation of the Prosecutor General and the Prosecutor's Office competencies does not indicate any relationship between the Prosecutor General and the Minister of Justice, whether as a member of the Government or as the representative of the central body of the state administration.

According to the finding of the Constitutional Court [10], "*the Prosecutor General is not an administrative body.*"

It is clear from the delimitation of constitutional competencies of the Prosecutor's Office to protect the rights and legitimate interests of natural and legal persons and state that the mission of the Slovak Prosecutor's Office is to protect *the public interest* and not the state interest. In the event of the conflict between protection of the rights and legitimate interests of individuals or legal entities and the protection of state interest, that may just as well be represented by the Ministry of Justice, the Prosecutor's Office has a duty to protect the rights and legitimate interests of individuals or legal entities, even if it is against the state interest represented by the Ministry of Justice.

The first sentence of Section 3 Paragraph 2 of the Act no. 153/2001 coll., on the Prosecutor's Office, as amended (hereinafter referred to as "the Prosecutor's Office Act"), the text of which the proposal does not amend, also explicitly states that "*the Prosecutor's Office has a duty, to the extent of its competence and in the public interest, to execute measures for the prevention of a breach of law, for the ascertainment and elimination of a breach of law, for the restoration of rights breached and an allocation of the accountability for their violation*."

According to the Constitutional Court, "*The proper and consistent performance of the duties that have been imposed on state bodies is in the interest of the state governed by the rule of law. Where the activities of state bodies could unlawfully interfere with the rights and legitimate interests of legal and natural persons, the state owes a duty to establish a system of supervisory mechanisms to protect these rights and legitimate interest. The Prosecutor's Office is one of the mechanisms in this system. Its position in the supervisory system is irreplaceable and has its grounds*.[11]"

5. The Supervised Object Shall not Stand as a Superior to the Supervisory Body

According to Section 18 Paragraph 1 of the Prosecutor's Office Act: "*In the places of service of custody, sentence of imprisonment […] the prosecutor supervises that only persons who were detained based on a decision on deprivation or restriction of personal liberty by a court or other authorized state body are placed here; he or she also supervises the observance of laws and other generally binding legal regulations within the above mentioned places.*" The state administration of the Prison Services is exercised by the Ministry of Justice. The prosecutor thus supervises the observance of the laws and other generally binding legal regulations by the Ministry of Justice.

According to Section 20 of the Prosecutor's Office Act, "*[t]he prosecutor supervises the observance of the laws and other generally binding legal regulations by the public administration bodies.*" These include also "*bodies of the state administration*" as well as "*the state bodies and other legal entities that have been authorized by a special statute to issue generally binding legal regulation*" […] "*Over the course of the supervision of the observance of the laws and other generally binding legal regulations by the public administration bodies, the prosecutor shall ensure and guard the active performance of statutory duties especially by the bodies executing the control*."

The aforementioned supervision also applies to the Ministry of Justice. The prosecutor exercises this supervision, among other means, by examination of legality of directives, regulations, measures and other legal acts issued in order to ensure the performance of duties in the sphere of the public administration and legality of the public administration procedures over the course of their issuance. The prosecutor would also be authorized to review the legality of statements which would, according to the proposal, be issued by the Minister of Justice *"for the sake of uniform application of the laws and other generally binding legal regulations"* and which *"shall be legally binding upon all prosecutors."*

Such suggested competence of the Minister, even if not in violation with the Constitution, would be legally void. According to such competence the Minister would issue statements on uniform application of the laws and other generally binding legal regulations. These statements would be legally binding upon all prosecutors, but the prosecutor would examine their conformity with the laws and other generally binding legal regulations, and could challenge them through the means of control over the observance of the laws and other generally binding legal regulations by the public administration bodies, such as a protest or a notice. He or she could also submit a motion to commence court proceedings for judicial review of their legality. This situation would amount to a violation of an essential legal principle, according to which the subject considered as an object of the supervision, shall not stand as a superior to the body that executes this supervision.

[10] Finding of the Constitutional Court of the Slovak Republic File Ref. PL. ÚS 17/96 of 24 February 1998, published in Coll., Title 30, under No. 78/1998, judgment statement 6.

[11] As noted in Comment No. 10 above.

6. The "Directiveness" is an Element of the "Superiority"

While examining if the prosecutor's competence to supervise the observance of the laws and other generally binding legal regulations by the public administration bodies is in compliance with the Constitution, the Constitutional Court states[12] that "*the prosecutor performing such supervision is not placed into a superior position in relation to the public administration bodies*" because he or she has no power „*to issue binding instructions to public authorities and request them to correct specific irregularities, to impose sanctions concerning established violations of the law, or to interfere with their functioning in other directive manner. According to the Constitutional Court, an element of superiority of the Prosecutor General is to be seen in the element of »directiveness«. In relation to public authorities, »prosecutorial supervision« may be exercised exclusively by means of recommendations and motions.*"

A contrario, the Constitutional Court sees an element of "*directiveness*" as an attribute of "*superiority*" in the power to interfere with functioning of other bodies and to impose obligations on them in a binding manner.

Therefore, if the Minister of Justice issued "*statements legally binding upon all prosecutors*," this element of directiveness would make him superior to the Prosecutor's Office. The Constitution does not grant such aforesaid status to the Minister of Justice.

The constitutional rule that the Prosecutor's Office is headed by the Prosecutor General unambiguously constitutes the hierarchy of the state bodies system within the Prosecutor's Office, in which the Prosecutor General shall be a supreme superior. This constitutional rule has been expressed in Section 2 of the Prosecutor's Office Act which states that "*the Prosecutor's Office is an independent, hierarchically structured system of state authorities headed by the Prosecutor General, in which the prosecutors are in the relations of inferiority and superiority*." In accordance with the Constitution, neither the Minister of Justice nor the Ministry of Justice has a place within this system.

7. Conclusion

If the Constitution does not create the relation of inferiority and superiority between two constitutional bodies, then the relation cannot be created by a statute. In such a case the relationship of these two bodies is regulated only by the general rule of mutual cooperation.[13]

According to Article 2 Paragraph 2 of the Constitution, "*State bodies may act only on the basis of the Constitution, within its limits, and to the extent and in a manner which shall be laid down by law*." This provision implies the constitutional prohibition of the competence extension of the state bodies by a statute. The statutes regulating competencies of the state bodies shall be enacted exclusively in order to transpose the Constitution. If the Constitution does not presume the requirement of enactment of a statute to execute some of the constitutional provisions, then there is no possibility of its adoption, and it is required to consider the relevant relationship solely on the basis of its regulation implied in the Constitution as a whole.

The aforementioned shows that the Minister of Justice has neither constitutional nor statutory competence to issue "*statements legally binding upon all prosecutors and prosecutor assistants*", or any otherwise called directive, binding regulations in relation to prosecutors "*for the sake of uniform application of the laws and other generally binding legal regulations*" or in any other interest. Any such proposal is evidently in conflict with the Constitution.

The fact that similar institutes exist in other states with different constitutional structure of the mutual relationships among the state bodies does not establish any possibility to utilize them in our legal order without any confrontation with the Constitution of the Slovak Republic. In addition, resembling institutes do exist in legal orders of other states—where the Prosecutor's Office is formally a constituent of the Ministry of Justice and the Constitution does not obstruct the issuance of the Minister's binding statements, but they appear to be obsolete, in most cases without application and their abolition is often discussed.

The tendency to subordinate the Prosecutor's Office to the state administration body, which the author of the proposal does not hide, cannot bring any advantage in an attempt to eliminate defects of the Prosecutor's Office activities. These have been mentioned by an explanatory report only at a general level and without being impartially grounded or analyzed. The tendency to subordinate the Prosecutor's Office to the executive power can lead to its politicization and thus bring an opposite effect, rather than the proclaimed aims of the proposal.

[12] As noted in Comment No. 10 above.
[13] As noted in Comment No. 2 above.

Discretionary Estimate as a Criterion of Delimiting the Principles of Legality and Opportunity of Criminal Prosecution

Snežana Brkić [1]

I. The Concept and Elements of the Principles of Legality and Opportunity in Criminal Prosecution

The development of Serbian criminal procedural law shows that there was no wavering in regard to the preservation of the principle of legality in criminal prosecution, either in legislation or in theory. The deviations in practice were followed only by the requirement for strengthening this principle, particularly so in regard to some types of criminal offences. The principle of opportunity had a negative connotation for a long time. However, a decade ago a process commenced of making gradually greater concessions to the principle of opportunity.[2] Although our circumstances do not manifest such a high degree of crisis as the principle of legality in criminal prosecution has reached in some other countries, and although there are no radical demands for its abandoning, the functionality of the both principles should be re-examined in the light of contemporary conditions. The first step in doing so is to provide their theoretical foundation. The conceptual determination and distinction of these principles is important because it is only once we know the extent of the rule and the exception that we can discuss a dominant course in legislation, the functions and tendencies in practice or taking the right criminological-political attitude *de lege ferenda*. It often happens that at the core of our failure to understand a phenomenon actually lies a terminological misunderstanding or insufficient knowledge of its actual effects in practice. This article aspires to offer a modest contribution to removing such obstacles by a rational consideration of the dilemma: opportunity or legality in criminal prosecution.

Since these concepts stand opposite to each other,[3] it is necessary to shed some light on their interrelationship, which is characterised not only by elements of differentiation but by elements of similarity as well. The principle of legality in criminal prosecution means that the criminal prosecution bodies are under an obligation to instigate the function of criminal prosecution as soon as the legal requirements for prosecution are fulfilled. The principle of opportunity in criminal prosecution means that the criminal prosecution bodies are obligated to instigate the function of criminal prosecution if the legal requirements for prosecution are fulfilled and if in a concrete case it is appropriate in regard to public interest. This implies that they share three common elements, while there is one demarcation element. The common elements are: the obligation of criminal prosecution, the bearer of the obligation of criminal prosecution, and the requirements necessary for instigation of this obligation. The demarcation element is the origin of the obligation of criminal prosecution.

Both principles are limited to the function of criminal prosecution and the competent state body as its bearer. Therefore, they do include neither private and subsidiary prosecutors,[4] nor the functions of detecting, reporting and adjudicating crimes. Both become effective only with the fulfilment of the legally prescribed requirements, which can be real and legal in nature, whose formulation and/or broadness preconditions the extent to which a suspect is protected. The requirement of a real nature actually means that there is a certain degree of suspicion that a certain person has committed a certain crime. Requirements of legal nature refer to the existence of all the elements of an *ex officio* prosecutable criminal offence, as well as positive and negative preconditions for prosecution. Namely, there are instances when the existence of a criminal offence which is prosecutable *ex officio* alone is not enough to constitute an obligation to prosecute. Additional legal requirements that might be needed in such cases are enveloped under the term of positive preconditions for prosecution. There are usually two such pre-

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[2] The 2001 Criminal Procedure Code of Serbia established for the first time exceptions to the principle of legality in criminal prosecution against adult suspects (Articles 236 and 237). Article 236 provides for a conditional dismissal of charges if a suspect volunteers to accept discharge of one or more legally prescribed obligations. This kid of so called diversion as an alternative to criminal proceedings has survived several changes during the 2004 and 2009 procedural reforms, which were marked by extension of the implementation of this institute.

[3] Gajo Petrović: 'Logika' *[Logic]*, Zagreb, 1989, p. 36.

[4] Theorists who under the principle of opportunity subsume private and subsidiary prosecutors neglect the qualitative difference between the way they reach their decisions, which is with an absolute freedom, and the way a state body reaches a decision, which is limited by law. However, those are equally wrong who, aware of the differences, point to two faces of the principle of opportunity: the one performed from the aspect of public interests (public prosecutor) and those from the aspect of personal interests (private and subsidiary prosecutors). The unacceptability of this position stems from the concept of discretionary estimate, which lies in the heart of the principle of opportunity, and which always belongs to a public body and is performed in the interest of the public.

conditions: a state body in authority must approve prosecution of a person who enjoys criminal-procedural immunity and an injured party's motion for prosecuting certain criminal offences which are otherwise prosecutable *ex officio.* Some procedural theorists treat such approval as one of the major deviations from the principle of legality.[5] In our opinion the approval by a state body in authority does not represent an exception to the principle of legality, but just one of legal preconditions constituting an obligation to prosecute. Although we do not dispute that the institution of approval has a discretionary character, which is inherent in the principle of opportunity as well, we find that the determining factor is that it is an extra-procedural assessment of expediency which does not belong to the very prosecuting body. We remind that the bearer of the prosecution is an integral part of the concepts of both the principle of legality and the principle of opportunity. Therefore, although we start from a discretionary estimate as the major demarcation element of the said principles, it has to be related to the other features they have in common. The power of discretionary estimate can be given to different bodies in performance of various functions. If this power does not cover the bodies and function of prosecution, however closely related to them it may be, and practically narrowing or widening the scope of their possible effect, it does not fall under the principle of opportunity in criminal prosecution. Moreover, the very choice between two different bodes (a public prosecutor, a political body) as bearers of the power of discretionary estimate, can, by itself, speak of advantages of one or the other institution, depending on possible different estimation criteria.

Some legislations restrict the prosecuting monopoly of public prosecutor not only by the introduction of a private lawsuit, but by preconditioning a legal offence prosecution by a motion by injured party. These are offences otherwise prosecutable *ex officio*, where public prosecutor cannot prosecute without a victim's initiative. Although a victim prevents public prosecutor from any possibility of prosecuting by failing to motion for prosecution, we are again inclined to take the stand that it does not constitute an exception to the principle of legality, but that it is simply a case of a lack of one of the positive preconditions for prosecution. It is, namely, not a question of a prosecution body or a discretionary estimate, but of a private person and of such a person's absolutely free will in exercising his/her subjective right. This, by no means, intends to diminish effects of this institution, which certainly determines the sphere of the implementation of the principle of criminal prosecution.

The negative preconditions for prosecution are such conditions that must not exist so that an obligation of criminal prosecution can commence (the so called procedural obstacles). The scope of such preconditions can be differently set, but it usually implies the following circumstances which preclude criminal prosecution: statutory limitation, amnesty and pardon. These are institutes of a disputable legal nature, attributed with mixed procedural-material effects by some, which can obviously lead to inapplication of otherwise applicable criminal material law. Here again, we hold the stand that the negative preconditions of prosecution do not constitute exceptions to the principle of legality in criminal prosecution, although they certainly restrict the scope of criminal prosecution.

The essential criterion for differentiating the principles of legality and opportunity is disputable. Some authors see it in the obligation of criminal prosecution implied by legality, and the right to prosecution allowed by the opportunity principle.[6] We cannot agree with this. Namely, the principle of legality and the principle of opportunity establish an obligation of criminal prosecution for state bodies in authority.[7] The only difference lies in the fact that in the principle of legality it is automatic, once the prescribed legal conditions are fulfilled, while in the principle of opportunity it is established with the estimation of expediency. In the principle of legality it stems directly from the law, in the principle of opportunity it is derived from the opinion of the very legal body. The principle of opportunity allows for prosecution not to be instigated even when legal conditions for prosecution are satisfied, if it is in the best interest of the public. The estimation of the interest should stand behind each and every prosecuted criminal act, regardless of the principle it relies on. The only difference is by whom, when and how it is carried out: by legislator during incriminalisation, in an abstract-general way, or a criminal prosecution body when instigating concrete prosecution, which allows it to, by taking into account the circumstances of a concrete case, disavow the otherwise applicable criminal material law. If we take all the aforementioned to be true, and with the ambition to express the difference between these two principles in the shortest possible way, we will do it through the concept of discretionary estimate,[8] which lies at the core of the principle of opportunity.

The aim of this contribution dictates an elaborate overview of this concept,[9] although each of the aforementioned common elements deserves a separate elaboration. Namely, the elaboration of the subject, method, bearer and scope of discretionary estimate seems important, because only when these are taken

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[5] Momčilo Grubač: 'Krivično procesno pravo', Belgrade, 2009, p. 138.

[6] For example, Panta Marina: 'O legalitetu i oportunitetu u krivičnom gonjenju' *[On Legality and Opportunity in Criminal Prosecution]*, Pravni život 6–7/1972, p. 4; August Munda: 'Učbenik kazenskega postupka Federativne ljudske Republike Jugoslavije', Ljubljana, 1957, p. 96; Nikola Ogorelica: 'Kazneno procesualno pravo', Zagreb, 1899, p. 422.

[7] The same, for example, Stanko Pihler: 'Neka pitanja u vezi sa načelom legaliteta u krivičnom pravu', Zbornik Pravnog fakulteta u Novom Sadu 1–3/1989, p. 235.

[8] The following terms are used: free estimate, discretionary power, free judgment, discretionary right, discretionary authority, discretionary acts, estimate of expediency. For more on terminological dispute see: Đorđe Tasić: 'O slobodnoj oceni (diskrecionoj vlasti)', Arhiv 3/1927, p. 178; Juraj Andraši: 'Načelna razmatranja o slobodnoj rasudi', Arhiv 1928, p. 102; Ivo Krbek: 'Diskreciona ocjena', Zagreb, 1937, pp. 236–237.

[9] The problematic of opportunity does not solely belong to the science of criminal procedural law, so discretionary estimate is not its original concept. The greatest interest in it has been shown by executive-legal theory, which is understandable, considering the relatively higher presence of this institute in the said area, as well as its numerous practical repercussions. It is there that the study of discretionary estimate has gained fairly solid contours and from this area it has been imported by other public law disciplines with relative modifications.

into account, the discretionary estimate no longer seems as an a priori undemocratic institution to be eradicated at all costs. On the contrary, it will, backed by an efficient control mechanism, remain a valuable instrument in regulating social relationships which require preservation of the primacy of the idea of expediency. In this sense, this article is intended to contribute to the demystification of the principle of opportunity which the theory often undervalues.[10]

II. The Wider Context of the Problem: the Degree to which Bodies Are Bound by Legal Norm

Set at the widest base, considerations on discretionary estimate lead us to the subtle issue of that kind of primacy of legislative power over the judicial and executive power and vice versa at whose heart lies the issue of a state body being (un) bound by legal norm. The ancient Greek philosophy hinted to the solution to this ancient dilemma with its inclination to seek the ideal of humanity in the rule of the best law, rather than in the rule of the best man.[11]

Nevertheless, the need to bound state bodies by a legal norm is not absolute in its character. Between an absolute legal boundness and an absolute non-boundness, as unacceptable extremes,[12] there is a whole gamut of legal subjection forms of varying intensity, including the actual state of affairs. It is in the interval of weaker normative boundness, which allows the law administrator to assume a creative role, where the phenomenon of discretionary estimate is to be sought. An objective base of creativity on the part of law administrator stems from the impossibility of a full realisation of tendencies of coherence, completeness and determination of a legal system, aimed at by the mechanism of hierarchical interrelatedness of legal norms. The law is rendered imperfect primarily by the imperfectness of language, which is, due to its metaphoric and polysemantic character, an unreliable tool for creating a strict terminological network and for expressing abstract thoughts.[13] Yet, the root of the contemporary crisis of normative communication should not be sought in the sphere of language and cognition alone. It is caused by objective social factors, first of all, the increasing complexity of contemporary political, economic and other processes and relationships, which require a more complicated legal system, which cannot be envisaged without a wider and more independent scope of activity of a law administrator. It is the matter of inability to anticipate all cases, which follows both abstract and casuistic norm provision. There are two kinds of gaps in the nature of the system of abstract norms: those that occur due to the lack of regulation of some, otherwise relevant, social relationships (caused by oversight on the part of legislator or because they appear later then the norms governing them), and those that occur due to logical incapability of an abstract norm to include all elements of all possible realistic situations that can be subsumed under it. Therefore, the deficiency can be compensated for by giving higher competences to law administrator, to some extent.[14] The lack of clarity, ambiguity and contradictoriness can be removed by interpretation, while legal gaps are solved by filling them. Besides this, even the most perfect abstract norms are provided with a new normative content by an individual norm.

III. The Subject and Method of Discretionary Estimate Performance

It is considered that a key feature of discretionary estimate is a freedom of choice between several alternatives.[15] From the point of view of legality, all alternatives are equally valuable and positive legislation, in principle, does not provide a bearer of discretionary estimate with any guidelines, leaving the choice solely with him, from case to case, as he deems appropriate. The circumstances he takes into account in doing so can be outside of law (the reasons of opportuneness) or of a legal nature. The latter are not positive legal as a rule (the reasons of law or justice), but they can exceptionally be such, under the condition that they are not of an imperative nature.[16]

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[10] Perhaps the misconception was contributed to by the unfortunate choice of terminology: a negative character was attributed to the term opportunity under the impression of the general meaning of the adjective opportune (added to by the confusion with the pejorative usage of the word opportunism), which deepened the contrast between this term and the term legality. Therefore, the suggestion seems appropriate to replace the term of the principle of legality with a more adequate term, such as the principle of imperativeness (Stanko Pihler, op. Cit., p. 235) or obligatoriness of criminal prosecution (Zagorka Simić-Jekić, 'Krivično procesno pravo', Beograd, 2003, p. 72).

[11] Aristotle: 'Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast.' ('Politika', Zagreb, 1988, p. 112).

[12] In the process of normative concretisation of law, 'a creator of a legal act always moves within a certain normative frame which can never be completely defined or undefined.' (Marijan Pavčnik: 'Prilog raspravi o primeni prava', Pravni život 8–9/1985, p. 777).

[13] Max Muller: 'Einleitung in die vergleichende Religionswissenschaft', 1876, quoted after Mihailo Đurić: 'Mit, nauka, ideologija', Belgrade, 1989, p. 39. Indeed, deconstruction, that is, terminological crisis, goes hand in hand with the contemporary scientific-technological revolution, influencing, in this respect, almost all areas of spiritual reality, even mathematics.

[14] Even though, there were several breaches in legal history of the dogma about an all-inclusive non-contradictory and hermetical legal system, with a corresponding misconception of law administration, especially the functions of trial, as an automatic subsumption. Modern legal theory started abandoning the classical concept of the law administrator as *viva vox legis* at the turn of the 20th century.

[15] Theory has attempted to define the subject of discretionary estimate from material aspect as well. So, according to Bonard it is an object of an act, according to Waline an estimate of what is required by factual situation (quoted after Ivo Krbek, op. Cit., p. 272). In our theory Milan Petrović reduces discretionary estimate to the freedom of motivation on the part of a state act ('Pravna vezanost i ocena celishodnosti u teoriji javnog prava', doctoral thesis, Belgrade, 1979, p. 90).

[16] Ivo Krbek, op. Cit., p. 212.

The criteria for carrying out discretionary estimate defined in such a way enjoy a high degree of agreement in theory. In this sense, discretionary estimate is described as a door in a house of law which can provide entrance to extralegal motivations.[17] It is, therefore, just an illustration of a penetration of 'metajuristic criteria' into the legal realm,[18] among which Krbek mentions 'moments of state or general expedience, social, economic, weighing contrasting interests,[19] but also moral, religious, good customs'.[20] Meier arrives at a similar conclusion, claiming that the discretionary estimate performs a legal-political task which normally belongs to legislator. Thus, the same criteria apply to the one performing it: making a decision based on a rational weighing of interests.[21] This statement can be accepted only conditionally. Namely, if legislator and judge have the same mission (realisation of legality in a state), and if the performance of jurisprudence is taken as their mutual activity, it must be stressed out that the method of their functions are somewhat different: it is abstract-general in case of legislator, while in the case of judge it is concrete-specific.[22]

IV. The Bearer of a Dicretonary Estimate

1. The Discretionary Estimate Bearer According to the Subject of Authority or the Subject of Obligation

Theory offers various answers to the question of who has the freedom of choice between several alternatives in regard to discretionary estimate. If we start from Visković's extended schema of the legal norm structure,[23] with separate places of its addressees, we can conclude that the discretionary estimate is performed by neither the subject of authority nor the subject of obligation, but a state body, which as a subject of competence incorporates both authority and obligation. The discretionary estimate bearer is a public body, not a private person. Therefore, those who enjoy subjective rights, whose possibility of absolutely free choice between the performance or non-performance of this right is not under question, or subjects of the so called alternative dispositions, who are subjects of obligation, are not subject to the regime of discretionary estimate, and thus to its limitations.[24]

2. The Discretionary Estimate Bearer According to the Distinction of State Functions

a) The Discretionary Estimate Bearer is a Public Body which Passes Individual Acts

Starting from the source of discretionary estimate, which lies in the inability of an absolute realisation of the principle of determinedness, some authors extend discretionary estimate to all cases of relative freedom in creating normative content. This invites the conclusion that discretionary powers permeates the entire legal body; the higher the body stands in hierarchy the more discretionary power it has, which means the highest degree rests with legislator.[25] Here, the discretionary estimate of legislator would exceed its constitutional-legal boundness, to the contrary from the judiciary, where legal boundness would be more pronounced, while in the executive they would stand in balance.[26]

Although we do not deny the great freedom of movement immanent in the legislative body,[27] we are more inclined to align with those who hold the opinion which negate the existence of discretionary estimate with the general legal norm enactor.[28] We are led to this reasoning by the incomparably higher degree of freedom a legislative body already has as compared to the freedom provided by discretionary estimate. It also follows from the difference between the political and legal judgment: both are valorising, but the former is more arbitrary than the latter. Therefore, it could not be said that legal boundness and estimate of expediency are 'basic modalities of the whole state activity.'[29] They are relevant only in the sphere of authoritative positions state bodies take in individual cases, that is, in enacting individual acts. This 'disqualifies' state bodies as well, besides the general act enactor, when they act from the position of *fiscus* rather than *imperium*, as well as all non-state bodies whose individual acts have no authoritative character.

b) Presence of Discretionary Estimate in Executive and Judiciary

Previous legal theory, which sees the material-functional criterion of separation between executive acts and judiciary acts in the degree of their boundness by law, considers discretionary estimate to be the key feature of the executive power, negating it in judiciary. It claims that the guiding principle that regulates the operation of the executive is not law and justice, but the

[17] Adolf Merkl: 'Allgemeine Verwaltungsrecht', 1927, p. 152.
[18] The difference between juristic and metajursitic criteria is based by Vuković on the difference between gelten (be valid) and wirken (to take effect): the former are valid, while the latter only affect (Mihajlo Vuković: 'Metajuristički kriterijumi u pravnom poretku', Pravni život 4/1971, p. 7).
[19] Also Đorđe Tasić: 'Interests are weight, indeed, everywhere where we can talk about free estimate (discretionary power)', Arhiv 3/1934, p. 200.
[20] Ivo Krbek, op. Cit., p. 212.
[21] Ewald Meier: 'Die Verfahrensgrundsatze der aargauischen Strafprozessordnung (par. 24–30) vom 11. Nov. 1958, Zurich, 1971, p. 48.
[22] To the contrary Max Rumpf, who attributes spiritual sciences with a unique method, characterised by specific terms, on the contrary to general terms and/or methods of natural sciences. ('Der Strafrichter' Bd. 1, Berlin, 1912, quoted after Stanko Frank: 'Razvijanje nauke o normativnim obilježjima bića krivičnih djela', Arhiv 4/1934, p. 291).
[23] Nikola Visković: 'Struktura pravne norme', Naša zakonitost 11–12/1971, pp. 833–847.
[24] Anyhow, all those who artificially extend the concept of discretionary estimate to these cases as well, must start from a certain inherent differentiation, and admit at least two more differences: (non)boundness by public interest and (non)establishment of obligation for third parties (for example, Ivan Melvinger: 'Uvod u pravo', Novi Sad, 1974, p. 323).
[25] Đorđe Tasić: 'O slobodnoj oceni (diskrecionoj vlasti)', Arhiv 1–2/1927, p. 381.
[26] This claim could hold only if we were talking about a weaker legal boundness in general, not about discretionary estimate.
[27] Which gains importance if we bear in mind that hierarchical-graduation association of legal norms is a reflection of the balance of the economic-political power of the subject of the norm provision, not merely functionally taken 'process of self-regulation' in the spirit of the Merkl-Kelzen theory.
[28] Ivo Krbek, op. Cit., p. 74.
[29] Milan Petrović, op. Cit., p. 12.

need and expedience, that the legal norm is no foundation but a limitation to the otherwise free-willed executive activity, that for the executive, law is not an aim but merely a means.[30] Jhering, too, builds the difference between the judiciary and executive on the difference between two contradictory ideas: justice, bound by nature, and expedience, free by nature.[31]

Since this view rests on two caricatures (the executive with excessive freedom and the judiciary with excessive normative boundness), the unmasking takes two directions, converging in the same conclusion that there is no principled difference in their attitude towards the law. Namely, discretionary estimate as one of the forms of law administration itself is based on legal order, being different from strict boundness 'only by the defined, different degree of freedom of movement a judge and an executive are given by the very law.'[32] This tie between the executive and law is further backed by a possibly higher freedom of movement of judiciary, on the other hand, which together led to breaking the foundation of the old concept. It remains applicable only in the case of one historical type of state – an absolutist-police state – where the executive was really not subjected to legal norms, or they only had a secondary and negative importance for it. Although no one serious negates the existence of discretionary estimate in judiciary, the remnants of the old German theory have survived in the view that there is a qualitative difference between the executive and judiciary discretionary estimate. We maintain that historical moments, contemporary tendencies, frequency and prevailing criteria of the executive and judiciary discretionary estimate application can, nevertheless, be regarded as differences in graduation only.

V. The Limits of Discretionary Decision Making

Discretionary estimate does not mean absolute freedom, but freedom within the boundaries set by law. Non-boundness by legal norm exists only in the material, but not in the formal sense. This means that there is no freedom of choice in regard to jurisdiction, scope of authority, aim, material-legal conditions, rules of procedure and determination of facts. On the other hand, the very choice between several alternatives is not completely free. It is not subject to legal rules indeed, but is still subject to the rules of expedience. The very notion of a state body as a discretionary estimate performer sets limitations and precludes the possibility of an absolutely arbitrary decision making. Therefore, discretionary estimate cannot be seen as equal to self-will. 'To act arbitrarily,' says Krbek, 'means to act out of reasons foreign to the public interest, public good, public service, etc., which means to fall out of the scope of the public function and act out of one's own personal caprice and whim.[33] That is why the moment of duty is often stressed out, which differentiates discretionary estimate from acts of a private person. The parallel between legality, opportunity and arbitrariness can be reduced to the following: in the first case the determining factor is the will of law (generality), in the second it is the concrete situation (concreteness), while in the third it is the will of the related person (subjectivity).

Discretionary estimate can deviate into self-will when the estimate of expedience is carried in the way inappropriate to the case. In such a case, protection from self-will is needed as a protective measure against wrong motives of state bodies. Some authors speak of the constitutional freedom from arbitrariness as a subjective public right to perform discretionary estimate appropriate to a given case.[34]

VI. Distinction between Discretionary Estimate and other Similar Cases of Relative Freedom of Movement of the Law Administrator

Discretionary estimate is only one of the forms of weaker boundness, which should be distinguished from other similar cases of relative independence of the law administrator. To re-utter this thought seems important from the aspect of the principles of legality and opportunity in criminal prosecution, since criminal-procedural theory is prone to confusion in this respect.

1. Interpretation of Law

If we take that interpretation is an activity aimed at determining the meaning (import) of a material phenomenon (sign), then interpretation of law is nothing more than determination of the exact (or true) meaning, import of legal norms, that is, a form of their understanding based on predetermined rules. In an ideal situation there would be a perfect correspondence between the meaning that a sign holds according to the agreed codex of meaning, and the meanings attributed to it by the subject-sign-sender and the subject-sign-recipient. If this happens, there is no need for interpretation as a special technique, which is done according to the set rules and which requires special knowledge.[35] Nonetheless, there is interpretation as an everyday, inconspicuous and unconscious activity, which follows the process of learning and implementation of all legal norms. The interpretation procedure consists of two stages: determination of the linguistic and legal meaning of a legal norm. In this, the movement of the interpreter can be more or less free, in regard to the aim and the means applied in reaching the said meaning. However, there are three features distinguishing discretionary estimate from interpretation.

a) The Reason for the Freedom of Movement

Discretionary estimate entails a clear and defined norm, as opposed to interpretation, the need for which rises with the falling clarity and definiteness of a norm. While interpretation

[30] Hubler: 'Die Organisation der Verwaltung', 1918, p. 10, quoted after Dragan Milkov: 'Pojam upravnog akta', doctoral thesis, Belgrade,1983, p. 260.
[31] Rudolf Jering: 'Cilj u pravu', Belgrade, 1894, p. 269. Some of our authors were not immune to this kind of understanding (for example, Danilo Danić: 'O sudskoj vlasti', Belgrade, 1932, p. 7.
[32] Ivo Krbek, op. Cit., p. 69.
[33] Ivo Krbek, op. Cit., p. 233.
[34] Milan Petrović, op. Cit., p. 181.
[35] Valtazar Bogišić expressed this in a unique way in Article 84 of the General Property Code of Montenegro: 'If something is understood by all, there is no need for interpretation'.

appears only as a necessary evil in the process of implementing an imperfect law, discretionary estimate is a power consciously given because of legislator's incapability to adjust his methods to the needs of a concrete case and his recognition of the fact that the law administrator will answer the demand for expediency better than he can.

b) The Result of the Freedom of Movement

Discretionary estimate always implies a choice between several given alternatives of an equal value, in the legal sense. Such a freedom of choice is something a law interpreter lacks. Although he has several options before him, he is required to choose the one which is closest to the intention of law and/or legislator.[36] Each and every interpretation, therefore, implies that there is an inherent result that only needs defining. Perhaps in criticising reduction of discretionary estimate to interpretation we better reach for Krbek's formulation: 'The difficulty in carrying out an interpretation of a legal norm, the fact that it requires a certain degree of subjective activity on behalf of the interpreter, still does not make it a discretionary estimate. The determining element of the notion of discretionary estimate is not the fact that there is a certain great question, how to solve a certain concrete case; its determining element is according to whose intention the question is to be solved.'[37] Therefore, discretionary estimate exists only when the solution to a case is sought following the individual opinion of the very body which is given the choice between several alternatives. There is no discretionary estimate if one has to follow the will of law or objective will of another factor.

c) Methods of Performance

In the case of discretionary estimate, the choice between several alternatives is carried out individually-concretely. The point of discretionary estimate is to find the best solution in a specific case. That is why a once chosen alternative has no character of a precedent. Each law interpreter, as opposed to this, acts on a concrete case, but determines norms for all such cases in apstracto.

The institution of gradual abstraction in historical development of law and the tendency of abandoning the primitive casuistic methods resulted in the appearance of indefinite (normative, value, estimative) notions. Their flexibility yields a dilemma about legislator's intention, as it leaves unclear if in their implementation one should be guided by the will of law, which is only difficult to determine, or the intention was to vest the law administrator with the right to discretionary estimate in the sense of a choice between several alternatives. There are two opposing views that crystallised over the time around this 'stumbling block'. It is great desert of Tezner who has refuted the thesis of indefinite terms as authorisation to discretionary estimate and proved that they belong to the realm of legally bound things, whose meaning is determined through interpretation and which are subject to executive-judiciary control.[38]

From the wide circle of indefinite terms we single out legal standards. They are instruments of legal technique known to the Roman law, although the term is relatively new. Pound points out three key features of standards: a) they contain moral judgment on behaviour; b) they do not require precise implementation but a common sense judgment or a trained intuition; c) they are not absolutely formed: they are relative in regard to place, time and circumstances, so they are to be implemented with the facts of a concrete case in mind.[39] A standard defies mechanical implementation, it is flexible and adjustable, which makes it appropriate in the fields where flexibility is more important than legal safety. What is crucial for a legal standard, therefore, is adjustability of its content in regard to concrete circumstances, while its essence stays unchanged. It is indefinite on an abstract-regulative level, but definite in contact with a concrete social relationship.[40] Moreover, in each concrete case there is only one acceptable type of behaviour, while all others are illegal. Indefinite terms and legal standards, therefore, exclude the freedom of choice, which makes them subject to the regime of interpretation rather than discretionary estimate.

2. Filling Legal Gaps

Finding an appropriate legal norm aimed at filling legal gaps also implies a freedom of choice between several alternatives. It, however, differs from discretionary estimate by the fact that it starts from a concrete case but it seeks a solution which is to be applicable in all future cases.[41] In other words, the choice is made abstractly-generally. A judge's role is here similar to the role of legislator, although it is not identical, as a judge is more limited in his operation, while his freedom of movement is more limited if the legal system is more developed. A judge who seeks a legal norm is bound by the spirit of the system and he only complements and upgrades it. Furthermore, the alternatives a discretionary estimate performer faces are legally predetermined, while a legal norm finder will be the one constructing them.

3. Free Evaluation of Evidence

Here we must start from making a distinction between factual and legal issues.[42] Facts are determined through evidence, which

[36] Depending on whether we advocate the so called subjective or objective interpretation.

[37] Ivo Krbek, op. Cit., p. 41.

[38] Friedrich Tezner: 'Rechtlogik und Rechtwirklichkeit', Wien-New York, 1986, p. 137. There are compromising theories which mediate between these two extreme views, more or less tending to one or the other side. For example in our theory Tasić, Krbek, Lukić and Popović take the position that indefinite concept by itself does not give power of discretionary estimate, but that it can do so in exceptional cases, where the determining factor is legislator's intention (Đorđe Tasić, op. Cit., p. 373; Ivo Krbek, op. Cit., p. 370; Radomir Lukić: 'Uvod u pravo', Belgrade, p. 209; Slavoljub Popović: 'O sudskoj kontroli neodređenih pojmova', Zbornik Više upravne škole u Zagrebu 1/1982, p. 144).

[39] Quoted after Stanko Frank: 'Standardi i direktive u kaznenom pravu', Arhiv 5–6/1939, p. 424.

[40] Marijan Pavčnik: 'Društveni standard kao formativni činilac prava', Pravni život 4/1983, p. 474.

[41] Ivo Krbek, op. Cit., p. 40. Opposed, Mihajlo Vuković, who adopts the view from some foreign authors that the found rule does not have a universal validity, but is only valid in the specific case ('Interpretacija pravnih propisa', Zagreb, 1953, p. 30).

[42] Although these are basic tools of everyday judiciary activity, which are subject to different regimes, theory and judicial practice have not developed a principled attitude towards the problem of their separation. This article is not dealing with all the repercussions this problem area can imply, or the different approaches in their solving.

are evaluated freely in contemporary law. The principle of free evaluation of evidence allows a judge to arrive at a conclusion about a (non)existence of a fact based on his free conviction, not based on a legally predetermined value of a certain evidence. Here we can only speak about a relative freedom of movement of a judge, whose evaluation is not bound by legal norm indeed, but whose personal conviction is not absolutely subjective and arbitrary. Since he is bound by the laws of human thought and rules of experience, his estimate must be logical and reasonable, subject to the control of parties and higher courts and therefore justified. Moreover, non-boundness by legal regulations refers only to the last link in the chain of proving – the stage of evaluation, but not the performance and presentation of evidence.

Facts are strictly objective: they either exist or they do not exist, and this cannot depend on someone's discretionary estimate. Free judgmental conviction upon which evidence evaluation rests does not imply any freedom of choice, which is typical of a discretionary estimate. Facts and evidence can lead to one and only correct view, while all the others are incorrect.

Discretionary estimate refers only to legal not evidence-related issues, which it assumes as already determined. What it actually does is give authority to reach different legal decisions based on one and the same factual situation. Therefore, it is wrong to deem it identical to free evaluation of evidence, where subjective factor is quite strong as well.[43] The confusion is deepened by the fact that sometimes it is more difficult to determine facts than to implement law in a narrower sense, as well as by the close ties between these two processes, while the boundaries between them are sometimes very fluid.

VII. The Importance of Purification of the Term Discretionary Estimate for Distinguishing the Principles of Legality and Opportunity

In the field of criminal procedural law the stated distinctions lose some of their practical significance, which is necessary in other places because of the specific executive-legal problem of judiciary re-examination of decisions. However, the distinctions seem necessary in the context of terminological determination of the principles of legality and opportunity in criminal prosecution. Namely, discretionary estimate can serve as a decisive criterion in their distinguishing only in its purified and differentiated form. Unjustifiably wide view subsuming other cases of relative freedom of movement on the part of law administrator under the term discretionary estimate can lead to an even higher level of confusion. It is, indeed, undesirable not only because of theoretical, but practical implication as well. We believe that what seems to be productive in providing a correct delineation between the principles of legality and opportunity is a correctly observed relationship between discretionary estimate-law interpretation and discretionary estimate-free evaluation of evidence. It is revealed that even the strictest rule of the principle of legality is not deprived of a certain level of freedom of movement on the part of prosecution bodies. This freedom is associated with the conditions for the institution of an obligation of prosecution, which both principles have in common. It is present in both the field of evidence and the field of legal issues.

a) On the one hand, there is a freedom of movement on the part of prosecution bodies in determining if there is a reasonable doubt, when prosecution body first dictates the intensity of evidence collection and/or informal sources of knowledge, freely choosing their number, kind, sequence and pace, and then evaluates them freely. This area of the prosecutor's subjectivity did not escape the attention of legal theory. Nevertheless, those who attribute it with discretionary character, offering it as a proof of identification of legality and opportunity, are mistaken.[44] We find that this *"Beurteilungspielraum"* is immanent in the function of prosecutor, but that it has no discretionary estimate qualities. This is how Vasiljević's remark should be understood, which claims that the principle of legality excludes the estimate of a political, but not the procedural opportunity in prosecution.[45] All instances of determining the existence of actual conditions entail weighing chances of a conviction, and if the forecast in regard to proving perpetration and responsibility is estimated as favourable, this instigates an obligation of prosecution. Public prosecutor would have no interest in bringing such charges which will prove to be needless because of a subsequent acquittal by court. It would not only be contrary to the interest of procedural economy, but would, to a certain extent, jeopardise the equality of citizens before the law. Some authors argue against the principle of *in dubio pro reo* in this field, so in doubtful cases they allow public prosecutor to be inclined to instigation rather than discontinuation of the proceedings.
b) On the other hand, a free operation of prosecution bodies is followed by the process of law implementation in the narrower sense. The decision on criminal (non)prosecution entails a previous legal qualification of the act. Since the system of incrimination can be criticised for its occasional lack of clarity, as well as a lack of determined and precise dispositions, there is a need for interpretation, which widens the scope of prosecutor's powers. Besides, if we abandon the traditional understanding of subsumption as a kind of automatism, we will see that it always (not only in the presence of indefinite and ambiguous terms) presents prosecutor with certain difficulties, thus opening 'free zones' for their removal. So Englisch, starting from equalling as the essence of subsumption, claims that only the same can be subsumed under the same, so that subsumption of a single case under a single term presents a logical nonsense.[46] If it is only a term that can be subsumed under

[43] Quite frequent misconception about the issue of facts as a subject of discretionary estimate is explained by Krbek by too strict and incorrect terminological opposition of executive judgment and discretionary estimate. Namely, escaping judiciary control is considered to be a key feature of discretionary estimate, and since some courts failed to deal with factual issues in the process of legality control, a wrong conclusion was drawn that when determining factual state discretionary estimate was carried out. (Ivo Krbek, op. Cit., p. 137).

[44] Ewald Meier, op. Cit., p. 39; O. A. German: 'Zum strafprozessrechtlichen Legalitatsprinzip', Schweizerische Zeitschrift fur Strafrecht 1/1961, p. 9.

[45] Tihomir Vasiljević: 'Krivično procesno pravo", Belgrade, 1981, p. 122. Similarly Toma Živanović: 'Osnovni problemi krivičnog i građanskog procesnog prava', Belgrade, 1941, p. 122.

[46] Karl Engisch: 'Dobijanje konkretnih pravnih presuda na temelju pravnog načela – osobito problem supsumcije', Pravni vjesnik 1–2/1988, p. 183.

a term, then a fact has to take the shape of a term, otherwise it cannot be comprehended.[47] If subsumption of a concrete content under one term is nothing more than putting such a case into a class of cases defined by abstract factual state of a legal norm, then a question is raised again if they can be equalled and if the deviations are important. The ideal of complete determination, as implied by the principle of legality, is thus revealed as fictive. Neither upper nor lower premise of the formal-logical judgment is not completely given.[48]

To conclude: a public prosecutor, regardless of the currently applied principle of criminal prosecution, is far from functioning as a prosecuting automat. A certain level of freedom of movement stemming from the nature of his function is unidentifiable to discretionary estimate. In the best case scenario, this can go to prove that discretion entailed by opportunity would be neither the first nor the only one in the spectrum of the already existing freedoms a prosecutor enjoys, which would compose a natural environment in case of its inauguration. In this sense, we could speak about a trend of extending the law administrator's powers as an expression of legislator's incapability to adjust his regulations to the particularities of a concrete case.

On the other hand, we should not forget that those other zones of freedom in acting, although different in their objectives, scope of power and legal nature, sometimes come quite close to discretionary estimate in their actual effects, and in some instances they are abused for this purpose. For example, it cannot be ruled out that a prosecuting body, by manipulating the number, kind and evaluation of evidence,[49] or by arbitrary interpretation of general clauses [50] and legal standards, procures a dismissal of charges, and/or discontinuation of proceedings where there are actual and legal conditions for prosecution. Moreover, it turns out that the reality is different from proclaimed values, that it has mercilessly perverted the principle of legality, whose authority is majorly undermined by the realisation that it is no guarantee of law implementation in all cases. In this sense, the principle of legality is criticised as being nothing but a facade hiding a significant factual opportunity. Anyway, if certain selection is necessary from the aspect of normal operation of the chronically overloaded criminal justice system, it should be institutionalised. If practice shows tendency towards an inconsistent implementation of the principle of legality, it is better to sanction it than to turn a blind eye to it. Legislator pushes himself to the background by prescribing an absolute obligation to prosecute, which law administrators obviously cannot fulfil. By declaring strict legality, legislator denies an opportunity to draw a line between actually existing selection and selection which is sometimes necessary.

The method and scope of accepting legality and opportunity in criminal prosecution varies according to a number of factors, such as legal ideology, political, constitutional and legal tradition, position of prosecuting body, and foremost, material criminal law, that is, its rigidness or flexibility. If legality is taken as a rule, the need for opportunity as an exception will appear only when other institutions of material or procedural law fail to secure a sufficient level of protection of a certain public interest. As a good illustration of this comes the institution of an act of little significance (former term: inconsiderable social danger), which served as a safety valve in the sphere of minor crime to prevent serious re-examination of the justifiability of the principle of legality in our jurisprudence.

Normally, positive laws today rarely recognise sole effectiveness of the principle of legality or the principle of opportunity. Where insisting upon a consistent administration of the valid principle would yield negative effects, it is resorted to its limitations and exceptions. We could even say that there is a tendency of convergence between these two, once sharply opposed principles. This is contributed to by an increasing demand for anticipatability of prosecutor's decisions in the opportunity countries, as well as an increasing demand for higher level of dissolution of the principle of legality in legality countries. Corrective measures resulting from this [51] are a certain proof that there is a need for combining positive effects of both principles. Moreover, it is noticeable that each system has a tendency to, with instruments appropriate to it, join the general tendency of diversion (aberration of criminal procedure). Although the ambition of this article is not to make a categorical statement in favour of any of them, it is our opinion that the idea of opportunity should not be rejected a priori. It is a legitimate power,[52] which has its limits, is subject to control, and, owing to some legal or extralegal factors, functions quite well in a number of countries contributing to eradication of crime.

[47] Some of Hegel's thoughts are in the same line with this: *To have a thought means to be educated to think, and no longer stay in the realm of purely sensual; objects can be adjusted to the form of generality and direct themselves in the will toward something general.* (quoted after Serbian translation of Hegel: 'Osnovne crte filozofije prava', Sarajevo, 1989, p. 337).

[48] Boštjan Zupančič: 'Nekaj misli o načelu zakonitosti', Revija za kriminalistiko in kriminologijo 1/1980, p. 29.

[49] Conclusions are interesting which were reached by Klaus Sessar in analysis of the West German prosecution offices. Examining the relationship between the scope of evidence and gravity of criminal offence in cases where the defendant did not admit to committing the crime, he concludes that the more serious crime the less evidence is presented, leading to higher justifiability of prosecution, and vice versa, in less serious cases the higher number of evidence serves to prove there is not enough evidence for bringing charges. (Klaus Sessar: 'Legalitatsprinzip und Selektion, Zur Ermittlungstatigkeit des Staatsanwalts' in: Goppinger, Kaiser: "Kriminologie und Strafverfahren", Stuttgart, 1976, p. 155).

[50] As an example we can give the institution of a minor crime, in regard to which there is great inconsistency in the territories of individual public prosecution offices.

[51] Guidelines for a uniform use of opportunity powers; deviations from the principle of legality.

[52] Both principles have equal rights to survival from the aspect of legal state and their compatibility with some other generally accepted principles of material-procedural law. More in: Snežana Cigler: 'Odnos načela legaliteta i oportuniteta krivičnog gonjenja prema drugim pravnim načelima', Glasnik Advokatske komore Vojvodine 4/1994, pp. 3–16.

Entwicklung des Begriffes und der Fassung der Straftat im tschechischen materiellen Strafrecht

Josef Kuchta [1]

1. Im Allgemeinen

In der tschechischen Strafgesetzgebung kam es in vorigen Jahren zu den großen Veränderungen. Als Resultat der langjährigen legislativen Bemühungen wurde neues Strafgesetz angenommen. In Kraft trat dieses Gesetz am 1. Januar 2010, und zwar unter der Gesetznummer 40 vom Jahre 2009 der Gesetzversammlung. Während 18monatlicher Wirksamkeit wurden über Geltendmachung in Praxis viele positive und negative Erfahrungen versammelt.

Dieses Gesetz verankerte viele wesentliche grundsätzliche Veränderungen im Vergleich mit dem vorherigen Strafgesetz vom Jahre 1961. Zu den wesentlichsten Veränderungen gehören selbstverständlich andere Fassung und anderer Begriff der Straftat, die jetzt fortschrittlichen Forderungen entsprechen. Über Grundunterschieden zwischen älterer und neuer Regelung möchten wir jetzt den Interessenten ausführlicheren Bescheid geben.

2. Begriff der Straftat und ihre Merkmale im älteren Strafgesetzbuch

Die Grundlage der Strafverantwortlichkeit nach vorherig gültigem tschechischem Strafrecht war die Begehung der Straftat.

Die Definition der Straftat war in der Bestimmung 1 Absatz 1,2 des Strafgesetzbuches enthalten. Die Straftat war entsprechend diesem Begriff für die Gesellschaft gefährliche Tat, derer Merkmale in diesem Gesetz angeführt waren. Die Tat, derer Stufe der gesellschaftlichen Gefährlichkeit geringfügig war, war keine Straftat, obwohl sie anders formelle Merkmale der Straftat auswies.

Diese Definition brachte sog. formell-materielle Fassung der Straftat zum Ausdruck, die zu den Grundbegriffen des tschechischen Strafrechtes in der sozialistischen Periode gehörte.

Grundmerkmale der Straftat nach dieser Fassung also waren:

- gesellschaftliche Gefährlichkeit (sgn. materielles Merkmal der Straftat). Bei Erwachsenen musste die Stufe der Gefährlichkeit mehr als geringfügige sein, bei den Jugendlichen mehr als kleine sein.
- Merkmale, die im Strafgesetzbuch angeführt waren (sgn. formelles Merkmal der Straftat, Tatbestand).

Damals gültige Rechtsregelung war also auf der formell-materieller Fassung der Straftat gegründet. Es handelte sich um die Konzeption, nach der die Straftat durch zwei gleichzeitig anwesende Merkmale gestaltet wurde. Zur Strafbarkeit mussten gleichzeitig zwei nötige Bedingungen erfüllt werden – gesellschaftliche Gefährlichkeit und der Tatbestand. Wenn einzige von diesen Bedingungen nicht gegeben wurde, handelte es sich um keine Straftat. Formelle Merkmale wurden im Strafgesetz sowohl im allgemeinen Teil (z.B. Definition einzelner Schuldformen, Vorbereitung, Versuches, Rückfalles usw.), als auch im besonderen Teil (Definitionen einzelner Arten der Straftaten) geschrieben. Diese Auffassung hatte ihre Folgen und Konsequenzen nicht nur für Lösung der Frage des allgemeinen Begriffes der Straftat, sondern auch für richtige Darlegung der Umstände, die Benutzung des höheren Strafsatzes bedingen. Die Stufe der gesellschaftlichen Gefährlichkeit hatte Relevanz auch für Verhängung der Strafe und auch für Lösung weiterer Strafrechtsfragen, z.B. des Rückfalles.

Es wurde schon gesagt, dass zur Strafverantwortung beide diese Merkmale nötig waren. Wenn es an einem fehlte, kam die Strafverantwortung nicht in die Frage und es handelte sich um keine Straftat. Es waren zwei verschiedene Fälle denkbar:

- die Tat ist gefährlich, aber hat keine formellen Merkmale im Strafgesetz. Solche Fälle konnte man als Straftaten nur damals beurteilen, wenn die Verfassung und Strafgesetzbuch die Analogie unzugunsten des Täters in der Richtung der Erweiterung der Strafverantwortung zulassen würden, das ist aber in zivilisierten Staaten und selbstverständlich auch in der Tschechischen Republik unzulässig. Daher handelt es sich nicht um die Straftat – bloß materielles Merkmal würde zur Strafverantwortung ungenügend.

  Solche Lücken im Strafgesetzbuch könnte man nur durch Schaffung des neuen Straftatbestandes im Strafgesetzbuch beseitigen, natürlich unter Berücksichtigung des Grundsatzes des Verbotes der Retroaktivität unzugunsten des Täters. Es ist aber von Willen des Gesetzgebers abhängig.
- die formellen Merkmale sind gegeben, besteht auch der Tatbestand, aber im konkreten Fall ist die Handlung nicht gesellschaftlich gefährlich. Um solche Fälle handelt es sich, wenn ein von den Tatbestandmerkmalen nur im geringfügigem Maß gegeben ist, oder wenn der Umstand, der ge-

[1] Doz. JUDr. Josef Kuchta, CSc., Lehrstuhl für Strafrecht, Juristische Fakultät, Masaryk Universität, Brno, Tschechische Republik.

sellschaftliche Gefährlichkeit seit Beginn ausschließt (sog. Rechtsfertigungsgründe), gegeben ist. Auch in diesem Fall ist die Handlung nicht strafbar.

3. Geschichte und Entfaltung dieser Fassung

Diese materiell-formelle Fassung war schon nach dem sowjetischen Muster im Strafgesetzbuch im Jahre 1950 kodifiziert. Im Zusammenhang mit Bestimmung §1 des Strafgesetzbuches über Zweck des Strafgesetzes, wo geschützte Interessen als Volksrepublik, ihr sozialistischer Aufbau, Interessen der Arbeiterklasse definiert wurden, sollte diese Inhaltsfassung vor allem Klassencharakter der Straftat betonen.

Materielle-formelle Fassung war auch im neuen Strafgesetzbuch vom Jahre 1961 beschrieben. Diese Fassung fand Ausdruck nicht nur in Gestalt der Definition allgemeinen Begriffes der Straftat, sondern auch in anderen Richtungen.

Die gesellschaftliche Gefährlichkeit war von großer Bedeutung vor allem bei Verhängung der Strafe. Diese Gefährlichkeit war Hauptkriterium, das vom Richter bei Bestimmung der Höhe und der Art der Strafe bedeutend berücksichtigt werden musste (§ 31 Abs. 1). Die Stufe der gesellschaftlichen Gefährlichkeit war bestimmt besonders durch Bedeutung des geschützten Interessen, das von der Straftat betroffen wurde, durch die Art der Tatdurchführung und ihre Folgen, durch die Umstände, unter denen die Tat begangen wurde, durch Person des Täters, durch Maß seines Verschuldens und durch seine Motivierung (§ 3 Abs.4). Daneben wurde die Stufe der Gefährlichkeit noch von sog. erleichternden und erschwerenden Umständen beeinflusst (§ 33, 34). Auch Rückfall konnte nur damals berücksichtigt werden, wenn die Tatsache der vorherigen Begehung anderer Straftat die gesellschaftliche Gefährlichkeit nachfolgender Straftat wesentlich erhöht (siehe § 34 Lit. j), § 41 des Strafgesetzbuches 1961). Auch die besonders erschwerenden Umstände von höheren Absätzen der Bestimmungen durfte man nur damals einziehen und benutzen, wenn dieser Umstand den Grad der Gefährlichkeit der Grundhandlung wesentlich erhöhte (§88).

Zur diesen materiell- formellen Fassung der Straftat wurden die kritischen Vorbehalte eingewandt, die vor allem die Erfahrungen von letzter 50 Jahren berücksichtigten. Es war klar, dass die ungenügende Geltendmachung des Grundsatzes Nullum crimen sine lege, sehr vager und unbestimmter Begriff der gesellschaftlichen Gefährlichkeit und unbestimmt formulierte Tatbestände zweifellos sehr zur Ungesetzlichkeiten des totalitaristischen Staaten Beitrag genommen haben. Solange die gesellschaftliche Gefährlichkeit als Hauptkriterium der Kriminalisierung der menschlichen Taten funktionierte, musste man die unbestimmte und ideologische Natur dieser Gefährlichkeit in viele Tatbestände projizieren, die aus fünfziger und sechziger Jahren vorigen Jahrhunderts bekannt waren. Diese vagen Tatbestände wurden im Kampf gegen politischen Gegner missbraucht.

Korrektiv der gesellschaftlichen Gefährlichkeit wurde also vor allem in der Richtung der Verstrengerung der Strafbarkeit geltend gemacht (besonders politische und wirtschaftliche Straftaten). Auch in Fällen der Minderung der Strafbarkeit (Umstände, die Strafbarkeit ausschließen und vertilgen) trug dieser Korrektiv zur Unbestimmtheit des Gesetzes großen Beitrag. Der Gesetzgeber war bemüht, Schutz der gesellschaftlichen Werte sicherzustellen, dem Staaten bestimmte Unabhängigkeit von seinen eigenen Gesetzen zu ermöglichen, seine eigene legislative gesetzgeberische Tätigkeit zu erleichtern, und so hatte er die Bedingungen der Strafverantwortung sehr breit und unbestimmt begrenzt. Als die Versicherung sollte gerade dieser Korrektiv der Gefährlichkeit dienen. Auch in diesem Sinn bedeutete die materielle Fassung der Straftat die Verkleinerung der Bedeutung des formellen Elementes.

Sozialistische tschechische Strafrechtslehre unterschied materiellen Begriff der Straftat (gesellschaftlich schädliche Tat), und formellen Begriff der Straftat (nach dem gültigen Strafrecht strafbare Tat). De lege lata ging unsere Rechtslehre vom materiellen Begriff aus, formelle Seite und Fassung stand ein bisschen im Hintergrund. Gesellschaftliche Gefährlichkeit war also der Hinweis für den Gesetzgeber, was kriminalisiert sein soll, Tatbestand war vor allem für Organe der Aplikationspraxis wichtig. Für diese Organe war es vor allem nötig, einzelne Merkmale des Tatbestandes festzustellen, und im positiven Fall dann konkreten Grad der Gefährlichkeit der Handlung für die Gesellschaft auszuleiten. Man sparte so an der Zeit und der Bemühung – wenn die konkrete Merkmale nicht festgestellt wurden, musste man nicht vagen Begriff der Gefährlichkeit benutzen und bewerten.

Materieller Begriff schuf die Grundlage und Grund der Kriminalisierung ausgewählter Taten, er brachte die Einbildung der Gesellschaft zum Ausdruck, was eigentlich die Straftat sein kann, und er war auch wichtiges politisches Instrument. Formeller Begriff war dagegen Grund des gültigen Strafrechtes, er ermöglichte die Unterscheidung der Straftaten von unstrafbaren Handlungen, und war auch für Garantenfunktion des Strafrechtes von großer Bedeutung.

Diese formelle Auffassung ging aus dem Grundsatz Nullum crimen sine lege hervor, und respektierte auch das Fordernis der Bestimmtheit der strafrechtlicher Normen. Der Gesetzgeber wurde dadurch gezwungen, die Bestimmtheit, Präzisierung und Klarheit der Strafnormen zu beachten, und die unbestimmten Normen zu vermeiden.

In Strafgesetzbüchern westlicher Staaten ist schon lange Zeit in der Regel die Straftat als rechtswidrige und strafbare Handlung definiert. In solchen formellen Definitionen fehlt also das unbestimmte Merkmal – gesellschaftliche Gefährlichkeit. Das aber bedeutet nicht, dass Begriff der Straftat und sein gesetzlicher Tatbestand in diesen Rechtsordnungen bloß als formelle Beschreibung ihrer gesetzlichen Merkmale begriffen sind. Am öftesten sind sie als Beschreibung der Merkmale charakterisiert und konkretisiert, die die Straftat als die Tat, die gesellschaftlich schädlich ist und die Rechtsgüter – Rechtsobjekte verletzt und daher ist es nötig, die Gesellschaft und die Bürger vor solcher Tat zu schützen, befasst.

Aspekt der Gefährlichkeit, bzw. der Schädlichkeit der Tat hat für die geschützte Rechtswerte die Natur der bedeutenden Auslegungsregel, die behilflich ist, den Tatbestand und seine Merkmale nach dem teleologischen Sinn auszulegen, Große Bedeutung. Auch bei dieser Auffassung funktioniert materieller Aspekt als Korrektiv der formellen. Die Geltendmachung befindet sich hier jedoch im Einklang mit Postulat Nullum crimen sine lege, im Rahmen der gesetzlichen Regelung der strafrechtlichen Institute, die dadurch nicht ersetzt, aber gut ausgelegt sind.

Bedarf des materiellen Korrektives ist dadurch begründet, dass es nötig ist, die Strafbarkeit für zwei Fallgruppen auszuschließen:

- Handlungen, die unter den Rechtsfertigungsgründen realisiert wurden,
- Bagatelle Handlungen, bei denen einige Merkmale nur im geringfügigen Maß gegeben sind.

Es ist klar, dass das Strafgesetz in den Tatbeständen ihre typischen, die Gefährlichkeit charakterisierenden Merkmale beschreibt. Ähnlich sind bei den Rechtsfertigungsgründen typische Merkmale des Ausschlusses der gesellschaftlichen Gefährlichkeit angeführt. Mangel an der Rechtswidrigkeit muss man aber aus gesamter Rechtsordnung resümieren, einige Rechtsfertigungsgründe sind im Strafrecht beschrieben, andere in anderen Rechtszweigen. Die Rechtslücken kann man auch unter Benutzung der Analogie in bonam parten beseitigen. Auf keinen Fall sollte es möglich sein, den Mangel an Rechtswidrigkeit nur auf die Konstatierung, dass es an gesellschaftlicher Gefährlichkeit fehlt, zu stützen. Tschechisches Strafrecht bisher ermöglichte solche Schlussfolgerung, und gleichfalls macht es dadurch die ganze Gruppe der Rechtsfertigungsgründe überflüssig. Diese Probleme sollte der Gesetzgeber durch Vervollkommnung der gesetzlichen Regelung, und nicht durch Gefährlichkeit der Tat lösen.

Im Allgemeinen wurden die Vorteile materieller Auffassung der Straftat bei der Lösung der Bagatelldelikte anerkannt. Diese Delikte sollten nicht strafbar sein, trotzdem sie formell Straftatmerkmale tragen. In diesem Zusammenhang ist die österreichische Regelung vom Jahre 1974 interessant, die zwar von Formaldefinition der Straftat ausging, aber in § 42 Problem der Bagatelldelikte auf die Art der materiellen Auffassung löste (Geltendmachung dieses Institutes nur damals in die Frage kommt, wenn geringfügiges Verschulden, unbedeutende Folgen usw. gegeben sind. Es ist die Frage, dass es möglich wäre, solches Institut als Interpretationsregel zu beachten, die von Subsidiarität des Strafrechtes ausgeht und restriktive Auslegung der Tatbestände ermöglicht.

Problem der Bagatelldelikte könnte man also im Rahmen des materiellen Strafrechtes lösen, aber die Lösung ist auch im Prozessrecht zu finden. Das hieß aber die Beschränkung des Legalitätsprinzips und Erweiterung der Opportunität. Formelle Lösung sollte aber Vorrang haben.

Unbestreitbar ist auch jetzt die Benutzung des Institutes der gesellschaftlichen Gefährlichkeit im Gebiet der Bestrafung, wo die Gefährlichkeit der Tat und Täters der Höhe und der Art der konkreten verhängten Strafe angemessen sein muss. Dass ist auch in westlichen Ländern allgemein anerkannt.

Die Problematik des allgemeinen Begriffes der Straftat war immer kompliziert und diskutabel. Sie stand im Zentrum der Aufmerksamkeit tschechischer juristischer Öffentlichkeit schon mehrere Jahre. Erst in diesem Jahr 2003 kam es aber zum Entwurf der Rekodifizierung des tschechischen Strafgesetzes, die u.a. auf die formelle Auffassung der Straftat gerichtet ist.

4. Zeitgenössische Regelung de lege lata

Zwecks Erreichung der Gesetzlichkeit der Bedingungen der Strafverantwortlichkeit wurde also neue Rekodifizierung in formeller Auffassung der Straftat verankert. Das sollte u.a. zur Erhöhung der Einigkeit bei der Auslegung und Benutzung des Gesetzes und zur Verstärkung der Gleichberechtigung und Rechtsgewissheit führen. Die Straftat ist jetzt im Strafgesetz auf folgende Art definiert: Die Straftat ist die rechtswidrige Tat, die vom Gesetz als strafbare Tat bezeichnet ist, und die in diesem Gesetz oder in anderen Gesetzen angeführte Merkmale ausweißt – Bestimmung 13, Absatz 1.

Diese Lösung sollte die Verlassung bisheriger Auffassung bedeuten und die größte Änderung dar, die das Charakter neuer Rekodifizierung bestimmt, stellen. Diese formellrechtliche Auffassung sollte folglich in die Definitionen einzelner Tatbestände projiziert werden. Das würde vielleicht mehr der Strafrechtslogik entsprechen, die darin besteht, dass es besser ist, wenn man wegen geringfügigen Diebstahls das Verfahren einstellt, als wenn solcher Fall seit Beginn als keine Straftat betrachtet ist. Das sollte vor allem bei der Jugendlichen als Folge die Vernichtung des Rechtsbewusstseins der sozial-ethischen Bedeutung des Diebstahles haben.[2]

Aus dem Begriff verschwand so materielles Merkmal. Nach dem Grundbericht zum Strafgesetzbuch sollte solche Auffassung zur Erhöhung der Einigkeit bei der Entscheidung und Darlegung des neuen Gesetzes führen, gleichzeitig sollte es zur präzisen Ausgrenzung einzelner Tatbestände beitragen. Diese strenge formelle Fassung ist aber im Strafgesetz nicht zum Ende geführt und sie wurde zum Gegenstand der Diskussion, die hochgeführte Aspekte berücksichtigte und zur ein bisschen Kompromisslösung führte.[3]

Formelle Auffassung kann nach vielen Ansichten im keinen Fall bedeuten, dass die gesellschaftliche Gefährlichkeit und ihre Kriterien schon keine Bedeutung hätten. Straftat kann nicht als nur Beschreibung der formellen Merkmale begriffen werden. Es ist also auch bestimmter materieller Korrektiv direkt in der Ebene der Strafverantwortlichkeit nötig.

Nach den Diskussionen wurde ins Gesetz Kompromisslösung inkorporiert, entsprechend dem die Strafverantwortlichkeit des Täters und damit verbundene Straffolgen nur in Gesellschaftlich schädlichen Fällen geltend gemacht werden kann, in denen die Geltendmachung der Verantwortlichkeit gemäß anderen Rechtsvorschrift nicht genügend ist – Bestimmung 12 Absatz 2 des Strafgesetzbuches. Es handelt sich um die Auslegungsklausel, die nicht direkt bei der Definition der Straftat gereiht wurde, und diese stellt Äußerung des Grundsatzes der Subsidiarität der Strafrepression dar.[4]

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[2] Samal P. K úvodním ustanovením připravované rekodifikace trestního zákona, trestněprávní revue, 12,2002, S. 365.

[3] Dazu z.B. die Abhandlung von Kratochvíl und Válková veröffentlciht In: Válková,H., Stočesová,S. Česká reforma trestního práva hmotného na rozcestí – bilance a perspektivy. Sborník příspěvků z odborného semináře konaného 15. června 2006 na PrF Západočeské universitě v Plzni. Plzeň, Západočeská universita, 2006, weiter die Beiträge veröffentlicht In: Koncepce nové kodifikace trestního práva hmotného České republiky. Sborník příspěvků z konference konané dne 17.4.2000 na MS v Praze, MU Brno, 2000.

[4] Kuchta,J. Rekodifikace českého trestního práva hmotného jako vrchol dvacetiletých snah přelomu tisíciletí a výskedek kontinuálního rozvoje. In: Právo,ekonomika,management, 2010, 1, S. 7.

Es wurde also neuen Begriff der gesellschaftlichen Schädlichkeit eingeführt, der sachlich den Begriff der Gefährlichkeit ersetzt. Es kommt jetzt also faktisch wieder zur Rückkehr zum materiellen Korrektiv. Durch seine Einführung in einfacher Form verschwächert der Gesetzgeber seinen ursprünglichen Argument über den Bedarf der Benutzung der konkreteren und eindeutigeren Kriterien. Es besteht jetzt die frage, ob diese Begriffe einig oder unterschiedlich sind. Wir sind der Meinung, dass die Kriterien der Schädlichkeit ein bisschen anders sein müssen als bei dem Begriff der Gefährlichkeit, diese Kriterien sind aber leider in neuer Regelung nicht bestimmt und ausgedruckt. Das verursacht Unklarheiten bei der Auslegung dieser Kriterien.[5]

Bestimmung 12 Absatz 2 beinhaltet also Prinzip **ultima ratio.** Im Einklang mit diesem Prinzip ist gefordert, dass der Staat die strafrechtliche Mittel sehr zurückhaltend geltend machen soll, das heißt vor allem in den Fällen, wenn die anderen Mittel nach anderen Rechtsgebieten ungenügend oder außer Kraft sind. Dieses Erfordernis hat deutlich Bedeutung für Interpretation und Auslegung der strafrechtlichen Normen.[6]

Dadurch verliert aber neue Gestaltung dieses Institutes und Korrektives ziemlichen Teil ihrer proklamierten Bedeutung, besonders wenn der Gesetzgeber der Präzisierung und Konkretisierung der Tatbestände im besonderen Teil des Strafgesetzes sehr schuldig blieb. Es ist auch nötig zu bemerken, dass die Kriterien der Schädlichkeit in die Frage nur damals genommen dürfen werden, wenn man über die Verhängung der Strafe erwägt, und nicht bei den Erwägungen über Strafverantwortlichkeit. Man muss auch in Betracht nehmen, dass neu vorbereitete Rekodifizierung der Strafprozessordnung mit breitem Erweiterung des Opportunitätsprinzipien rechnet. Alle diese Erwägungen werden also von Polizisten und Staatsanwälten in Vorbereitungsverfahren beurteilt werden, und dass kann zur grossen Ungewissheit bei der Entscheidung führen.

In die Frage kommt auch prozessuale Lösung der Depenalisierung. Der wichtigste Grund dafür ist, dass die Interventionsberechtigung des Staatsanwaltes bei der Geltendmachung des Opportunitätsprinzips verschiedene Varianten des alternativen Verfahrens noch im vorgerichtlichen Stadium des Strafverfahrens gewährleisten, dass zum möglichen Ausgleich zwischen dem Täter und dem Beschädigten führt. Das legt natürlich erhöhte Ansprüche an die Arbeit der Polizeiorgane und Staatsanwaltschaft, denn es wird zum wesentlichen Anwuchs der Straffälle kommen.

Materielle Fassung der Straftat funktioniert im Strafgesetzbuch also in drei Hauptrichtungen:

- im Gebiet der Strafbarkeit – es äußert sich in der Formulierung der Grundlagen der Strafverantwortlichkeit und einzelner Tatbestände, gleichfalls als in Konstruktion des Grundsatzes **ultima ratio** in der Bestimmung 12 Absatz 2
- im Gebiet der Strafzumessung – Bestimmung 39 Absatz 2 konstruiert Hauptkriterien der sozialen Schädlichkeit, ihrer Höhe der Höhe der verhängten Strafe angemessen sein muss
- in der Prozessordnung in der Verbindung mit **ultima ratio**, wenn Straforgane im Fall sog. Bagatelldelikten das Strafverfahren nicht eröffnen müssen oder im Gegenfall das Strafverfahren einstellen können.

Materielles Merkmal äußert sich auch noch in weiterer Richtung, und zwar in neu gefassten Kategorisierung der Strafrechtsdelikten. Bisher hatte das Strafgesetzbuch nur eine Kategorie Strafrechtsdelikten – die Straftaten. Neu ist sog. Bipartition der Strafdelikte eingeführt – nebenan bestehen zwei Deliktentypen – die Verbrechen und die Vergehen. Diese Gliederung geht aber vom Begriff der Gefährlichkeit, resp. der Schwere gerichtlich strafbarer Handlungen aus, wobei als das Hauptgliederungskriterium die Höhe des Strafsatzes funktioniert.

Gesamte Problematik der Grundlagen der Strafbarkeit und der Fassung der Straftat ist also im tschechischen Strafrecht angesichts historischer Entfaltung sehr kompliziert und ruft momentan mehr Fragen als Antworten hervor. Hauptaufgabe bei der Aufklärung und Vereinigung dieser Problematik gehört jetzt der Teorie und vor allem der Praxis, die benötigte Judikatur schaffen muss.

[5] Fenyk, J. Základy trestní odpovědnosti podle nového trestního zákoníku České republiky. Trestní právo, 2009, 3, S. 6.

[6] Dazu z.B. Šámal,P. Některé aktuální problémy návrhu kodifikace trestního zákoníku v roce 2007, In: Aktuální problémy rekodifikace trestního práva hmotného, AUC 2/2007, S. 14, 15.

Does the Czech Republic Need Criminal Liability of Legal Persons?

Marek Fryšták [1]

I.

Since March 2011, the Chamber of Deputies of the Parliament of the Czech Republic has been debating – as chamber print No. 285 – the government bill on criminal liability of legal persons and on proceedings against them [2]. Rather than outlining the contents of the bill, the present article seeks, first, to deal with the issue of whether the Czech Republic actually needs such legal regulation or not, and second, if such a need does exist, to find out the reasons for such regulation. When addressing these questions, the issue will be approached from two perspectives: with view to the international obligations of the Czech Republic and with view to observations and experience derived from practical applications.

II.

In Brussels on 26 July 1995, all of the then member states of the European Union, including the candidate countries (with the Czech Republic being one of them), adopted and signed the Convention on the protection of the European Communities' financial interests. This Convention was supplemented in the subsequent years with the first and second protocols, adopted and signed on 27 November 1996 in Dublin and 19 June 1997 in Brussels. Both protocols were also signed by the Czech Republic.

Article 3 of the second protocol to the Convention emphasizes the duty of each member state to adopt the necessary measures for introducing liability of legal persons for fraud, active corruption and money laundering committed for their benefit by any person acting either independently or as a part of the legal person's (statutory) body. Legal persons should be punished by effective, proportionate and dissuasive sanctions that include monetary fines, deprivation of the right to public benefits and subsidies, temporary or permanent exclusion from commercial activities and even the liquidation of legal persons.[3]

These EU documents became binding on the Czech Republic as a result of the position documents to Chapter 24 in connection to Article 69 and subsequent articles of the Europe Agreement signed between the European Communities and their Member States of the one part and the Czech Republic of the other part on 4 October 1993.[4] The Czech Republic declared that the corresponding regulation will be adopted in connection with the passage of the new codification of substantive criminal law. The position documents stated that the criminal liability of legal persons was expected to be regulated by law. However, as later legislative developments revealed, the proclaimed introduction of such criminal liability was neither so certain nor so unequivocal.

The new social and economic changes that hit Europe during the 20th century and culminated in the 1990s and at the turn of the millennium started almost imperceptibly to wear off the exclusivity of the principle of individual criminal liability of natural persons. No state on the continent was spared discussions and considerations of this issue since the existing legal instruments serving for the protection of the society from faulty and unlawful behaviour of legal persons were not effective and did not sufficiently perform their repressive and preventive functions. In its national legislation, every country thus had to address the question of whether to abandon the old and time-honoured principles of continental law concerning the criminal liability of natural persons and introduce genuine or non-genuine criminal liability of legal persons [5] or whether to opt for some other method, e.g. by strengthening administrative liability.

This issue had to be necessarily addressed by the Czech Republic as well – not only with view to its international obligations. The lack of agreement on how to progress in this issue resulted in the fact that the Czech Republic has, until today, ratified neither the Convention and its protocols nor many other international documents relating to punishment of legal per-

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[2] http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=285&CT1=0 (Accessed on 22.5.2011).

[3] Fenyk, J., Fryšták, M. Protection of the financial interests of the Eropean Communities in the Czech Republic. In European Law and National Criminal Legislation. Praha: Právnická fakulta UK, 2007, s.116–117.

[4] For more details, see the Communication of the Ministry of Foreign Affairs on the signing of the Europe Agreement between the European Communities and their Member States of the one part and the Czech Republic of the other part, published in the Collection of Laws of the Czech Republic as the Act No. 7/1995 Sb.

[5] Kratochvíl, V. Trestněprávní odpovědnost právnických osoba a jednání za jiného. Právny obzor, 2002, No. 4, p. 366.

sons.[6] The difficulty of the discussion was also reflected in several legislative measures (described in more detail below) that, even at a cursory glance, show a certain lack of logic, illustrative of the fact that the government of the Czech Republic was not clear about how to deal with the criminal liability of legal persons and the related international obligations. Initially, the government's legislative steps concerned not only the introduction (or strengthening) of the liability of legal persons under administrative law but also the introduction of criminal liability.

Under the Government's Decision No. 162 of 20 February 2002, a proposal of the new conception of administrative punishments was adopted. Among other, the proposal led to the drafting of a new bill on infractions and proceedings in the matter of infractions.[7] The bill significantly extended the list of sanctions imposed for committing infractions[8] regardless of whether they are committed by natural persons or legal persons. The administrative punishments that were to be introduced under the intended law included the fine, the prohibition of activity, the removal of authorization, the confiscation of a thing, the publication of a decision on an infraction, the prohibition of participation in public tenders and public competitions, and the prohibition to receive grants and subsidies. The bill was submitted to the government of the Czech Republic for debate in February 2004. However, the government's legislative council made the recommendation in September 2004 that the debate should be discontinued until the adoption of the new criminal code and the act on the criminal liability of legal persons and on proceedings against such persons.

As early as July 2004, the Chamber of Deputies of the Parliament of the Czech Republic received a government bill on the criminal liability of legal persons and on proceedings against such persons, which was discussed as chamber print No. 745.[9] The report on the legislative intent for this bill states that by adopting the criminal liability of legal persons, the Czech Republic would meet its international obligations arising from the Convention and other international documents requiring the introduction of liability of legal persons for their offences.

It needs to be emphasized that neither the Convention and its protocols nor any other international document categorically requires the introduction of criminal liability of legal person. They merely impose on the signatories the obligation to introduce the liability of legal persons for their offences, leaving it up to them whether the liability will be criminal or administrative.

The said bill was turned down by the Chamber of Deputies of the Parliament of the Czech Republic straight in the first reading in November 2004. The issue was thus shifted aside for some time.

In February 2008, the Chamber of Deputies of the Parliament of the Czech Republic received the government bill of the new criminal code that was to terminate the period of almost twenty years of efforts to re-codify procedural criminal law. The legislative intent to this bill, debated as chamber print No. 410, expressly states that the bill of the new criminal code does not consider the introduction of criminal liability of legal persons to parallel the classic criminal liability of natural persons. As a result of an agreement between the minister of justice and the minister of the interior, the regulation of the liability of legal persons, including effective, proportionate and dissuasive sanctions, will be covered within the draft proposal of administrative punishments that is being drafted by the Ministry of the Interior. The international documents require the existence of liability of legal persons for their offences, without unconditionally requiring their criminal liability – for that reason, some EU member states (e.g. Germany) do not have criminal liability and do not intend to introduce it in the future. The administrative punishments should embrace the range of sanctions recommended for legal persons, e.g. the prohibition to receive public grants and subsidies, monetary fines, temporary or permanent exclusion from commercial activities, supervision and liquidation of the legal person, etc.[10]

Essentially the same conclusion was arrived at by a specialized committee established by the minister of justice in 2000 when assessing the possible ways of dealing with the liability of legal persons for their offences. However, that attempt did not result in any unequivocal solution as regards criminal liability of legal persons. The committee concluded, among other, that an equal criminological and political goal can be achieved through administrative punishments of legal persons.[11]

The above-stated reasoning is, in a way, paradoxical. It is true that since 2002, the government of the Czech Republic has been implementing various steps as regards the reform of administrative punishments. At the time the draft of the new criminal code was submitted for debate to the Chamber of Deputies of the Parliament of the Czech Republic, legislative work on some acts was discontinued because – as mentioned above – September 2004 saw the government stop its debate on the bill of the new law on infractions that had been intended to increase the administrative liability of legal persons. The debate ended with claim that it would reopen after the adoption of the new criminal code and the act on criminal liability of legal persons and on proceedings against such persons.

The obligation to criminalize certain serious forms of anti-social activities and take measures against legal persons is contained not only in legal regulations of the European Union, which are

[6] On 5 April 2011 and 6 April 2011, the European Parliament approved the Report on the protection of the European Communities' financial interests, which stated, among other, that Estonia, Malta and the Czech Republic have not still ratified the Convention and its protocols. As regards other international documents, this concerns, for instance, the United Nations Convention against Transnational Organized Crime concluded on 15 November 2000 in New York. The Czech Republic signed it on 10 December 2000 but has not ratified it yet. The related Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, that entered into force on 25 December 2003, was likewise signed by the Czech Republic but has not yet been ratified.

[7] The bill can be accessed on the page of the Ministry of the Interior at www.mvcr.cz.

[8] The concept of "infraction" (přestupek in Czech) was chosen as the basis of administrative liability, unifying the existing infractions with other administrative delicts of natural persons and existing administrative delicts of legal persons.

[9] http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=745&CT1=0 (accessed on 22.5.2011) and Fenyk J. Návrh českého zákona o trestní odpovědnosti právnických osob a řízení proti nim (2004). In Dny práva 2009. Brno: Masarykova univerzita, 2009, pp. 1699–1710.

[10] For more details, see http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=410&CT1=0 (Accessed on 22.5.2011).

[11] Šámal, P. K otázce přičitatelnosti trestného činu právnické osobě. In Dny práva 2009. Brno: Masarykova Univerzita, 2009, p. 1778.

binding upon the Czech Republic, but also in many international treaties. The latter are still not binding upon the Czech Republic, although – with view to the country's membership in international organizations that drafted those treaties as well as the priorities of its own policies in the area of criminal law – the country should be bound by them.[12] The reason why the ratification of or accession to those treaties have been postponed is that the Czech legal system does not allow sanctions to be imposed on legal persons for their offences as specified in the treaties.

International organizations have been repeatedly and with an increasing intensity urging the Czech Republic to ratify or accede to those treaties because, as one of the last states that are unable to meet their obligations, the country is getting into an isolated position. Unfortunately, the Czech Republic is the very last member state of the EU that has not implemented its obligations in this area.

At present, the Czech Republic is not able to meet its obligations arising from the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Both of these framework decisions are based on the principle of mutual recognition, demanding member states to acknowledge and enforce decisions against legal persons issued by other member states.

The requirement to provide for criminal liability of legal persons within the European Union newly appeared even in Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. If the Czech Republic fails to implement the requirements of those directives, it will be subject to proceedings on the grounds of violating the Treaty on the Functioning of the European Union and, subsequently, the imposition of a financial penalty.

Apart from that, under the Lisbon Treaty, which came into effect on 1 December 2009, any possible new legal regulation that may deal with the liability of legal persons on the level of the European Union will be adopted in harmony with Title V Chapter 4 of the Treaty on the Functioning of the European Union, e.g. only by means of directives, and with the same possible negative consequences for the Czech Republic as in the case of the two directives that have been adopted before. Should the Czech Republic not be able to meet its obligations arising to it under EU regulations, it would face the commencement of proceedings for violating the treaties under Article 258 of the Treaty on the Functioning of the European Union. In addition, such proceedings would have to be combined, in harmony with Article 260(3) thereof, with a proposal to impose a lump sum or penalty payment. The Czech Republic could thus suffer financial penalties, incurred over a relatively short period of time.

III.

It must have been a certain "instinct of self-preservation" that led the Czech Ministry of Justice to quickly draft the bill of a new law on criminal liability of legal persons and on proceedings against such persons, and release the bill into the legislative process. It is certainly a shame that the Czech Republic has taken such a long time (at least since 1995) to deal with the issue of liability of legal persons for their unlawful behaviour and thus meet its EU and international obligations arising from the country's membership in the EU and from international treaties signed but not yet ratified. Already during the EU accession negotiations, the Czech Republic repeatedly proclaimed its will to introduce criminal liability for legal persons but that intention may not have been meant quite seriously: it was only the threat of starting the proceedings for the violation of the Treaty on the Functioning of the European Union that led to a speedy draft of the relevant bill.

If the question is raised at this point whether the Czech Republic needs criminal liability of legal persons or not, then I would reply that it does, in a way. Obviously, the Czech Republic does not, with view to the above-mentioned, have any other possibility. By relativizing the answer with "in a way", I wish to indicate that I am personally inclined to introduce criminal liability for legal persons for reasons that are detailed below, arguing that it should be carefully considered whether the proposed solution is the best one. If we consider the situation in other EU countries, then genuine criminal liability of legal persons that is directly provided for in criminal law is not to be found in all member states. It exists, among other, in the Netherlands, France, Denmark and Austria. By contrast, non-genuine criminal liability of legal persons, which makes it possible to impose a criminal law sanction or some similar sanction on legal persons (even though criminal liability of legal persons is not regulated under criminal law) is typical of Spain. The punishment of legal persons under administrative law is typical of Germany, Slovakia and Italy.

One cannot fail to mention that the proposed bill should also be politically acceptable – it remains to be seen from what happens in the future stages of the legislative process if that is the case. Needless to say, voices have been raised at various professional venues arguing that the bill was drafted in too much haste.[13]

IV.

Let us now consider the question asked at the beginning of the article from the point of view of experience and observations obtained in practice in connection with the phenomenon of economic crime. The following discussion is based on several case studies which can, despite originating in the 1990s, be generalized in a certain way.

Even though the proportion of economic crime in the overall crime rate is not very high, the harm it causes to society is more than evident. Occurrences of economic crime have a harmful and destructive effect on social consciousness – both by direct harm caused to citizens (e.g. as the clients of banks, savings institutes and investment funds gone bankrupt) and owing to the difficulty of detecting and proving such crime. It is likewise negative that

[12] This concerns, for instance, the Convention on Cybercrime signed in Budapest on 23 November 2001 and the UN Convention against Corruption adopted and signed on 31 October 2003 in New York. The Czech Republic signed the former convention on 9 February 2002 and the latter on 22 April 2005, though it has not ratified either of them yet.

[13] Such opinions were voiced, among other, at the conference "New phenomena in economic crime in light of the reform of criminal law, held on 2 February 2011 by the Department of Criminal Law at the Faculty of Law, Masaryk University in Brno, Czech Republic.

economic crime tends to be committed by a new type of offenders ("white-collar" workers). They are proper citizens – successful in their jobs or business and enjoying full trust of those around them – who are quite ordinary and do not stand out from the crowd. When accused of or charged with a crime, other people tend to be very surprised because "no one would think it possible". Economic crime has grown to such a proportion that it destabilizes not only the legal consciousness of citizens but also the entire national economy. It carries the social message connected with the idea of how social justice operates when obtaining property and economic – and thus social – influence.[14]

After 1989, numerous "investment companies" sprouted in the Czech Republic, promising extraordinarily high returns on the financial means invested. Their *modus operandi* was very simple. Initially, the companies did business by buying shares that many people obtained during the coupon privatization – everybody could savour the blissful feeling of being a shareholder and believing that a little would turn into much and one's financial investments would bring incredible riches. That was something that had previously been known only from movies. Almost simultaneously with selling their shares to the company and obtaining the money, the citizens were offered the opportunity to invest it – in return for receiving high quarterly interest payments and, once a year, a share in the company's profits. Such an offer was too attractive to resist. At the beginning, the investors really did receive the amounts they had been promised. That was a sufficient argument proving that the scheme did work – and the number of people interested in such a good investment opportunity grew almost geometrically. It worked – so it could not be a fraud! A network of dealers quickly developed who were willing to offer the "product" for a commission fee. Only during criminal proceedings was it found that there was no actual valorization of the financial investments. The money that was paid out actually came from other trusting individuals who became lured by the advertized returns on their investments. The entire mechanism ground to a halt the moment there was not a sufficient number of other people willing to invest in the company. The company then did not have any money for the payment of the agreed amounts and for the coverage of its expenses and other "activities". Understandably, the sole purpose of this criminal activity was to collect and pay out money; the finances were supposed to be channelled out of the company by means of loans provided to other legal persons. Suddenly, there were hundreds and thousands of victims – mostly older people who often invested their life-long savings in such companies.

Another significant fact that made such a practice easier was that the investment companies typically existed as joint stock companies with their registered capital highly exceeding the minimal statutory limit, which was CZK 1,000,000 (about EUR 40,000) in the 1990s. This was a certain psychological strategy that was meant to ensure the trustworthiness of the company guaranteeing the return of the investments made. In the case of the investment company studied here, the registered capital was CZK 300,000,000 (about EUR 12,000,000) in the form of shares.

The criminal investigation found it hard to unravel the complexity of mutual relations and connections between all the companies and entities involved. It was clear to the police authorities from the beginning that the corporate agent of the main company, who signed agreements on the contribution of financial means, was neither the main nor the only offender. It was quite evident that there was someone behind the stage, pulling the strings. The financial operations were so complicated that a single individual could not realistically have organized and managed them. In spite of that, the criminal proceedings ended with a final and conclusive judgment for the corporate agent only, due to reasons to be mentioned below.

During examination, the victims were asked what had led them to invest their money in the company. They concurred that they had been convinced mainly by the fact that the investment company was a legal person and a joint stock company with a high amount of registered capital. Such a company, in their view, could not get into financial difficulties and go bankrupt. And even if that happened, its obligations would be guaranteed and secured with its high amount of registered capital.

The very beginning of the existence of the investment company was related to the activity of other legal persons and entities. Quite purposefully, they all traded a certain package of shares among themselves so that the share price would be artificially increased. An expert who was called in during the criminal proceedings to assess the value of the shares was in a very difficult situation because the price is determined on the basis of supply and demand – even if they are artificially created.

Approximately one year after the registration of the investment company in the Commercial Register, the amount of its registered capital was increased by means of the above-mentioned package of shares. As mentioned previously, all was directed for the ultimate purpose – to channel the financial investments obtained out of the company by means of loans to other entities, which – of course – included legal persons. It is logical that loans in the order of millions provided to natural persons could have raised certain doubts about the debtors' ability to pay back such loans. For that reason, legal persons were chosen for the scheme. However, it needs to be pointed out that the debtors' obligations were initially met, but only in order to give the semblance that the deals were trustworthy and genuine. The company was thus able to argue that lending money was one of the ways in which it increased the value of the financial investments entrusted to it. Another method of taking the money out of the investment company was the purchase of shares from various natural and legal persons. Once again, it was revealed – no sooner than during the criminal proceedings – that those entities were related and the share price for which the investment company bought the shares was artificial, formed as a result of purposefully created demand and supply. Such a conclusion can be further substantiated by the fact that apart from those related entities, no one else traded with the shares.

As mentioned above, the only offender sentenced was the corporate agent of the investment company. In the end, he was the only person because this "main" offender (basically a front man) refused to testify during criminal proceedings and did not cooperate with the police investigators in any way. In addition, the mutual relations within and between the individual legal persons were so complex that it was extremely difficult to prove

[14] Fryšták, M. Hospodářská kriminalita z pohledu teorie a praxe. Ostrava: KEY Publishing, 2007, p. 182.

individual criminal liability of other specific natural persons. In this case, the police was not successful in proving their guilt.

The investment company ended up in bankruptcy. This was because it had – apart from its registered capital made up of entirely worthless shares – almost no other property that could be converted into money; consequently, it was absolutely impossible for it to meet its obligations towards individual investors in the amount exceeding CZK 30,000,000 (e.g. approximately EUR 1,200,000). It was paradoxical that even those entities which benefited from financial loans did not show any interest in repaying them. The bankruptcy of the investment company was terminated after several years due to the low value of the bankrupt's estate – insufficient even for the payment of its expenses.

All the other entities without whose involvement the criminal activity would not have been possible were thus not in any significant way affected by either the criminal proceedings or the bankruptcy of the investment company and their further operations continued essentially unchanged. Such a situation – given the previous discussion – cannot be considered as ideal.

It is striking that people have not learnt from their negative experience. Even at present one comes across various investment companies that promise to increase the value of invested finance highly in excess of the "standard" interest rates of commercial banks. They still find enough "gullible" clients willing to invest their financial means in such companies.

V.

Does the Czech Republic then need criminal liability of legal persons?

It is absolutely unthinkable that the commission of the criminal activities in the extent and with the damage described above could happen if there was no "cover" for the entire scheme by a legal person with the intention of creating the semblance of respectability, trustworthiness and soundness. Let us consider the following hypothetical situation: if all of the criminal activity had been committed only by natural persons without anybody "behind them", would they have been able to obtain such a degree of trust among people and collect such an amount of financial investments? It seems most likely that they would not. Had it not been for all those legal persons, the implementation of the whole scheme would have been rather complicated and problematic.

When considering the typical forms and ways of committing economic crime, such crime is often unimaginable without a certain form of involvement of legal persons. Where the nature of the crime is, for instance, based on the application of an unjustified claim for the return of an excessive VAT deduction on the basis of fictitious documents or false data about the existence of goods, there is a need for such goods to be accompanied with trustworthy documentation. And such documentation cannot be created without the existence of a string of legal persons that "trade" in such goods. In many instances, legal persons very clearly serve as tools for the commission of economic crime.

In general, it may be stated that the modern technical development makes the operational, controlling and decision-making mechanisms of legal persons so complicated that it is very often practically impossible to find out who specifically is responsible for a given decision. Enforcing criminal liability of particular individuals is thus frequently next to impossible.

In this connection, I am convinced that a legal person should bear the consequences of its offences in criminal proceedings by being punishable by court, i.e. on account of the existence of criminal liability of legal persons regulated in an independent law. Such a law should be *lex specialis* with respect to criminal law codes. Such a unified legal regulation contained within a limited set of legal regulations would, of course, make it easier for police authorities to investigate the crime and apply the relevant law.

Considering the possible administrative punishments for legal persons, it needs to be pointed out that the infractions committed by legal persons are to be found scattered in many legal regulations which effectively block their codification within a single legal regulation (or a small number of regulations), as is the case in criminal law. Administrative punishments are scattered, uncoordinated, insufficient, without a detailed elaboration concerning liability and without a sufficient scale of suitable sanctions, etc. That is in itself a circumstance that makes it more difficult for the relevant authorities to apply the regulations in practice. They are expected, among other, to know all of the relevant legal norms. That might not – at first sight – be such a problem in the area of the performance of public administration, which is subject to many special and diverse legal regulations in various subject areas. The individual authorities apply the norms within the statutory delimited scope, thus not being made to work with all the norms relating to infractions committed by legal persons. But, what would the situation be if – instead of criminal liability of legal persons – we decided to strengthen administrative liability instead? Would the above-mentioned scattered nature be retained and how would the insufficient system of sanctions be dealt with? If all the existing legal regulations were to be amended, would that result in an even greater lack of clarity and unity? Or should we attempt to codify the whole area into a single legal regulation?

It is not my aim to seek answers to the questions above. They serve to underline the fact that – from the perspective of the expected effect, e.g., the possibility to impose effective, proportionate and dissuasive sanctions on legal persons for their offences – it seems as more suitable to introduce the criminal liability of legal persons in a separate legal regulation.

Some of the problematic aspects outlined in the analysis of the situation have led me to the conclusion that the introduction of criminal liability of legal persons is a step in the right direction. It cannot be tolerated that perpetrators of economic crime should, thanks to their cleverness and ingenuity, be one step ahead of police investigators. And it is bad if that is the case owing to gaps in or inadequacies of the existing legal regulation. Maximum efforts must be exerted in order to find new instruments that can effectively fight economic crime. We should therefore not be content solely with the final and conclusive judgments against the offenders or the confiscation of the proceeds of crime. Our efforts should be directed at establishing such conditions and mechanisms that would make it difficult for offenders not only to commit such crime but also to cover up their activities and create the "semblance of legality" in the eyes of future injured persons. For reasons outlined above, it would certainly benefit if sanctions started to be applied against legal persons involved in such crime through organizing, participating or covering it up.

Limitation Period and Immunity in the Czech Republic

Zdeněk Koudelka [1]

Accompanying phenomenon of the creation of the parliaments, as the power limiting the power of the monarchs, is the immunity of its deputies. The purpose of this immunity has always been the protection of the deputies from the monarchs infringement. The protection is, however, targeted to the parliament as a whole, not to the individual deputies. The deputy is only the holder of this benefaction. That is why the deputy is not entitled to renounce on his immunity – this is to be decided by the whole parliament or its chamber.

The criminal immunity has developed in two forms which we know also in the legal order of the Bohemia, Moravia and the Silesia.[2] Aside I let the liability for the misdemeanours where the immunity is implied only on the deputy's request.[3] Neither do I discuss the civil liability.

1. Material Immunity

Criminal material immunity (indemnity) excludes the possibility to charge a particular behaviour as an offence. Regarding to the deputies the material immunity is targeted to the following official acts:

1. voting in the Chamber of Deputies or voting in its organs; here the liability is completely excluded,[4]
2. expressions made in the Chamber of Deputies; here the liability is limited only to the disciplinary degree. There are particular rules dealing with the disciplinary procedure.[5]

With regard to the material immunity, the question whether or not there is a time limitation does not occur since there is, unlike the procedural immunity, not any liability at all.

2. Procedural Immunity

Criminal procedural immunity enables the criminal prosecution against a deputy under the procedural condition – namely the consent of the chamber of Parliament. The Constitution forbids the prosecution unless the chamber gives this consent. If the consent is given, the prosecution is possible and the time limitation becomes relevant.

3. Limitation of Time

The criminal code (Trestní zákoník) states that the time limitation does not take into account the time where the offender was not possible to be charged because of legal barrier (suspension of limitation period). The immunity is not explicit named as the legal barrier.[6] In the doctrine has been, however, published the opinion that the deputy's immunity is just such a barrier.[7]

This opinion rises, however, counterarguments. The procedural immunity is, unlike the material immunity, not an absolute barrier of the criminal procedure. It makes the criminal procedure conditional – the criminal procedure is possible only once the chamber of the Parliament gives consent. There have been already several deputies who have been prosecuted. Thus I consider that **the procedural immunity** which occurs with the mandate of the deputy **does not alone suspend the limitation period of the criminal procedure.** For this opinion I give following arguments:

3.1 Teleological Argument

Not suspending limitation period corresponds to the original reason of the immunity as a measure of the protection of the deputies from the arbitrariness of the monarch or the executive. This is a privilege of the deputies which privileged them from other people. Should the merely fact that somebody became a deputy suspend the limitation period so the position of the deputies would contrarily worsen. Lets take an example – while by an murderer the criminal liability lapses in 20 years, by repeatedly elected deputy the liability would still exist even for a minor criminal act after 20 years. The deputies, who were originally the object of the protection, would finally be expose to the arbitrariness of the police organs who would save the infor-

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[2] JAN FILIP: *Vybrané kapitoly ke studiu ústavního práva*, 2. edition Brno 2004, p. 294–297, ISBN 80-210-2592-1.
[3] Art. 27 par. 3 Constitution of Bohemia, Moravia and Silesia. § 9 law No. 200/1990 Coll., Misdemeanour Act in wording of the law No. 78/2002 Coll.
[4] Art. 27 par. 1 Constitution of Bohemia, Moravia and Silesia No. 1/1993 Coll. (hereinafter only Constitution).
[5] Art. 27 par. 2 Constitution. § 13–20 law No. 90/1995 Coll., Standing order of the Chamber of Deputies.
[6] § 34 par. 3 letter a) of the Criminal Code No. 40/2009 Coll.
[7] František Púry in PAVEL ŠÁMAL a kol.: *Trestní zákoník I – komentář*, Prague 2009, p. 391, ISBN 978-80-7400-109-3 and PAVEL ŠÁMAL, FRANTIŠEK PÚRY, STANÍSLAV RIZMAN: *Trestní zákon I – komentář*, 6. edition Prague 2004, p. 596–597, ISBN 80-7179-896-7.

mation "in the drawer" to use them once the deputy is no more in charge. The purpose of the immunity would be negated.

3.2 Historical Argument

A historical argument supports this opinion. The suspension of limitation period has never been used with regard to the deputies. Though there were several opportunities to do so – there were several representatives of the communist regime until 1989 who were simultaneously deputies. E.g. Vasil Biľak was deputy of the Slovak National Counsel 1954–64, National Assembly 1960–68 and Federal Assembly 1969–89. Milouš Jakeš was a deputy of the Federal Assembly 1971–89, Jozef Lenárt was deputy of the National Assembly 1960–69 and Federal Assembly 1969–89. It would have enabled to start criminal procedure against e.g. Jozef Lenárt after 1989 for an offence committed in 1960 which is the year he became a deputy. Nevertheless, such an interpretation has never been used. As far as there was a criminal prosecution against some representatives of the communist regime, another law suspending the limitation period was used – namely the provision that the time until 29. 12. 1989 is not relevant for the limitation if the criminal procedure has not been started because of the political reasons.[8]

3.3 Argument of Effectiveness and Advisability

The essential purpose of the statute of the limitation is to ensure the criminal procedure within a reasonable time after committing the crime. On one hand the access to the evidence is smaller (failed memory of the witnesses, destroyed traces), on the other hand the interest of the society on the punishment of the offender is lower where the crime was committed long time ago. Thus suspension of limitation period ought to be an exemption which is not to be extensively enlarged. The narrow interpretation which does not suspend the limitation period by the mere existence of immunity keeps argument of the effectiveness and advisability of the law. There are some deputies today, who have been deputies since 1990. However, they are not likely to be deputies for the whole their professional life. A criminal procedure of en ex-deputy of age 65 who might have e.g. caused a traffic accident at the age of 25 is neither effective nor advisable.

3.4 Running and Suspension of Limitation Period

Once a deputy commits a crime the limitation period starts to run. If the police authority finds out that the deputy has committed a crime, it is its duty to ask without undue delay the Chamber of Deputies for the consent to start criminal proceedings. The police authority must not act tactically and keep such an information "in the drawer". The Chamber of Deputies decides about the request after discussing it in the Mandate and Immunity Committee of the Chamber of Deputies.[9] The Chamber of Deputies is not bound by any legal period of time. **Thus, we can link the suspension of limitation period to:**

1. **request of the police authority for the consent to start criminal proceedings.**[10] In this case the police authority knows the facts justifying criminal proceedings against a deputy and due to this situation the police authority would start the criminal proceedings if it did not need the consent of the Chamber of deputies. Nevertheless, it is not quite sure if the criminal proceedings start after the consent of the Chamber of Deputies is given because some new facts can occur. In addition, it is a mere request, not a decision on consent with the criminal proceedings of a deputy because such a decision belongs to the Chamber of Deputies. The Constitution links the impossibility of criminal proceedings to the disagreement of the Chamber of Deputies.
2. **disagreement of the Chamber of Deputies with criminal proceedings.** Once the Chamber of Deputies does not agree with the criminal proceedings, the legal barrier of prosecution occurs which is connected with the suspension of limitation period. This fact is without any significance in the Czech legal order because the criminal proceedings are in such cases excluded forever. Suspension of limitation period by disagreement of the Chamber of Deputies with criminal proceedings would gain significance on the condition that the constitutional regulation would change in that way that the disagreement of the Chamber of Deputies with criminal proceedings of a deputy for a concrete deed excludes the criminal prosecution only within the period of the mandate. The criminal prosecution would be possible once the period of the mandate terminates. Such a legal regulation exists in Slovakia where the constitution states that the limitation period does not run when the Parliament does not give the consent with criminal prosecution.[11] This regulation was repeatedly unsuccessfully suggested also in the Czech Republic.[12] If such a provision is anchored, then the deputy, whose prosecution was disagreed, will be possibly extradited on condition that the newly elected Chamber of Deputies gives consent with the prosecution. If the newly elected Chamber of Deputies does not agree, then the legal barrier occurs again but only for the further election period of the Chamber of Deputies.

   The Criminal Procedure Code does not connect the impossibility of criminal prosecution of a person with immunity with the existence of procedural immunity or with a request of depriving of procedural immunity but with disagreement of concrete state authority.[13] **It is correct to connect the suspension of limitation period to such disagreement with criminal proceedings**.

[8] § 5 law No. 198/1993 Coll., Law on a illegality of the communist regime.

[9] § 12, § 45 par. 1 letter c) law No. 90/1995 Coll., Standing order of the Chamber of Deputies.

[10] František Vondruška from the Supreme Public Prosecutor's Office stands on this opinion and I thank him for his remarks.

[11] Art. 78 par. 3 Constitution of the Slovak Republic No. 460/1992 Coll. in wording of the constitutional act no. 90/2001 Coll.

[12] Art. I of the deputies' drafts of the constitutional statute which change the Constitution – press of the Chamber of Deputies 20 and 317, 3. election period. Point 2 of the art. I of the governmental draft of a constitutional statute which change the Constitution – press of the Chamber of Deputies 349, 4. election period. Art. I of deputies' draft of constitutional statute – press of the Chamber of Deputies 980, 4. election period.

[13] § 11 par. 1 letter c) of the Criminal Procedure Code No. 141/1961 Coll.

4. Senators and the judges of the Constitutional court

The above mentioned conclusions can be applied similarly with regard towards senators and the judges of the Constitutional court. The only distinction would be, however, the impossibility to request for a new consent with the criminal prosecution in the situation where the senator is repeatedly elected. The requested chamber regarding to the criminal act of the senators and the judges of the Constitutional court is the Senate. Since this is a permanent body of the Parliament (where every two years one third of the senators is elected), the repeated request is impossible.

5. President

President of the republic has both material and procedural immunity for criminal offences and misdemeanour.[14] The only responsibility he takes is for a high treason which is a judged by the Constitutional Court. High treason in this sense is, however, not a criminal offence and can be committed exclusively by the president. A criminal procedure against president for the crimes committed during his office is excluded forever. Thus the question about the suspension of limitation period does not occur. It is, however, possible that president has committed a crime before he was boarded the office. In such a case the criminal procedure can be started once president leaves the office. Since during the period of his office, the criminal procedure against president is banned by the Constitution, the suspension of limitation period occurs during the presidential period.

6. Ombudsman

Consent of the Chamber of Deputies is required to start criminal proceedings against the ombudsman. In contrast with deputies, by disagreeing is the criminal prosecution excluded only for the functional period of the ombudsman.[15] By disagreeing with the criminal prosecution occurs the suspension of limitation period. The limitation period continues to run after the end of the ombudsman's function when the legal barrier of criminal prosecution falls. We can demonstrate on the ombudsman's function that the mere existence of procedural immunity is not any legal barrier – the need for consent of a competent state authority, but the denied consent itself.

7. Judges

There is no constitutional regulation in case of judges of general courts. The law states that one condition is consent of the president of the republic with criminal prosecution if the judge committed crime in the performance of his function or in connection with his function.[16] If the presidential consent is considered as a decision, then it is a decision on the base of a common law which underlies the countersignature of the prime minister.[17] This process was applied in April 2003 in case of the judge Jiří Berka (judge of the County Court in Ústí nad Labem) when the president of the Czech Republic Václav Klaus granted his consent to start criminal proceedings. However, with regard to judiciary of the Constitutional Court[18] it is important to interpret the concept of decision underlying the countersignature of the prime minister in the way that it has to be decision in a matter. The presidential consent is however not such a decision in a matter but decision of the police authority. Decision of the police authority cannot be issued without the previous presidential consent but the mere consent of the president does not predicate that the police authority decision will certainly be issued. President of the republic can grant the consent, is entitled to let it be or can explicitly deny the consent. In the last two cases follows the impossibility of criminal prosecution of a judge. Nevertheless, it became a constitutional convention that where the president denies the consent he does not issue a negative decision. E.g. he did not issue a negative decision where he did not granted the consent to appoint the vicepresident of the Supreme Audit Office in 2002 or he repeatedly did not grant consent to appoint generals in 2009 or denied consent to grant state awards. The president of the republic applied the same procedure when he decided not to appoint a judge (the Municipal Court in Prague, however, ordered the president to appoint the judge on the base of an unconstitutional legal opinion of the Supreme Administrative Court).[19] President of the republic, nevertheless, stood on the constitutional convention and did not issue any negative decision with regard to the appointing the judge.

In contrast to the disagreement of parliament chamber in case of a deputy, by the presidential disagreement is the criminal prosecution not excluded forever. The president can grant his consent later on the base of a new request or without such a request as well if there is still the former request of the police authority and the president changes his mind. It is highly likely in the situation when the president of the republic is changed. If the president wants to prevent the criminal prosecution of a judge forever, he orders not to start the criminal proceedings.[20] In case of judges is the presidential consent of the character of the procedural immunity which does not enable criminal proceedings but bounds it to another procedural condition. Due this fact the conclusions made by deputies can be applied also in this situation.

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[14] § 65 Constitution.

[15] § 7 par. 1 law No. 349/1999 Coll., Law on the Public Defender of Rights.

[16] § 76 law No. 6/2002 Coll., Law on Courts.

[17] Art. 63 par. 3 Constitution.

[18] The Constitutional Court stated that lodging a petititon to start procedure on constitutionality of a statute does not underlie to countersignature of the primeminister although this competency of the president of the republic is anchored in § 64 par. 1 letter a) of an ordinary statute No. 182/1993 Coll., o Ústavním soudu, because the petititon is no decision in a matter which underlies to the Constitutional Court in the form of judgment. Judgment No. 16/1994 of the Collection of judgments and rulings of the Constitutional Court (91/1994 Coll.).

[19] ZDENĚK KOUDELKA: *Soudní kontrola aktů prezidenta republiky*, Právník 10/2008, p. 1065–1081, ISSN 0231-6625.

[20] Art. 62 letter g) Constitution.

8. Principle of Speciality

The convicted who was extradited to the territory of Bohemia, Moravia and Silesia and is to be prosecuted for another crime than for which he was extradited, is also a person who underlies to a consent of a state authority. With respect to the principle of speciality is required consent of an authority of another state.[21] This is also case of procedural immunity but it does not suspend the limitation period.

The principle of speciality means that the extradited person must not be prosecuted for a different crime than for which he/she was extradited. There must be granted consent of the extraditing state if there is not the consent of the extradited person.[22] By such a person occurs the fiction of stay in foreign country for being prosecuted for some other crimes, some states require the international (European) arrest warrant although the required person is under jurisdiction of the requiring state. Next to the above mentioned arguments connected to the suspension of limitation period there can also be mentioned that stay in a foreign country does not suspend the limitation period and because of this reason it is not possible to suspend the limitation period when a person is factually under the jurisdiction of the Czech authorities. The contrary would mean that by an unextradited person runs the limitation period whereas by the extradited person would be the limitation period suspended by the crimes for which the person was not extradited. Such an interpretation would worsen legal status of a person, which is inadmissible.

[21] Decision of the Supreme Court No. 24/2007 Collection of decisions and opinions, criminal (11Tcu 29/2006). PŘEMYSL POLÁK, HELENA HÝBLOVÁ: *Přehled judikatury k mezinárodní justiční spolupráci v trestních věcech*, Prague 2009, p. 13, ISBN 978-80-7357-451-2.

[22] § 389 Criminal Procedure Code.

Infanticide before the C. k. Regional Court in Olomouc in the Second Half of the Eighties and in the First Half of the Nineties of the 19th Century

Lucie Bendová Bednářová [1]

I. Introduction

Recently I have devoted myself to questions of the infanticide at the birth or shortly after that (and also infanticide comitted several weeks afterwards) in the article „Infanticide versus putting away a child with regard to the issue of punishments in practice of the C. k. Regional Court in Olomouc at the end of the 19th century a in the beginning of the 20th century." The results of the examining of this crime were the conclusions characterising the given delict, its perpetrators a legal practise of the C. k. Regional Court and C. k. Public Prosecutor´s office in Olomouc towards the end of the 19th century and in the beginning of the 20th century.[2] Now my aim is to find out, to what extent the practice of the aforesaid authorities and social situation was different and to what extent it was identical in the second half of the eighties and in the first half of the nineties of the 19th century.

This time I devote myself exclusively to the infanticide at the birth or shortly afterwards (crime under § 139 of the Penal Code of May 27, 1852 No. 117 Coll.) not infanticide comitted several weeks after birth anymore (i.e. crime of „ordinary" murder under § 134 of the same law), otherwise my interest remains the same. I deal with the facts of the crime again, its punishment and with number of cases of infanticides heard by court in the observed period. On example of concrete legal cases I devote myself to the causes of crime, ways of its realisations, persons of perpetrators and their partners, possible participation of these men in the crimes and their criminal prosecution. I also try finding out, how the relevant district courts and C. k. Regional Court in Olomouc investigated the crimes of the infanticides, how the juries decided the guilt of this crime [3] and which punishments the Regional Court in Olomouc imposed.

I am trying to find answers to these given questions in the period sources – the Penal Code of May 27, 1852 No. 119 ř.z., Rule of Criminal Procedure of May 23. 1873 No. 119 Coll. and criminal files on the crimes of infanticides from the years 1886–1894. In the Article I examine five criminal cases of the infanticide from the archival document collection called Regional Court in Olomouc I, which is located in the Olomouc branch of the Provincial archive in Opava. Pieces of knowledge from these sources are added with information from legal professsional magazines Zprávy Právnické jednoty moravské from 1917 and Právník from 1864, from articles about current crimes of infanticides, which were published in Olomouc newspaper Pozor in 1880 and Našinec in 1880 and 1895 and from archival Auxiliary book – criminal index of the indictees A–M from 1886–1897.

In the criminal files of the crimes of infanticides from 1886–1894 there are found informative charts about the indictees, law reports about the chief proceedingd, advisory law reports, questions for jurors and judgements, however some informationally valuable documents are missing – interrogations of the indictees, interrogations of the witnesses and expert opinions of medical examiners, which did not survive. It is possible to square up to this fact to a certain extent by searching out of other sources, but there can appear some other difficulties for researchers.[4] Aforementioned criminal files unfortunately have minor informational value than criminal files from the beginning of the 20th century, which concern the same crime. With respect to territorial area of the C. k. Regional Court in Olomouc the cases of infanticides concern not only Haná, but also region of the former Sudety with german population, and so we can relatively often come across the criminal files, whose all documents are written in German.[5]

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[2] See BENDOVÁ BEDNÁŘOVÁ, Lucie: Vražda novorozeného dítěte versus odložení dítěte se zřetelem k otázce trestů v praxi C. k. krajského soudu v Olomouci na konci 19. a na počátku 20. století. In: Cofola 2010 (The Conference Proceedings), Brno, Masarykova univerzita, 2010, p. 1010–1022.

[3] In cases of infanticides 12 member laic juries ruled of the guilt. The jurors could be only men who fulfilled conditions required by law. See § 297 an. DIE STRAFPROCESSORDNUNG VOM 23 MAI 1873.

[4] I would like to thank to Mrs. Helena Řiháková of Olomouc branch of Provincial archive Opava who drew my attention to the possibility of making use of documents of C. k. Public Prosecution in Olomouc. Unfortunately there is sometimes a trouble with a difficulty in readability of joined written old german cursive script – for example the crime of infanticide – Marie Beil, see further.

[5] See PROVINCIAL ARCHIVE OPAVA (hereinafter only ZAO), branch Olomouc, document collection Krajský soud v Olomouci (hereinafter only KS v Olomouci), Haubert, Jan: Inventář. Díl I. a II. (1850–1897), 1960. The district courts in Litovel, Uničov, Konice, Olomouc, Plumlov, Prostějov, Šternberk, Rýmařov, Dvorce, Šumperk, Staré Město, Vízmberk (Loučná nad Desnou), Zábřeh, Mohelnice a Šilperk (Štíty) belonged to the teritorial district of the Regional Court in Olomouc, from 1855 also the district courts Přerov a Kojetín.

As far as scholarly books related to the examined subject matter are considered, especially book by Daniela Tinková „Hřích, zločin a šílenství ve věku odkouzlování světa" belongs to important literature. Apart from other questions it deals in detail with the crime of infanticide in the second half of the 18th and in the beginning of the 19th century.[6]

II. The Legal Form

The facts of the case of murder of a child at the birth and punishment for this crime are contained in provision of § 139 of the aforementioned legal code. The criminal conduct consisted in an active killing of an infant baby, or in a passive omission to provide a child with help which is needy at the birth. Solely mother could be a perpetrator of the crime, the legislator required intention as far as form of guilt goes. According to the judicature, provision of § 139 could also be applied to mother, who killed a baby „shortly after birth". Decision No. 5817 of May 7, 1854 and decision No. 9124 from of July 1, 1899 laid down, that in this case the judge can consider mother´s „…mental condition according to its nature" and rule." This facts of thus protected the infant´s life. The lawmaker differentiated if the murdered infant was of legitimate or illegitimate origin, and this condition was decisive for the punishment of this crime.[7]

In light of the penalty, the murder of a child at birth or shortly afterwards posed a priviliged fact in issue. Mother was punishable by a lower penalty than perpetrator of a commited „ordinary" murder was, who was liable to capital punishment. Murder of an illegitimate child was in terms of the punishment privileged twofold, however. For what reason? According to Daniela Tinková, the lawmaker did not intend to discriminate the illegitimate children, via lower punishment the law only took into account the social and economical situation of an unmarried mother. Though unintentionally, the given provision of course in fact discriminated illegitimate infants, for it did not provide the same criminal-law protection to their lives as to the lives of infants born out of wedlock. Murder of a legitimate infant at birth or shortly afterwards was punishable by heavy life imprisonment, regardless whether committed via active conduct or omission to help. Murder of an illegitimate infant committed via active conduct was punishable by heavy jail for a term of minimum 10 years and not exceeding 20 years. In the case a mother caused death to an illegitimate infant via omission to provide needy help at birth, she was liable to a punishment of heavy jail for a term of minumum 5 years and not exceeding 10 years.[8]

Mitigating and aggravating circumstances, which the lawmaker laid down in enumerative listing in provisions of § 43–§ 47 of Criminal Code, could have substantial influence on imposing of these punishments. In criminal cases of infanticide a lot of mitigating circumstances regularly occured, for instance distress, hitherto blamelessness, confession or uncaused longer custody. The provision of § 338 of Code of Criminal Procedure laid down rules for reductions of punishments and lower limits of penalties, to which the court could reduce the punishments providing more mitigating circumstance occured. The court was entitled to reduce punishment, which was to be imposed under the law in duration of the term between 10 and 20 years or for life, and namely on grounds of concurrence of important and prevailing mitigating circumstances, nevertherless not in terms of manner of the punishment but only in terms of its length, however the punishment could not be reduced under three years. In cases, for which the law determined the penalty between 5 and 10 years, the court was entitled, on the grounds of the aferementioned circumstances, to impose a milder manner of the jail and also the punishment could be reduced, however not under one year.[9]

Also the fact in issue of the misdemeanour under the provision of § 339 of the Criminal code, so called „Concealment of the Birth", was meant to hamper the crimes of infanticide. The unmarried pregnant women were obliged to send for a midwife, birth assistant or some honest woman under the penalty of heavy jail for a term in duration from three to six months. They did not have this duty merely providing they were stricken by the birth. In such a case they were obliged to announce additionally the fact they gave birth to a person, who was entitled to provide assistance at the birth, eventually to public officer, and to show them abortive foetus or a dead infant. The given fact in issue was the last possibility of public prosecutor to achieve at least some punishment of a woman, who was acquited of the charges of infanticide by the jury. Public prosecutor was required to propose to the court putting of an eventual question regarding the guilt of the misdemeanour „Concealment of the Birth" during the chief proceedings at the stage of preparation of the questions for the jury.[10]

In 1916 the Highest Court of Cassation in Vienna decided about a nullity plea, filed by public prosecutor against the acquittal in criminal case of infanticide. The Court of First Instance acquitted the indicted woman of the charges of the crime of Infanticide and morover rejected to examine the conduct of the indictee in terms of the misdemeanour „Concealment of the Birth" because the public prosecutor did not make the neccesary proposition in that sense and in opinion of the court the fact in issue of the misdemeanourt under § 339 of the Criminal code was not included in the fact in issue of the crime under § 139 of the same law. However the Highest Court of Cassation denoted the opinion of the Court of First Instance as unsustainable. The court stated that the provision of § 339 was aimed at protection of the same legal values as the provision of § 139 was, and namely the living foetus or a newborn child. The court agreed that in case this crime was tried by a jury, the public

[6] See TINKOVÁ, Daniela: Hřích, zločin a šílenství v čase odkouzlování světa (hereinafter only Hřích, zločin a šílenství…c. d.). Praha, Argo, 2004.

[7] See LEPAŘ, Mojmír: Trestní zákon ze dne 27. května 1852 č. 117 ř. z. se zákonem o tisku a jinými (hereinafter only Trestní zákon…). Praha, Knihtiskárna dr. Edvarda Grégra, 1901, p. 75.

[8] See LEPAŘ, M.: Trestní zákon…c. d., p. 73–75. Further see TINKOVÁ, D.: Hřích, zločin a šílenství…c. d., p. 353.

[9] See LEPAŘ, M.: c. d., p. 30–31. Further see § 338 DIE STRAFPROZESSORDNUNG VOM 23 MAI 1873.

[10] See LEPAŘ, M.: c. d., p. 166–167. See also for example ZAO, branch Olomouc, document colllection KS v Olomouci I., sg. C 1891/45, č. kart. 1071, vražda novorozeného dítěte – Filomena Blumel. Further see the article mentioned in the subsequent remark.

prosecutor was obliged to make a proposition of putting of an eventual question regarding the guilt of the misdemeanor „Concealment of the Birth“ and if he did not do so, he was not in accordance with the provision of § 344 of the Rules of Criminal Procedure entitled to file a nullity plea anymore. Nevertherless, because the criminal proceedings on the given crime used to pass off before an ordinary court, i.e. not before the assize court during the period of the world war I., in opinion of the court, the situtation was different particularly in the sense that the public prosecutor was not necessarily likely to find out in clear manner that the court would reject the legal opinion of the prosecution and that the court would not deal with other possible legal aspects or that the court would not take them for covered by the indictment. According to the Highest Cassation Court, the public prosecutor had right to count on the provision of § 262 of the Rules of Criminal Procerure, under which the court was obliged to examine the deed denoted in the indictment with regard to all circumstanses, including those that came to light during the chief proceedings, and to subordinate it to the correct law. In an ordinary proceedings the questions were not put to the jury, therefore the sanction of the provision of § 344, which laid down that in case of omission of relevant eventual proposition public prosecutor was not entitled to file a nullity plea anymore, did not come into question in case of the public prosecutor. This sanction was only applicable to the proseedings before the jury. That is why the Highest Cassation Court acknowledged the nullity plea of the public prosecutor as justified, anulled the judgement and remitted the criminal case to the pertinent district court with reference to the lack of ascertainment of the matter of fact of § 339 of the Criminal Court that was coming into question.[11]

III. The Legal Practice

During the period 1898–1917 the C. k. Regional Court in Olomouc heard only 5 cases of Infanticide. During the period 1886–1897, i.e. 8 years shorter period, the number of these cases must have been considerably higher, for in the Auxiliary book – criminal index of the indictees A–M from 1886–1897, pertaining to this period, 12 cases of infanticide are showed out merely up to letter J. It is unfortunately not easy to ascertain the total amount of these crimes that were tried before the C. k. Regional Court in Olomouc in the period of 1886–1897 because the archival inventory for the period before the year 1898 has not been elaborated yet. The Auxiliary books – criminal indexes of the indictees from 1886–1897 are very extensive and are naturally not divided according to the particular crimes, misdeeds and misdemeanours.[12]

At the beginning of the year of 1886 the C. k. Regional Court in Olomouc heard the criminal charge of infanticide which allegedly was comitted 26 years old maidservant Jenovéfa Bokůvková from Prostějov. This indictee was not tried before court for the first time. In 1881 the district court punished her for the misdemeanour of theft according to the provision of § 460 of the Criminal Code by eight days of imprisonment aggravated by two fasts, in 1884 as an accomplice in crime for the misdemeanour of theft according to the provision of § 464 of the Criminal Code she was punished by a week of strict prison and in 1885 she was sentenced for the misdemeanor of fraud according to the provision of § 461 of the same law by three weeks of imprisonment aggravated by two fasts every week. Furthermore from the criminal files we can learn that Jenovéfa Bokůvková could not write, because she signed in by means of three crosses. The mentioned fact indicates that school attendance of the indictee was evidently very short or irregular and that she came from background which accentuated manual labour, not education. It is impossible to discover further particulars about res gestae related to her crime, for example about depressive life situation, she referred to before the court, or about a father of the murdered newborn, because the allegation of the indictee from preliminary inquiry and allegations of witnesses are missing in the criminal files. There are not even experts´opinions of medical examiners regarding the person of the indictee and the cause of death of the child. The indictee pleaded guilty in chief proceedings. She stated in evidence that she gave birth to her illegitimate baby at three o´clock p. m., she fed it and at eight o´clock she threw it into the water nearby Prostějov. The parturition did not already last at that time but despite of it she allegedly did not know what she did. She insisted that she commited the act because of pressure. Subsequently the presiding judge confronted her with the relevant part of her allegation from the preliminary hearing where she stated that she was sane in course of the act. But the indictee did not explain the existent contradiction to him. When probation finished the presiding judge made out a question related to the fact whether the indictee is guilty that she murdered her illegitimate child on August 23 in 1885. Public prosecutor suggested to jurors to answer the question in the affirmative, on the contrary the counsel asked them to consider carefully, with respect to pressure of the indictee, to the fact if she acted with a malicious intent which was essential for a criminal act. After ending of the chief proceedings the presiding judge summarized its substantial outcomes and explained legal attributes of the crime and importance of legal terms to the jurors. He called jury´s attention on their general duties and on regulations on consultation and voting. Afterwards twelve members of lay jury unanimously decided that Jenovéfa Bokůvková was guilty. The counsel had no other choice but to ask the court to take into consideration neglected upbringing, upset and pressure of the indictee. The C. k. Regional Court took into consideration only proposed pressure and confession of the perpetrator, nevertheless it sentenced Jenovéfa Bokůvková with the application of the provision of § 338 of the Criminal Code to minimum punishment – three years of heavy jail aggravated by one fast every week and also by solitary confinement in a dark cell always on 23 August every year of the punishment. It concerned the day when she

[11] See ZPRÁVY PRÁVNICKÉ JEDNOTY MORAVSKÉ, 1917 (roč. XXVI), p. 231–234.

[12] See ZAO, branch Olomouc, document collection KS v Olomouci I., Tauš, Karel – Jandová, Alena – Roubic, Antonín: Jmenný a místně – věcný rejstřík spisů sg. Vr 1898–1917, 1973. Further see ZAO, branch Olomouc, document collection KS v Olomouci I., Pomocné knihy – trestní rejstřík obžalovaných A–M, kniha č. 346.

committed the murder of her child.[13] In terms of hitherto examined cases of infanticides I came across the last-mentioned way of aggravation of punishment for the first time. Generally the C. k. Regional Court imposed only one manner of aggravation, exclusively aggravation of punishment by fast.

Difficult economic situation of unmarried mother illustrates criminal case of infanticide which was comitted by 28 years old Aloisia Böhm. She worked as a maidservant in a village of Mährisch Kotzendorf (nowadays Moravskoslezský Kočov)[14] and her relevant domicile was near Altstadt am Freudenthal (nowadays Staré Město u Bruntálu).[15] She had two illegitimate children whom her mother took care of. During the chief proceedings before the C. k. Regional Court in Olomouc on August 4, 1890 the indictee stated in evidence that her mother threatened her that she would not have been allowed to arrive at home and would have had to beg with her children if she had given birth to another children. Also her employer threatened her that she would have bundled her off if she had had a baby. Aloisia Böhm sent her entire wages to her mother for alimentation of children, so she did not have any money. After the childbirth she got up and went to work, because she had to exorcise suspicion of her employer who told her that if she had stayed in bed and had not been able to work, she would have had to leave her job. Public prosecutor standardly suggested to jurors to answer the put question about guilty in the affirmative, counsel left the answer up to will and opinion of the jurors. The jury then unanimously found the indictee guilty. The prosecutor and the counsel nevertheless agreed on the fact that certain mitigating circumstances had to be taken into account, and namely confession, existing impeccability, urgent pressure of the indictee and uncaused longer duration of detention. Consequently the counsel asked the court to punish his client moderately. Despite the fact that the uncaused longer detention was not accepted by the court as mitigating circumstance, the court sentenced the indictee to the punishment of imprisonment for a term of three years of heavy jail aggravated by one fast every two weeks, which represented minimum punishment.[16]

On the contrary in 1891 a laic jury of the C. k. Regional Court in Olomouc acquitted 29 years old Filomena Blumel, a maidservant from Mährisch Schönberg (nowadays Šumperk)[17]. This indictee was not prosecuted for infanticide committed by active conduct but for omission to help. Regarding the question whether the indictee is guilty that she intentionally let her illegitimate child die in consequence of omission to help on november 11, 1890, the jurors answered in negative. However they agreed upon the fact that she ommitted to send for a midwife, birth assistant or some honest women to her childbearing. The third question concerned the circumstance which could rid the indictee of the guilt, and namely whether she was stricken by the childbearing. 9 of 12 jurors answered yes and thus the C. k. Regional Court had to acquit Filomena Blumel also in terms of the fact in issue „Concealment of the birth". Similarly as the two previous criminal files neither this one contains the allegation of the indictee in the preliminary inquiry, allegations of the witnesses, neither the expert opinion of the physician. It is unfortunately impossible to find out from a brief judgement, whether the jurors, with regard to all circumstance, decided correctly.[18]

Also a year later, though less definite, the jurors voted 7 to 5 that indicted 34 years old Marie Beil from Wermsdorf (today Vernířovice)[19] was innocent. This case is noted for two interesting facts: on the one hand it was quite an exceptional case of a married woman being prosecuted for the crime in question, and on the other hand the indicted woman was a well educated woman, who worked as a midwife in the village of Rudelsdorf (today Rudoltice).[20] Her child, whom she allegedly let perish by ommision to provide needy help, however was an illegitimate one. Although the aforementioned facts foreshadow an interesting story, I did not succeed in finding out its details. Neither the allegation of the indictee and allegations of the witnesses nor an exeprt opinion of the medical examiners was preserved in the cirminal file and the pertinent file of the C. k. Public Prosecution in Olomouc was nearly unreadable. In my opinion, though, an archivist or a researcher with long-time reading experience of joined written old german cursive script (so called „Kurrent") from the second half of the nineteenth century would be very likely to undecipher it.[21]

The last criminal case that. I acquainted with, was infanticide committed by 20 years old daughter of a cottager from Čehovice near Prostějov, Žofie Blahoušková. Neither this criminal file contains allegation of the indictee, allegations of the witnesses or an expert opinion, that is why it is impossible to examine res gestae. The jurors attached themselves unanimously to the opinion that the indictee was guilty of infanticide of her illegitimate child. The court recognised as a mitigating circumstance the confession, the age under twenty, present impeccability and a longer duration of the custody and sentenced the offender to the usual punishment of three years of heavy jail aggravated by one fast per month.[22]

From the abovementioned criminal files follows that often perpetrators of the infanticide were single young maidservants, similarly as at the end of the 19th century and in the beginning of the 20th century. From time to time they were also women at the age over 30, sometimes with a slightly better social status

[13] See ZAO, branch Olomouc, document collection KS v Olomouci I., sg. C 1886/148, č. kart. 1015, vražda novorozeného dítěte – Jenovéfa Bokůvková.
[14] See http://www.antikomplex.cz/mistopisny-slovnik/obec/3130-moravsky-kocov/.
[15] See http://www.antikomplex.cz/mistopisny-slovnik/obec/3207-stare-mesto/.
[16] See ZAO, branch Olomouc, document collection KS v Olomouci I., sg. C 1890/470, č. kart. 1066, vražda novorozeného dítěte – Aloisia Böhm.
[17] See http://www.antikomplex.cz/mistopisny-slovnik/obec/2968-sumperk/.
[18] See ZAO, branch Olomouc, document collection KS v Olomouci I., sg. C 1891/45, č. kart. 1071, vražda novorozeného dítěte – Filomena Blumel.
[19] See http://www.antikomplex.cz/mistopisny-slovnik/obec/2995-vernirovice/.
[20] See http:// www.antikomplex.cz/mistopisny-slovnik/obec/2984-rudoltice/.
[21] See ZAO, branch Olomouc, document collection KS v Olomouci I., sg. C 1892/42, č. kart. 1076, vražda novorozeného dítěte – Marie Beil.
[22] See ibid., C 1894/561, č. kart. 1090, vražda novorozeného dítěte – Žofie Blahoušková.

which for instance had a midwife. Exceptionally this crime was committed by married women, mothers of illegitimate children. Among the perpetrators we can find women, who already had several illegitimate children, and also some habitual offenders. They came from small municipalities and from towns as well. As a cause of the offences especially economic distress appeared in the criminal files. The impecuniary offenders lacked in support from family, the parents (mother) threatened them with loss of housing and employers with loss of job. One of the offenders also excused her deed with an upset at birth which caused her that she did not know what she did. Shame before family and the society was not mentioned in any of the researched cases, however we cannot exclude it. Of courtse, sometimes it was not possible to determine the cause of a crime at all because of missing documents. In contrast to the criminal files from the beginning of the twentieth century we did not find out much about the manners of realisation of the crimes (the causes of death of the newborns). For instance in the examined criminal files throwing of a newborn child into the water or an intentional omission to help an infant. This time it was imposible to ascertain anything about the social status and participation in the crime of the fathers of the murdered infants due to absent documents in the files. Naturally this does not imply that they would never participate in the crime, for example as inciter.[23] Also a case from the half of the nineteenth century is known when an illegitimate newborn was murdered by his father, not by mother.[24] The lack of documents hampered the ascertainment of the fact in what way the investigation of these cases passed off, whether it had some defficiencies, for instance concerning interrogation of the witnesses, or whether it proceeded duly. In the second half of the eighties and in the first half of the nineties of the nineteenth century, as well as in the beginning of the twentieth century there were cases in which the juries acquitted the indictees. Both acquittals described above concerned the cases of less serious omission to help. Because we do not know the res gestae of the cases, we cannot declare to what extent these judgements were correct. Often C. k. Regional Court imposed three years long, the lowest possible punishments of imprisonment, because in cases of infanticide a lot of mitigating circumstances existed. Some criminal cases also ended up with abatement of the criminal prosecution, for instance the case of Aloisie Handl in 1893 or case of Julie Breiter in 1894.[25]

Olomouc's newspapers Pozor and Našinec confirm and complete knowledge from examined criminal documents. According to majority of articles infanticides were commited by single maidservants, if need be day labourers, exceptionally women of better social status, for example a daughter of farmer, widow of miller or married owner of a house. Mates of perpetrators sometimes had lower social status than their partners, for example helper of miller had a secret intimacy with widow of miller, a farm labourer with married owner of a house, at some other time that was on the contrary, a gamekeeper kept an intimacy with a daughter of a farmer. As a cause of crimes the newspapers indicated exclusively a shame. They concerned in ways of carrying out of crimes, they wrote about a throttling, an extinguishment, a breaking up of a pate of a child or about a burying in by clay. Punishments mentioned by newspapers generally were three or four years of heavy jail. For example both newspapers informed about the criminal case of 22 years old hardhat Celestina Boudová from Olomouc. In 1895 she attempted to murder her newborn that she gave birth by the fort Tafelberk. She put it in a pit and buried in by clay, but soldiers and painting workers noticed her act and saved the newborn. The C. k. Regional Court in Olomouc sentenced her to four years of heavy jail, therefore the punishment slightly higher than punishments usually imposed by the court in the years of 1886–1894.[26]

IV. Conclusion

The fact in issue of the infanticide, regulated in the Criminal Code of 1852, contained by its period conditioned distinguishing of infanticides of legitimate and illegitimate children. The infanticides of illegitimate children were as far as the punishment is concerned double privileged even assuming the legislator obviously did not intend to discriminate the illegitimate children but to take into account social and economic situation of their mothers. Anyway, the content of the mentioned provision and its effectiveness was discriminatory. The Criminal Code set down high punishments for the crime, but the provision of § 338 of Rules of the Criminal Procedure, which enabled to reduce the punishment higher than ten years of imprisonment to three years and to reduce the punishment between five and ten years of imprisonment to one year, if important mitigating circumstances existed in the case, generally ensured that these punishments in their severest variant were not imposed. Existence of several mitigating circumstances was regular in the criminal cases of infanticide. The Auxiliary book of the C. k. Regional Court in Olomouc – criminal record of indictees A–M gave evidence that the C. k. Regional Court in Olomouc heard much higher number of cases of these crimes in years of 1886–1897 than in years of 1898–1917 when it tried only 5 such criminal cases. The number of cases of infanticide which the mentioned court heard showed a downtrend from the second half of the eighties of the 19th century almost till the end of the World War I. Causes of crimes which occured in the second half of the eighties and in the first half of the nineties of

[23] See ZAO, branch Olomouc, document collection KS v Olomouci I., sg. Vr 132/98, č. kart. III 679, vražda dítěte – Karolina Zechová.

[24] See PRÁVNÍK, 1867, p. 351–359. In 1848 the Regional Court in Hradec Králové examined the crime of infanticide of newborn child of a maidservant Marie Jirásková. A healer Josef Dobrovský, the father of the illegitimate child, stated in evidence that he caused an injury to child during the chilbirth, because he wanted to save its mother and then the child was born dead. According to the allegation of Jirásková he did not help her during the childbirth, on the contrary he took her vital chil away and carried it away. According to the court it was not proved if he caused the injury to the child because of lifesaving of its mother or intentionally, so the court stopped his examination for the crime of murder.

[25] See ZAO, branch Olomouc, document collection KS v Olomouci I., Pomocné knihy – trestní rejstřík obžalovaných A–M, kniha č. 346.

[26] See POZOR, 1880 (roč. IX), č. 17, 10. 2., p. 2, ibid. č. 29, 9. 3., p. 2, ibid. č. 41, 8. 4., p. 3, ibid. č. 104, 7. 9., p. 3, ibid. č. 142, 7. 12., p. 3. See also NAŠINEC, 1880 (roč. XII), č. 25, 27. 2., p. 3, ibid., č. 38, 28. 3., p. 3, ibid. č. 91, 4. 8., p. 3, ibid. č. 135, 14. 11., p. 3. Further see NAŠINEC, 1895 (roč. XXXI), č. 6, 13. 1., p. 4, č. 37, 29. 3., p. 3, ibid. č. 72, 28. 6., p. 3, ibid. č. 78, 12. 7., p. 3, ibid. č. 82, 21. 7., p. 3.

the 19th century were especially economic. Objectively difficult situation of these women further was made worse by a heartless attitude of families and employers towards them. Also documents from the beginning of the 20th century proved perpetrators´ fears of their parents, of loss of a potential bridegroom or of loss of a job. The perpetrators apologized their act also by their state of upset during the childbirth, similarly as in the beginning of the 20th century. The cause of shame did not appear in the examined documents but newspapers of the time mentioned it and it corresponds with view of contemporaneous society and the civil law on illegitimate children. Contrary to the documents from the beginning of the 20th century the criminal documents from the examined period did not give too much answers as far as manners of acts are concerned except usual omission to help or drowning. But these facts can be found out in contemporary newspapers. A young single woman of low social and economic status, generally a maidservant, was the most frequent perpetrator of the crime but exceptions also existed. It is impossible to ascertain rank, eventually participation of fathers of murdered children in the crimes, their prosecution, the fact, that the mates of higher rank as well as of lower rank than the perpetrators were in question, was recorded by the newspapers. They were also the mates of similar rank as the perpetrators but there often was certain obstacle to their marriage or more likely an accidental liaison between them as in cases in the beginning of the 20th century. Another issue which is unfortunately impossible to examine because of missing papers from criminal documents is ascertaining of way of investigation of crimes from the second half of the eighties and the first half of the nineties of the 19th century. The attitude of juries towards the perpetrators was not extra different in the second half of the eighties and the first half of the nineties of the 19th century and in years of 1898–1917. In the period examined in the article the indictees were acquitted as well as in the later period. For example a jury decided to believe the fact that the indictee did not neglect to provide a needy help to a child and that she was stricken by the childbirth. In the beginning of the 20th century a jury even attached to upset, caused by the birth, declared by an indictee or to an argument of an indictee that her newborn was dead thorough this was in contradiction with findings of an expert opinion. It is impossible to find out whether the juries sometimes ruled in contradiction with the expert opinion also in the second half of the eighties and in the first half of the nineties of the 19th century because they are not found in existing files. The C. k. Regional Court in Olomouc largely sentenced the indictees to the lowest possible punishments of three years of heavy jail, less commonly imposed the punishments of four years of heavy jail. According to the Criminal Code these reduced punishments were aggravated, generally by fast, but in the oldest examined case the court imposed untypical manner of aggravation – a solitary confinement in a dark cell, namely always on annual day of murder of a child. The given aggravation seems very archaicly in light of its time period. In fine we can state that in the second half of the eighties and in the first half of the nineties of the 19th century the penalties imposed by C. k. Regional Court in Olomouc were not stricter than in years 1898–1917. The later period, aside from decreasing number of tried cases, could be also noted for an increasing number of the indictees being acquitted by the juries (in relative numbers). Nonetheless, it would be essential to research all judgements rendered in cases of infanticide from years 1886–1897 and from years 1898–1917 to verify this hypothesis.

Selected Aspects of the Russian Jury Courts Operation after the Judicial Reform of 1864

Katarína Fedorová [1]

Introduction

After the humiliating defeat of Russia in the Crimean War, tsar Alexander II. have begun with the transformation of the society through implementation of several reforms, from which the fundamental was the reform of the archaic judicial system, realized with the Court Establishment Act, the Criminal Process Act, the Civil Process Act and the Law establishing penalties, imposed by the conciliation courts, issued on 20th November 1864. The protrackted non-public written process of the pre-reform period had been replaced by a flexible public and oral procedure. New unprecedent elements were incorporated into Russian Law such as guarantees of the rights of the defendants, institute of advocacy, conciliation courts, and institute of the jury courts. The jury courts, considered as a cornerstone of the judicial reform by its introduction[2] should had become a symbol of equal participation of all social classes [3] on judiciary and its execution, and its independence from the state machinery. The introduction of jury courts called out not only enthusiasm but also concerns, particularly about possible political misuse of the institute by the opponents of the government, as well as about the lack of intellectual capability of lower-level classes of society, especially the former serfs, to competently perform the role of a judge. The fundamental problem for the activity of the jury courts proved to be a contradiction between the independent nature of jury courts and the authoritative character of samoderzhavie. In the words of I. V. Gesen: *"From the first day has been clear that the new institute is an alien element for the state body, which has to be assimilated or rejected according to the general physiological law".*[4]

The Position of the Jury Courts within the Judicial System

With the judicial reform the jury courts were stepwise established in the newly created judicial districts [5] to decide question of guilt or innocence of the accused in criminal proceedings, where the impending punishment under the law was coupled with the limitation or forfeit of the status rights.[6] The jury consisted of twelve jurors, selected from the list compiled for every uyezd by a special, so called interim commission, created by the local parliament.[7] The participation within the jury was considered to be a civil duty, which could not be denied by any member of the society meeting the preconditions for its exercise.[8] In the list of jurors were listed all russian speaking local male citizen of Russian nationality aged 25–70, fulfilling the property qualification [9], who were according to the meaning

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2 For example, a major Russian lawyer of this period, A. F. Koni called the jury as *„the best part of judicial reform, based on the confidence in the national spirit"*. KONI, Anatolij Fedorovic: Sobranie cocinenij v vosmi tomach, Tom 4. Moscow: Juridiceskaja literatura, 1966, p. 43.

3 Participation of all social classes on the judiciary execution as one of the main ideas behind the incorporation of jury courts in judicial reform of 1864 should be considered in the context of other significant reform of Alexander II., the emancipation of serfs in the Emancipation Manifesto of 19th February 1861. In the process of preparation of the judicial reform the competent concluded that the introduction of jury courts in Russia is *„much more urgent than in other countries because in no other country has a historical life of the nation put such harsh boundaries between social classes, for which there are so many differences between the traditions and way of life of our judges from higher and the accused from lower social classes"*. FROLOV, Vladislav Viktorovic: Sudebnaja reforma 1864 goda v Rossii i ee otrazenie v pravosoznanii rossijskogo obscestva serediny XIX veka. Sankt Peterburg: SPGU, 2003, p. 69.

4 GESEN, Iosif Vladimirovic: Sudebnaja reforma. Sankt Peterburg: Tmpo-Litografija F. Vajsberga i P. Gorsunina, 1905, p. 142.

5 First jury courts were established on 17th April 1866 in St. Petersburg and on 23rd April 1866 in Moscow. Subsequently were the jury courts created in Charkov, Odesa, Kazan and Saratov. From 1866 to 1883 59 judicial districts with jury courts were created.

6 According to the Law of penalties and corrections the limitation of status rights meant a loss of noble titles, honorary degrees, prohibition of employment in state and public service, loss of clerical status, the loss of the right to vote and to be elected to public and honorary positions. A forfeit of status rights meant loss of matrimonial, parental and property rights.

7 The work of the commissions deserved critique, as noted by F.A. Koni: *"In the first fifteen years since the establishment of the jury courts these commissions were so inaccurate that the lists of jurors consisted also from mentally ill, dead, blind and deaf, aged 70 years and so on"*. KONI, Anatolij Fedorovic: Prisjaznye zasedateli. Moscow: Statut, 2003, p. 33.

8 *„The participation in the jury is not a right but a duty towards society and it is a serious duty, which brings no advantage to the individual, but is often connected with significant losses."* VLADIMIROV, Leonid Evstafevic. Sud prisjazich. Sankt Peterburg: Izdatelstvo SGU, 2009. p. 51.

of the commission morally harmless and capable to perform the obligations of a juror. Three weeks before the start of the trial, thirty jurors were chosen from the list, from which the prosecutor and the defendant had the right to call off six potential jurors without giving any reason. From the remaining number of eighteen candidates twelve jurors were chosen by a lot. The trial was presided by a professional judge together with other two judges called major judges. The proceedings were public, except for trials dealing with criminal acts against religion, women honor and family. The jurors took an active part on the process, they were entitled to ask questions the defendant, victim, witness, and request explanations to presented evidences in terms of their legal qualifications from the presiding judge. Important part of the process were the final speeches [10] of prosecutor, advocate and presiding judge, summing up the process facts and their legal significance and formulating questions which jurors had to answer, based on the wording of the indictment and the evidence gathered. The basic question was of course the guilt of the defendant in the matter, which included three elements – whether the offense was committed, whether it is committed by the accused and whether the accused could be considered guilty of the offense. Furthermore, jurors may be asked to answer questions touching the mitigating or aggravating circumstances, the degree of culpability and the degree of possible involvement of other persons in the commission of the offense. In case of accused younger 17 years of age jurors were mandatory asked about his intellectual capacity, in not completed offense jurors had to answer, whether the conduct of the accused might cause harmful effect. The verdict of the jury had to be unanimous, if jurors concluded that the defendant is innocent, presiding judge was obliged to exempt him from prosecution and allow him to leave the court. In case of finding him guilty, professional judges had to impose punishment provided by law. However, if all three judges unanimously agreed that by the decision of the jurors was an innocent person found guilty, they were allowed to transfer the case for a new trial by another jury court, whose decision in the matter was final. With this possible exception, a judgment set in criminal proceeding involving the jury could not be subject of appeal, such sentence was reviewable by the Senate in cassation proceeding at the request of the convicted or at the objection of the prosecutor, only in case of breach of the legal procedure.[11] After the initial enthusiasm has gone, the activity of the jury courts arouse contradictory reactions, criticism in particular resulted from low repression rate [12] and controversial decisions of jurors in several „major" criminal trials, exuding very high public interest. The root cause for this problems can be seen in the vision of the jury, as the court of conscience, standing on high moral pedestal above the law [13] "thanks" which juries delivered liberating judgments in cases where the guilt of the accused has been sufficiently demonstrated in the proceedings, but his conviction would be with regard to his personality, social situation [14], or circumstances of the offense inconsistent with "supreme justice", but often also in the complexity of the very subject of the proceedings. Since the jury courts decided the question of guilt also in complicated cases of breaches of financial regulations and passport laws, they often freed the accused, because they just did not understand the heart of a matter or even their function as jurors.[15] Among many controversial decisions of jury courts [16] particular interest arouse with the verdicts in the trials against Stanislav Kroneberg and Vera Zasulic, which highlighted the key issues associated with the activity of the jury courts in Russia.

[9] The scope of the property qualification differed in dependence on local situation, in Moscow, Sankt Peterburg and Odessa a candidate had to own real estate worth at least 2000 rubles, in the capitals of gubernias at least 1000 rubles, in other cities 500 rubles, or to own at least hundred of tenth of land, or to earn at least 200 rubles, in Moscow and Sankt Peterburg 500 rubles. The property qualification was not high, especially in reference to the asked income, it had to prohibit the jury participation of the most poor and uneducated ex serfs, at least during the first period after their emancipation. The idea of participation of all classes on the judiciary had so its limits, based on the russian real life situation.

[10] As members of the jury courts largely did not have legal education, the final speeches were often crucial for their decision. Especially speeches of advocates in many processes driving the public interest, were more then by a legal argument marked by pathos and lush metaphors, emphasizing burdensome socioeconomic status of the offender and almost quarrying analysis of his motives, which in the perspective of the law had none or only minimal importance, however jurors were often strongly impressed.

[11] The grounds for review of a sentence were a contradiction with the evident purpose of the law, an incorrect legal description of the matter, breach of the principles of judicial proceedings. In case that the Senate upheld the proposal of cassation, he returned the case to a district court for a new proceeding.

[12] The repression rate of the jury courts, i.e. ratio between a number of accused and number of convicted in the years 1873–1878 was 64.3%, repressivity of other courts in the same period was 72.6%. DEMICEV, Aleksej Andreevic: Sravnitelno-pravovoe issledovanie suda prisjaznych v Rossii (istorija i sovremennost). Niznij Novgorod: Niznegorodskaja akademija, 2003, p. 247.

[13] Such position towards mission of jury courts was initially supported also by A. F. Koni who wrote: *"The jurors are not asked whether the accused committed the offense, but whether is guilty, that it was committed, not the fact, but the inner personality of the accused, aroused in him is subject to the court. By its question about the guilt the court creates an unique interval between fact and guilt, and needs the jurors, following only the voice of their conscience and mindful of their great moral responsibility, to fill the interval with considerations, in light of which the accused proves to be a man guilty or innocent ".* KONI, Anatolij Fedorovic: Sobranie cocinenij v vosmi tomach, Tom 4. Moscow: Juridiceskaja literatura, 1966, p. 220.

[14] Jury courts often decided cases of substantiated perpetrators of petty thefts, whose advocates argued that with regard to their poverty, theft is their only option to survive. SATKOVSKAJA, Tatiana Vladimirovna: Pravovoj byt rossijskich krestjan vtoroj poloviny XIX veka: Dissertacija kandidata istoriceskich nauk. Rostov na Donu, 2000, p. 90.

[15] Historian V. I. Gerie, a frequent member of the jury left a note, according to which one juror claimed to the other members of the panel that *"the role of the jury is to love"*. The historian went on to say that *"in general, I often found among the jurors a reasonable view of the offense, but there was always some philanthropist indicating the circumstances*". DEMICEV, Aleksej Andreevic: Sravnitelno-pravovoe issledovanie suda prisjaznych v Rossii (istorija i sovremennost). Niznij Novgorod: Niznegorodskaja akademija, 2003, p. 99.

[16] Controversy provoked acquittal verdicts of juries e.g. in trials of I. I. Mironovic, accused of attempted rape and murder of 13 year old Sara Bekker, P. P. Kacka, accused of murdering a former lover, who had violated his promise to marry her, or with G. Notovic, accused of public defamation.

The Trial of Stanislav Kroneberg

Subject of the trial taking place in St. Petersburg in January 1876, was the systematic torture of seven years old Marie Kroneberg by her father Stanislav Kroneberg. Daughter of Kroneberg, a graduate of the Warsaw University Faculty of Law, was born in 1868 from extramarital relationship and was located by her mother after birth in a peasant's family in Switzerland. In 1875 Kroneberg took the child who did not speak Russian and did not know her father, to St. Petersburg, where he intended to create a complete family with his new partner. Girl's understandable problems with adaptation to a new life situation solved Kroneberg through crude beating, from which she should have learned to be a woman *"not charming, but useful"*.[17] Maids, living with the family in one household, after one particularly drastic whipping[18] anounced Kroneberg to the police, whereupon was arrested and brought to the court. Jurors were asked to answer the question whether the defendant's conduct with regard to all circumstances of the case falls outside the scope of eligible education activity, and therefore whether Kroneberg could be found guilty of the crime of torture. The fact that the defendant is beating the aggrieved, was demonstrated not only by testimony of witnesses of Kroneberg's treatment of his daughter, but especially through the testimony of three medicine experts who testified that on the fifth day after the arrest of Kroneberg, when they had the opportunity to see the injured, the whole body of the girl was covered with bruises. Expert Landsberg said in the court that he could not regard the girl's punishment educational, if such corrections continued, it would cause serious harm to the child as Kroneberg was hitting Marie in rage attacks, helter-skelter. The defense responded to this evidence by calling up the seven years old aggrieved, who "confessed" during the interrogation, led by the defense lawyer V. D. Spasovic that she is a liar and a thief. The defense, which had no means of proof establishing that the accused did not conduct in the indictment described way, used the space of closing speech to clarify that Kroneberg's behaviour was not a criminal offense, but only "non-normal way of education," reasoned by a bad character of the girl and her questionable behaviour. The aggrieved was characterized as *"cunning girl having a bad character, which screams, once placed into a corner, a liar, a thief"* evoking in the father, who was *"unfortunately a bad teacher*" according to the defense understandable *"nerves"*.[19] The advocate also highlighted the fact that if the jurors recognized the defendant guilty, he may be punished under the law by forced labor in Siberia, with the result that the family split and the girl would have no one to take care on her. The jury ruled that the Kroneberg's conduct to his daughter is not an offense and he was set free. The verdict of the jury court in this very closely monitored process rose dramatic and contradictory responses. While one group of people welcomed the decision of the jurors as a sign of independence from state power, which has no right to set up laws and courts intervening in family relationships and the way of education, freely chosen by a parent, a second group of population perceived the verdict as an expression of unprecedented backwardness of jurors and their indifference to the suffering of a child which the state machinery is unable to prevent. One of the most influent representatives of the latter view was F. M. Dostoevskij, having striking and convincing critical stance towards the jury trial, whereas with regard to his status in society he had a vast space for the dissemination of such a statement.[20] The Kroneberg trial is interesting also for the judges attitude towards physical punishment, especially in the context of further described process of Vera Zasulic. While in Kroneberg's case, physical violence against a child was understood as adequate educational procedure, in the latter case, physical violence against Bogoljubov was perceived as scandalous humiliation of defenseless person. Such discrepancies reinforced the argument of the unpredictability of decisions of jury courts and their detachment from the legal qualification of crimes, thereby surely undermined confidence in the institute.

The Trial of Vera Zasulic

On 24th January 1878 Vera Zasulic walked into the house of St. Petersburg City Chief general Trepov and fired twice at the general from a revolver she brought, hitting his left hip. Vera Zasulic was arrested on the spot and subsequently charged with attempted murder. The motive of the crime inhered in the incident of 13th July 1877, when the general came to the prison on Spalernaja street, where he met prisoner Bogoljubov, member of the organization Zemlja i volja[21], accused of serious crimes of a political nature. At this meeting, Bogoljubov bowed Trepov, but when the general passed through a second time, Bogoljubov did not hacked down his cap. Extremely annoyed Trepov took the cap with screaming from Bogoljubov's head. Prisoners, watching the incident from windows, began to shout and protest, whereupon Trepov issued an order to physical punishment of Bogoljubov. Trepov's procedure was illegal, because physical punishment for disciplinary offenses might be under Russian law imposed only on convicted persons, while a judgment in Bogoljubov's case, convicting him on the penalty of forced labor in the period of fifteen years was not yet in force. Although the event attracted quite a stir, the general was not punished for his illegal practice in any way, on the contrary, his act was met with favorable reactions of power elites, among

[17] SALTYKOV-SCEDRIN, Michail Evgrafovic: Sobranie cocinenij, Tom pjatnadcatyj. Moscow: Chudozestvennaja literatura, 1973, p. 212.

[18] Kroneberg was indicted of beating a girl at least quarter of an hour with a wooden rod, called „shpicruten" used in Russia to carry out corporal punishment charged by a military court, e.g.for adult offenders. The nature of the whipping is also evidenced by the fact that after finishing it, father was so exhausted that nearly blacked out. DOSTOEVSKIJ, Fjodor Michajlovic: Sobranie cocinenij v pjatnadcati tomach, Tom 13, Dnevnik pisatelja. 1876. Sankt Peterburg: Nauka, 1994, p. 57.

[19] SALTYKOV-SCEDRIN, Michail Evgrafovic: Sobranie cocinenij, Tom pjatnadcatyj. Moscow: Chudozestvennaja literatura, 1973, p. 216–219.

[20] A manifesto of Dostoevskij's opinion is also a scene of process with Dmitrij Karamazov in the Brothers Karamazov, where Dmitrij's advocate calls the jurors for his release, because even if he killed his father *„a murder of such a father is not a patricide"*. DOSTOEVSKIJ, Fjodor Michajlovic: Bratja Karamazovy. Moscow: Eksto, 2008, p. 767.

[21] Organization Zemlja i Volja (Land and Freedom), founded in 1862 in St. Petersburg, had a political goal to overthrow samoderzhavie and unleash a peasant revolution.

them of The Minister of Justice Palen. Trepov's act caused in Vera Zasulic a need to punish the perpetrator of oppression of defenseless prisoner, whom according to her argument she had never met before. Whereas with regard to the circumstances of the case The Minister of Justice was sure that the jury court can not decide otherwise than to recognize the defendant guilty, the case was transferred to a decision of the jury court and was not proceeded as a criminal offense against state.[22] A process with Vera Zasulic at St. Petersburg's district court begun on 31st March 1878 under the chairmanship of A. F. Koni. The action of Zasulic was classified as attempted murder under the provisions 9 and 1454 of the Law of penalties and corrections with impending punishment of forced labor in the range of 15 to 20 years with deprivation of all property rights. In the trial was shown that Zasulic obtained the revolver in advance, and the revolver was "strong and short", what the prosecutor in itself considered a sufficient evidence of her intention to kill Trepov. As regards to the nature of shots, expert witnesses[23] agreed that injuries of the victim were life-threatening. Zasulic said in the proceedings that she went into the house of general Trepov with the intent to take revenge for the violence against Bogoljubov. The motive of the accused arouse the most attention. While the prosecutor emphasized the negative nature of revenge and terrible consequences of unlawful exercise of personal revenge for society, the advocate presented it as a selfless act conducted solely to illustrate the injustice: *„Bogoljubov' s torturers did not need to hear the moans of physical pain, but the ravished moan of human soul, moan of strangulated, humiliated and trampled human (...) there appears a woman, with no motive for a crime, no personal interest or personal revenge, a woman whose act is a part of a the fight for an idea on behalf of the person who was a mate of her unhappy life".*[24] In his final speech, presiding judge ordered the jurors to decide on three questions – whether is Zasulic guilty that she decided to take revenge for the punishment of Bogoljubov and for this reason purchased a revolver, fired on general Trepov a larger caliber bullet, whether the act was premeditated and Zasulic did so in order to kill general Trepov and if so, whether Zasulic did everything depending on her to achieve the objective of killing the victim, while the death did not occurre for reasons beyond Zasulic's will. At the end of his speech the presiding judge said: *"If you see the accused guilty in the first or all three points, you can also recognize mitigating circumstances arising from the nature of thing. These circumstances are always important, because you judge the living man, whose present is directly or indirectly affected by his past. Regarding these circumstances, keep in mind life of Zasulic presented to you".*[25] The jury decided that the accused is innocent in all three points. The presiding judge in accordance with the law exempted Zasulic from indictment and released her from custody. However, when Alexander II. heared the verdict, in contravention of applicable laws imposed general Kozlov, Trepov's deputy in the town chief office to issue a warrant for the arrest of Vera Zasulic, but she managed to hide in a conspiracy flat and later emigrated to Switzerland. The Minister of Justice Palen alleged A.F. Koni from illegal conduct and transferred him to a civil college of the court. Palen himself was dismissed from his post for negligent supervision of Zasulic's case.

The Modification of the Jury Courts

The process of Vera Zasulic fully revealed the serious crisis of Russian juries. Even A.F. Koni, a staunch advocate of the judicial reform was forced to admit that: *„not only isolated shunts, errors in decisions, but misguided attitude to their role, their duties, has become a habit of jury courts. Such attitude is contradictory to aims of justice and points on the inadequacy and unpreparedness of jurors to consider all sorts of things".*[26] Another strict view held I. A. Ilin, according to whom: *„no legal or political reform by itself changes the psyche of a man, accustomed to passive humbleness, not knowing that self-dependent decision rises only from the depths of freedom and self-regarding will".*[27] The unpredictability of decisions, low repression rate, constitution of juries which did not correspond with the purposes of justice, especially due to poor level of education and literacy, lax attitude of interim commissions to their duties as the underlying causes of the crisis led to legal reconstruction of the jury courts by laws passed in the years 1878–1889. The Law of 9th May 1878 excluded from the scope of juries all criminal acts having political overtones, such as resistance to state authority, murder and attempted murder of the state power representatives. By the Law of 18th May 1882 and Law of 18th December 1885 was the field of action of the jury courts narrowed by removal of specific "technical" crimes as breaches of passport and financial law and also by unloading of petty thefts, which were transferred to the scope of the conciliation courts.[28] The Law of 28th April 1887 changed the composition of interim commissions, which members could became only the persons with judicial experience, the method of composing the list of potential jurors and the preconditions for jurors. Addition of

22 Under Articles 1030 and 1031 of the Law of penalties and corrections of 1864 criminal offenses against the State were arbitrated by judicial chambers and Supreme criminal court without the participation of jurors in a specially modified procedure.

23 Expert witnesses were three surgeons who had the opportunity to examine the victim immediately after the crime. KONI, Anatolij Fedorovic: Vospominanija o dele V. Zasulic, Sobranie socinenij v vosmi tomach, Tom 2. Moscow: Juridiceskaja literatura, 1966, p. 36.

24 KONI, Anatolij Fedorovic: Vospominanija o dele V. Zasulic, Sobranie socinenij v vosmi tomach, Tom 2. Moscow: Juridiceskaja literatura, 1966, p. 95. By mention of the unhappy life the advocate alluded to the two-year stay of Vera Zasulič in custody on suspicion of political crimes, which did not result in prosecution.

25 KONI, Anatolij Fedorovič: Vospominanija o dele V. Zasulič, Sobranie sočinenij v vosmi tomach, Tom 2. Moscow: Juridičeskaja literatura, 1966, p. 96.

26 KONI, Anatolij Fedorovič: Sobranie sočinenij v 8 tomach, Tom 4. Moscow: Juridičeskaja literatura, 1966, p. 223.

27 ILIN, Ivan Aleksandrovic: O Suscnosti pravosoznanija. Sobranie cocinenij v 10 tomach, Tom 4, Moscow: Russkaja kniga, 1994, p. 187.

28 Proportionally with limitation of the scope declined volume of jury courts jurisdiction, while in the years 1866–1877 juries decided about 75% of all trials taking place on district courts, in the years 1878–1889 the volume of jurisdiction decreased by an average of 10–15%. On the turn of the 19 and 20 Century, the tendency to reduce the volume of the jurisdiction of the jury courts deepened, the jury courts decided for just over 40% of cases. Repression rate of the jury courts did not change. DEMICEV, Aleksej Andreevic: Sravnitelno-pravovoe issledovanie suda prisjaznych v Rossii (istorija i sovremennost). Nižnij Novgorod: Niznegorodskaja akademija, 2003, p. 265.

literacy to the requirements led to reduction of participation of peasants, traditionally the poorest and most undereducated jurors, in average 9%. According to new legislation, to the list of potential jurors could not be enlisted persons, in opinion of the commission classified as mentally challenged and easily influenced. Number of candidates, who could be refused by the process parties was reduced from sixteen to three. Low interest of higher classes to attend juries was solved by enactment of punishment – candidate who did not appear in court for the third time was fined and prohibited to vote and to be elected to functions requiring social trust. This measurement led to significant increase in participation in the jury courts. Other changes included the expansion of procedural rights of jurors, whom were given the right to request changes in wording of questions given to them and the improvement in their working conditions, e.g. by the prohibition of night sessions. These measures resulted in creation of the original Russian variant of jury courts reflecting the reality of Russian life much better than its concept enacted in judicial reform of 1864, which was based on the model of Western European Countries, notably France and Great Britain. Therefor it was not necessary to change the legal environment of jury courts in the following period. From 1890 to 1914 only three laws dealing with juries were passed. The Law of 3rd June 1894 simplified the oath pronounced by jurors before trial, the Law of 2nd March 1910 enacted the right of jurors to be acknowledged about the sentence impending to defendant and the Law of 26th November 1913 established the right of jurors to have paid costs associated with their participation in the trial. During the First World War there was a comprehensible alteration in modus of jury decisions. Creation of various extraordinary and military courts led to limitation of operational scope of juries, war conditions improved repression rate and changed the composition of juries.[29] In the years 1914–1917 could be observed increased strictness especially in crimes against property and decreased tolerance to previously widely accepted mitigating circumstances as exigency and acting under the influence of alcohol. After the commencement of the Interim Government the efforts to democratize legislation governing the status of jury courts could be seen[30], however there was not enough time to prove their effectiveness. The Decree of Court, issued after the October revolution eliminated all existing courts, including jury courts.[31] In the Russian Federation was the reinstitution of jury courts established in 1993.[32]

Conclusion

Although the judicial reform of 1864 eliminated dysfunctional pre-reform judicial system, it was not able to change from one day to other the way of thinking of many social classes, across generations accustomed to living in a feudal-bureaucratic Russia. The effect of jury courts was complicated not only by conflicts between the cultural and social relations of life of Russian people and the essence of jury trial, formed in conditions of Western countries, but also by the country internal political situation, marked by the struggle of samoderzhavie and revolutionary movement. Between these extreme poles of society, for obvious reasons not able to find a compromise, was existing essential part of population, from which the jurors were recruited. Mental and political background of the crisis of jury courts, clearly noticeable in the trials of Stanislav Kroneberg and Vera Zasulič led to rebuilding the institute of jury courts by number of laws passed in the years 1878–1889 and its adaptation to real Russian environment. Although "the reform of the reform" proved to be useful for effectiveness of jury trials, further operation of this institute was abolished after the October revolution.

[29] For example, in Vladimirskij ujazd in 1887 were 67% of jurors peasants, in 1917 it was 39.7%. In contrast, the representation of officials increased from 23.7% to 31.5%. DEMICEV, Aleksej Andreevic: Sravnitelno-pravovoe issledovanie suda prisjaznych v Rossii (i istorija sovremennost). Nizny Novgorod: Niznegorodskaja akademija, 2003, p. 115.

[30] The Regulation of the Interim Government of 30th March 1917 returned within the scope of the jury court cases removed from it by laws of y. 1878–1889. In addition, for the first time in history Russia juries decided the guilt of the accused of crimes against the state. Another remarkable measure of the Interim Government was the introduction of jury trial in military affairs on the basis of the Regulations of 6th and 28th May 1917.

[31] The Decree of court was not carried out immediately after its release – the jury courts in various governorates functioned even in 1918. Many Soviet historians, for example J. S. Tokarev saw the cause of this phenomenon in the counter-revolutionary sabotage forces, the real reason for delayed application of the Decree was rather in a slow pace of Soviet authorities. The Decree of court was published in the press immediately after its release, state authorities, however reluctantly, started to act first when they received it separately. LEZOV, I.A. Sudebnoe strojitelstvo na mestach v pervye mesjacy Sovetskoj vlasti. Moscow: MGU. 1998. p. 115.

[32] By the Federal Law on inserting amendments into the Law of the RSFSR on the Judiciary system, the Criminal Procedural Code of the RSFSR, the RSFSR Criminal Code and the Code on administrative violations of the RSFSR Law of 16th July 1993.

Hate Crimes as Manifestations of Political Extremism

Štěpán Kalamár [1], Andrea Schelleová [2], Ivo Svoboda [3]

Introduction

Political extremism is a topical phenomenon of today, which is closely watched by the public. However, extremism is a general and global problem and is not confined to the Czech Republic only. It is manifested both domestically and internationally. Consequences of extremist acts are often fatal, which fact makes the phenomenon highly socially dangerous.

Specific characteristics of the phenomenon include latency and also the fact that the perpetrators are often very young. Last but not least, specific features with respect to the collection and accumulation of information or, more specifically, its forensic documenting must be emphasized as well. The range of related issues is extremely broad. They pertain to the sharing and acceptance of fundamental democratic values, including equality of people in dignity and rights, right to life and health, freedom of belief and religion, or protection of minority rights. These issues are also about the perception of and respect to rights of ethnic and other minorities and about the right of nations to self-determination.

However, extremism is generally perceived as any ideology or activity aimed against the existing political system as such, and striving for its destruction and subsequent replacement by its own alternative. The latter is usually assumed to be non-democratic, dictatorial, and violating human rights.[4] According to Mareš, extremism is an antithesis of a legal state.[5]

1 Constitutional and International Law Provisions Concerning Sanctions Against Manifestations of Political Extremism

As a rule, the term "extremism" denotes pronounced ideological attitudes which deviate from legal and constitutional standards, involve elements of intolerance, and strike at fundamental democratic constitutional principles defined in the Czech constitutional order (this definition is used, for example, in the "Information on the Issue of Extremism in the Czech Republic", a document which has been prepared since 2006 and constitutes an annex to the "Report on Public Order and Internal Security in the Czech Republic"; before 2006, the "Information on the Issue of Extremism" was published as a separate document). It is interesting to note that the term was coined and used for the first time by the German government in 1972 to denote some terrorist activities of the RAF group.[6]

If we were to look for international law standards offering protection against the phenomenon of extremism, we would have to mention in the first place the general and well-known institutes designed to protect human rights, in particular keynote UN documents including:

- Charter of the United Nations (Act No. 30/1947 Coll.),
- Universal Declaration of Human Rights,
- International Covenant on Civil and Political Rights (Act No. 120/1976 Coll.),
- International Covenant on Economic, Social and Cultural Rights (Act No. 169/1991 Coll.),
- Convention on the Prevention and Punishment of the Crime of Genocide (Act No. 32/1955 Coll.),
- International Convention on the Elimination of All Forms of Racial Discrimination (Act No. 95/1974 Coll.),
- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Act No. 143/1988 Coll.), as well as:
- United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

In addition, activities of the Commission for Human Rights and the Human Rights Committee may be mentioned as well. It is impossible not to mention major initiatives of the Council of Europe, which emphasizes the necessity of human rights protection. Apart from the Convention for the Protection of Human Rights and Fundamental Freedoms (Act No. 209/1992 Coll.), there is also the Framework Convention for the Protection of Na-

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[4] CHARVÁT, J. *Současný politický extremismus a radikalismus. (Political extremism and radicalism of today.)* Praha: Portál, 2007, pp. 9–10.

[5] MAREŠ, M. *Úvod do problematiky pravicově extremistických hudebních produkcí na území ČR. (Introduction into the topic of extreme right-wing musical productions in the territory of the Czech Republic.)* Brno: FSS (an opening study of scientific and practical information), p. 4.

[6] A methodological document of the Supreme Public Prosecutor's Office on the issue of extremism, from October 2009. Please refer to further chapters of the article for the definition proper of extremism.

tional Minorities (Act No. 96/1998 Coll.) and the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Act No. 53/1974 Coll.). Insofar as the Czech Republic, being an EU member state, is concerned, another essential document is the Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. When dealing with international law implications in the field of protection against manifestations of extremism, it is also possible to refer to activities of the Organization for Security and Cooperation in Europe, which established the office of the High Commissioner on National Minorities to act as a mediation and supervisory body within the organization.

As to the Czech Republic's legislation, the position of international documents is defined in Article 10 (and Article 10a) of the Constitution of the Czech Republic, according to which promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding upon the Czech Republic, constitute a part of the legal order; should an international agreement contain a provision contrary to the Czech law, the former prevails. Other documents that can be referred to from the viewpoint of domestic law and constitutional foundations of the legal system include the Constitution of the Czech Republic (Act No. 1/1993 Coll.) and the Charter of Fundamental Rights and Basic Freedoms (Act No. 2/1993 Coll.), which constitutes a part of the constitutional order of the Czech Republic. The first article of the Charter stipulates that all people are free, have equal dignity, and enjoy equality of rights. The Charter prohibits any discrimination based on the colour of skin, language, faith, religion, gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, gender or other status. It is thus based on a natural law concept of rights and equality of rights for all people. The Charter also contains provisions on rights of national and ethnic minorities. Constitutional sources or principles providing the basis for sanctions against manifestations of extremism in our legal system include, but are not limited to:

The **principle of majority and protection of minority rights**[7] consists in the adoption of decisions on the basis of a consent expressed by a majority of decision-makers, who may do so through their elected representatives. The protection of minorities guarantees their right to existence and a realistic possibility to become a majority through democratic fight. The term is not limited to language, national, ethnic, religious and social minorities, but applies to just about any minority defined by a single common characteristic feature or a common opinion about a certain issue. Even an individual with a different opinion may be viewed as a minority. At the same time, the protection of minority rights also means that no one, including the people themselves, can dispose of such rights. A majority cannot impose, even using a legal process, any restriction of rights (e.g. freedom of speech or association etc.) upon a minority, thus rendering the latter unable to persuade other people to join its side and thus become a majority. Moreover, any minority-aimed restriction of fundamental rights may be in contravention of the principle of equality of citizens.

The **principle of inherence and inalienability of fundamental rights and freedoms**[8] is based on a notion that an individual is endowed with them on the merits of his or her very existence. The state can thus guarantee, provide for and develop these rights and freedoms, but cannot repeal them. The inherence of human rights means that one cannot give them up. In addition, they cannot be assigned or transferred to someone else (inalienability). The second sentence of Article 1 of the Charter of Fundamental Rights and Basic Freedoms expressly stipulates that these rights and freedoms are inherent, inalienable, non-prescriptible, and not subject to repeal.

According to the first paragraph of Article 1 of its Constitution, the Czech Republic is a state based on respect for the rights and freedoms of man and citizen.

The background outlined above is expressed in separate legal acts and ordinances and also reflected in criminal law which is of the "ultima ratio" (last resort) nature, i.e. fulfils an auxiliary role in the society. Section 12 of the Criminal Code[9], namely its part concerning the **principle of legality and subsidiarity in criminal repression**, stipulates that:

(1) Only the Criminal Code shall determine criminal acts and criminal sanctions that can be imposed for the perpetration thereof.
(2) The perpetrator's criminal liability and any consequences connected therewith under the criminal law may only be applied to socially harmful acts in respect whereof the liability under other legal acts is not sufficient.

Insofar as the sociological and criminological aspects are concerned, extremism can be defined as a sum of certain sociopathological phenomena produced by more or less organized groups of people and their sympathizers, the dominant feature of which is a rejection of essential values, standards and ways of behaviour prevailing in today's society.[10] From the viewpoint of police work, the term "extremism" usually denotes verbal, symbolical, graphic, violent and other acts of individuals and groups, which significantly deviate from generally accepted and recognized standards, with significant elements of intolerance and a negative attitude to compromises, attacking the very foundations of the state, lives, health or someone else's property. Herczeg points out that it is often very difficult to determine who is an extremist and who is a radical, i.e. a person still operating within limits of the constitutional system.[11]

It is therefore possible to say that the subject of extremism-prompted or -related criminal acts is of a multidisciplinary nature and needs an interdisciplinary approach; it requires know-how and capabilities from many scientific disciplines, as only

[7] Article 6 of the Constitution of the Czech Republic, Act No. 1/1993 Coll.
[8] Article 1 of the Constitution of the Czech Republic, Act No. 1/1993 Coll.
[9] Act No. 40/2009 Coll., Criminal Code, in effect from January 1st, 2010.
[10] KUCHTA, J., VÁLKOVÁ, H. a kol. *Základy kriminologie a trestní politiky (Principles of criminology and penal policy).* Praha: C. H. Beck, 2005, p. 490.
[11] HERCZEG, J. Trestné činy z nenávisti (Hate crimes). Praha: ASPI, 2008, p. 14.

these will guarantee an objective and fair criminological evaluation of the problem. Specific evidence-gathering methods must be used in criminal investigation, and specific methodologies have to be employed to analyze the collected evidence. Needs of bodies involved in criminal proceedings and facts of the case have to be taken into account as well. Similarly, the bodies involved in criminal proceedings must formulate questions they may potentially need answered by an expert witness.

2 Possible Criminal Sanctions Against and Criminological Investigation of Manifestations of Extremism in Slovakia

The absence of a legal definition of extremism was perceived as a deficiency both among the general public and among the professional community. The Constitutional and Legal Affairs Committee of the National Council of the Slovak Republic thus proposed, during the process of presenting comments on the draft of the Criminal Code (Act No. 300/2005 Coll.), to introduce legal definitions of the terms "extremism", "extremist" and "extremist group" into the Criminal Code. At the end of the day, its efforts (unfortunately) produced just a list of extremist crimes in Section 140a of the Slovak Criminal Code (the amendment was enacted by Act No. 257/2009 Coll. and took effect as of September 1, 2009.

Provisions of Section 140a, **Extremism-Related Crimes**, stipulate that: "Extremism-related crimes shall include the criminal acts of sponsoring and promotion of movements aiming at suppressing the rights and freedoms of citizens (Sections 421 and 422), production of extremist materials (Section 422a), distribution and dissemination of extremist materials (Section 422b), safekeeping of extremist materials (Section 422c), defamation of race, nation or belief (Section 423), incitement to national, ethnic or racial hatred (Section 424), incitement, defamation or threatening of people on the grounds of their race, nation, nationality, colour of skin, ethnicity or lineage (Section 424a), and special-bias crimes as defined in Section 140, Paragraphs d) and f).

Section 140 of the Slovak Criminal Code, **Special Biases**, stipulates that the term applies to criminal acts perpetrated

a) upon an order,
b) as an act of vengeance,
c) with an intention to camouflage or facilitate another crime,
d) with an intention to publicly incite violence against or hatred aimed at a group of people or an individual on the grounds of their race, nation, nationality, colour of skin, ethnicity, lineage or religious belief, if the intention is manifested by threats for the reasons set forth above,
e) with an intention to perpetrate the criminal act of terrorism or of some forms of participating in terrorism according to Section 419,
f) because of national, ethnic or racial hatred or hatred based on skin colour, or
g) with a sexual motive.

The special part of the Slovak Criminal Code (Act No. 300/2005 Coll.), namely Part 1 of Chapter 12, contains (apart from other crimes and their definitions) a list of extremist criminal acts; however, there is no legal and professionally formulated definition of extremism, not to speak of one that would be generally accepted by the professional community and explicitly determine, for the purpose of criminal proceedings, what extremism amounts to. The absence of such a definition causes great difficulties in proving extremist crimes, as illustrated by the fact that, by October 2010, no person indicted for an extremist criminal act in Slovakia has actually been sentenced.[12] This holds particularly true for crimes falling under Section 422a (Production of extremist materials), Section 422b (Distribution and dissemination of extremist materials) and Section 422c (Safekeeping of extremist materials).

The non-existence of the definition referred to above, or, as a minimum, a specification of the term "extremism" in the Criminal Code of the Slovak Republic, combined with the absence of a definition of extremism generally acknowledged and accepted by the society and the non-existence or non-appointment of a forensic expert or forensic institution that would evaluate and analyze extremism-related issues, results in a relatively low level of knowledge and erudition in this field; this situation means a *de facto* non-prosecutability of such criminal acts in Slovakia and renders any criminal investigation of suspected extremism-related crimes paralyzed or impossible. The situation is also reflected in a rather general and vague declaration in the current "Draft Concept of Combating Extremism" in Slovakia.[13]

3 Possible Criminal Sanctions Against and Criminological Investigation of Manifestations of Political Extremism in the Czech Republic

Insofar as potential criminal sanctions against and criminological investigation of manifestations of extremism in the Czech Republic are concerned, it is appropriate to mention that there is a fundamental classification system of political extremism, which comprises a criterion of primary political affiliation (right-wing as opposed to right-wing)[14] and a criterion of secondary political affiliation (religious, nationalistic, ecological). As for the former criterion, it should be noted that the description of the political spectrum is based on the traditional division of parties in the French National Assembly after the French Bourgeois Revolution (some sources even claim that it was a division of the estates during the period prior to the Revolution), the so-called right-left axis.[15]

[12] In mid-June 2010, the author of this habilitation thesis lectured at a training course on extremism, which was organized by the Police Presidium of the Slovak Republic; he received this information from the director of the Extremism Department of the Police Presidium of the Slovak Republic, in the presence of the Vice President of the Regional Court in Košice.

[13] See Annex 2 – although the concept was put together as early as in 2006, the above statements pertain to the situation in January 2011.

[14] For details on the terms "right" and "left", please refer to CHARVÁT, J. *Současný politický extremismus a radikalismus. (Political extremism and radicalism of today.)* Praha: Portál, 2007, pp. 13–16.

[15] Ibid, pp. 17, 18.

Although the division outlined above has been used in many publications and sources, there exists an objection claiming that there has been an extensive exchange of ideas among socialists, liberals and liberal conservatives, which renders the significance of the division rather dubious. Černý also deals with right-wing extremism (freedom, right of an individual to development, unacceptability of interventions in the economy, inviolability of ownership etc.) and the left-wing (equality, social justice, solidarity and collective interests) perception of the world (in addition, there is a centrist political orientation).[16] So much for the horizontal axis. The vertical axis characterizes the level of orthodoxy of entities advocating, representing and promoting a given view or opinion. The term "extremism" denotes an extreme-right or extreme-left position of an entity on a notional cross-shaped axis system, with "conservatism" at the top, "liberalism" at the bottom, "left" on the left-hand side and "right" on the right-hand side. Charvát[17] characterizes the right-wing and left-wing varieties of extremism as follows:

Right-wing extremism:

1. rejects equality,
2. unilaterally high (biased) opinion of one's own nation, ethnic group etc.,
3. targets groups that differ in some way,
4. worships violence,
5. emphasizes the role of the state – "etatism",
6. focuses itself against the democratic constitutional state,
7. uncompromisingly stands against the extreme left.

Left-wing extremism:

1. purports some degree of agreement and compliance with the democratic constitutional state, but makes radical to extremist conclusions – absolute equality,
2. declares a close connection with ideologies such as Maoism, Trockism, Stalinism, Marxism-Leninism, anarchism,
3. emphasizes errors and shortfalls of the democratic state and takes actions against it – efforts to replace the existing establishment by the dictatorship of the proletariat, or by an anarchistic concept of a loose society without any authorities or control,
4. agrees with violence,
5. emphasizes "Anti-Fascism".

The Supreme Public Prosecutor's Office issued a document known as **General Instruction No. 1/2008, on criminal proceedings**, which remained in effect till the end of 2009 and which contained, by way of reference in Article 72, a list of crimes perpetrated for malevolent reasons, including racial, ethnic, religious or other hatred [in accordance with the provisions in effect till the end of 2009 which, however, due to the provisions of Section 2, Paragraph 1, of the Criminal Code, will be applicable even after the new Criminal Code, Act No. 40/2009 Coll., takes effect]. The crimes referred to above are as follows:

- violence against a group of people or an individual (Section 196 of the Criminal Code),
- defamation of a nation, ethnic group, race or belief (Section 198 of the Criminal Code),
- incitement to hatred against a group of people or to a curtailment of their rights and freedoms (Section 198a of the Criminal Code),
- murder (Section 219, Paragraphs 1 and 2 g), of the Criminal Code),
- bodily harm (Section 221, Paragraphs 1 and 2 b), of the Criminal Code),
- bodily harm (Section 222, Paragraphs 1 and 2 b), of the Criminal Code),
- extortion (Section 235, Paragraphs 1 and 2 f), of the Criminal Code),
- damage to someone else's property (Section 257, Paragraphs 1 and 2 b), of the Criminal Code),
- sponsoring and promotion of movements aiming at suppressing rights and freedoms of citizens (Section 260 of the Criminal Code),
- sponsoring and promotion of movements aiming at suppressing the rights and freedoms of citizens (Section 261 of the Criminal Code),
- sponsoring and promotion of movements aiming at suppressing the rights and freedoms of citizens (Section 261a of the Criminal Code).

Article 72 of the General Instruction referred to above also lists other criminal acts that may be committed for malevolent or hateful reasons, although the malevolent reason does not constitute a part of the crime's definition.

When the new Criminal Code[18] became effective, the Supreme Public Prosecutor's Office issued **General Instruction No. 8/2009, on criminal proceedings**; Footnote 297 to Article 73 of the document contains the following list of crimes perpetrated for malevolent reasons, including racial, ethnic, religious or other hatred:

- murder (Section 140, Paragraphs 1 or 2, and Paragraph 3 g), of the Criminal Code),
- grievous bodily harm (Section 145, Paragraphs 1 and 2 f), of the Criminal Code),
- bodily harm (Section 146, Paragraphs 1 and 2 e), of the Criminal Code),
- torture and cruel and inhuman treatment (Section 149, Paragraphs 1 and 2 b), of the Criminal Code),
- deprivation of personal freedom (Section 170, Paragraphs 1 and 2 b), of the Criminal Code),
- restraint of personal freedom (Section 171, Paragraphs 1 and 3 b) of the Criminal Code),
- abduction to a foreign country (Section 172, Paragraphs 1 or 2, and Paragraph 3 b), of the Criminal Code),
- extortion (Section 175, Paragraphs 1 and 2 f), of the Criminal Code),
- violation of secrecy of deeds and other privately kept documents (Section 183, Paragraphs 1 and 3 b), of the Criminal Code),

[16] Černý, P. Politický extremismus a právo (Political extremism and law), Eurolex Bohemia, Praha 2005, pp. 23 et seq.

[17] CHARVÁT, J. *Současný politický extremismus a radikalismus. (Political extremism and radicalism of today.)* Praha: Portál, 2007, pp. 17–20, 63–122 [the "extreme right" and "extreme left" terms].

[18] Act No. 40/2009 Coll., the Criminal Code.

- damage to someone else's property (Section 228, Paragraphs 1 or 2, and Paragraph 3 b), of the Criminal Code),
- abuse of official authority (Section 329, Paragraphs 1 and 2 b), of the Criminal Code),
- violence against a group of people or an individual (Section 352, Paragraphs 2 and 3, of the Criminal Code),
- defamation of a nation, race, ethnic or other group (Section 355 of the Criminal Code),
- incitement to hatred against a group of people or to a curtailment of their rights and freedoms (Section 356 of the Criminal Code),
- insult between soldiers (Section 356, Paragraphs 1 and 2, of the Criminal Code),
- insult between soldiers by violence or a threat of violence (Section 379, Paragraphs 1 and 2 d), of the Criminal Code),
- insult of a soldier of the same rank by violence or a threat of violence (Section 380, Paragraphs 1 and 2 c), of the Criminal Code),
- violation of rights and protected interests of soldiers holding the same rank (Section 382, Paragraphs 1 and 2 c), of the Criminal Code),
- violation of rights and protected interests of subordinate soldiers or soldiers holding a lower rank (Section 383, Paragraphs 1 and 2 c) of the Criminal Code),
- genocide (Section 400 of the Criminal Code),
- attack on humanity (Section 401, Paragraph 1 e) of the Criminal Code),
- apartheid and discrimination against a group of people (Section 402 of the Criminal Code),
- establishment, sponsoring and promotion of a movement aiming at suppressing the rights and freedoms of man (Section 403 of the Criminal Code),
- manifestation of sympathies for a movement aiming at suppressing the rights and freedoms of man (Section 404 of the Criminal Code), and
- denial, questioning, approval and justification of genocide (Section 405 of the Criminal Code).

The document referred to above also stipulates that extremism-related crimes may also include crimes motivated by racial, ethnic or other social hatred.

4 Judicature as a Source Creating Specific Criminological Methods Employed to Investigate Manifestations of Extremism

A new Criminal Code[19] has been in effect in the Czech Republic since 2010; as mentioned above, it construes factual substances of hate crimes a bit differently, both formally and with respect to their contents; due to a relatively short period of time between the effective date of the new Criminal Code and the date of completion of the present work, it was not possible to collect enough judicature reflecting the new Criminal Code. However, the judicature dating back to the time the old Criminal Code[20] was in effect, i.e. until December 31, 2009, provides enough material for orientation when crimes suspected to have an extremist undertone are investigated. It provides enough information both for bodies involved in criminal proceedings (courts, public prosecutors and police, in particular SKPV[21], and for expert witnesses and forensic institutes. The judicature can also be used to deduce the scope and focus of activities of the Czech Police in the area of gathering evidence and supporting information for criminological analyses and criminal investigation. The documents and evidence can subsequently be employed by expert witnesses and forensic institutes for the purpose of elaborating an expert opinion or expert analysis. The existing judicature can also be used as a guideline in the selection of criminological methods and methodologies employed to investigate a given phenomenon or fact.

Last but not least, it should be emphasized that the present judicature in the Czech Republic is supported by collections of findings of the Constitutional Court and by rulings and resolutions of the Supreme Court, regional courts and the Supreme Administrative Court.[22]

For example, a collection of findings of the Constitutional Court of the Czech and Slovak Federative Republic on the matter of prevention of the sponsoring and promotion of movements and organizations based on ideas of racism, xenophobia or anti-Semitism states that: ***"The security of the state and its citizens (public security) requires that the sponsoring and promotion of movements threatening it be prevented. A ban under the criminal law on the sponsoring and promotion of certain ideologies, whose doctrines and practices have rendered the promotion of other ideologies and political or other movements impossible, protects not only human rights and freedoms, but also democratic foundations of the state. Movements and ideologies provably aimed against the foundations of a democratic state, such as guaranteed fundamental rights and liberties for all, have to be curtailed and their legal ban is a measure necessary to guarantee fundamental rights and freedoms."***[23] Based on a ruling of the Supreme Court and in accordance with provisions of the first paragraph of Section 260 of the Criminal Code then in effect (Act No. 140/1961 Coll.), the term "movement" is deemed to denote: ***"…a group of people, which is at least partly organized, although it may not be officially registered, aiming to suppress human rights and liberties or proclaiming ethnic, racial, religious or class hatred or hatred toward another group of people. For the crime to be deemed committed, the movement must exist at the time when the perpetrator is supporting or promoting it; however, it may exist in a modified form (e.g. Neo-Nazi or Neo-Fascist movements)."***[24]

In this respect, bodies involved in criminal proceedings may find inspiration in another segment of the ruling already quoted above, which reads as follows: ***"…. every form of organization***

[19] Act No. 40/2009 Coll., the Criminal Code.
[20] Act No. 140/1961 Coll., the Criminal Code, as amended.
[21] Služba kriminální policie a vyšetřování (Service of Criminal Police and Investigation).
[22] … such as in the case of the order to dissolve the Workers´ Party in 2010.
[23] Constitutional Court of the Czech and Slovak Federative Republic. Pl. ÚS 5/92, Sb.n.u.ÚS ČSFR, 1992.
[24] Supreme Court, Tpjn 302/2005, R 11 / 2007.

contains certain structural elements of a movement, which is why it does not have to be overly emphasized, in particular with a view to the fact that a movement needs to be only partly organized to be viewed as such….”[25].

The ruling referred to above also deals with the definition of the term “existing movement”, stipulating that: ***“…. In this respect, the term “existing movement” is also deemed to denote a movement which succeeds, although in a modified form, a movement which no longer exists (e.g. Neo-Nazi or Neo-Fascist etc.), if it makes use of the ideology, symbols, salutations and other attributes of the extinct movement …”.***[26]

The part of the above ruling, which is particularly important and inspiring for bodies involved in criminal proceedings, especially those collecting and processing evidence and supporting information for the proceedings, reads as follows: ***“…. The existence of such a movement, which can be identified at least roughly, at the time when the perpetrator was supporting or promoting it, must be proven in the proceedings by submitting evidence attesting to the existence or specific activities of the movement. Apart from testimonies of witnesses, such evidence may include, for example, leaflets or other documents and web pages of the movement, video- or audio-recordings of events organized by or speeches of representatives of the movement, but also reports of bodies monitoring its activities, expert opinions etc.”*** Here the court clearly aims to guide the criminal investigation in a way which would help the police (and also forensic experts and forensic institutions) produce outputs capable of proving the crime according to the legislation in effect.

When referring to the matter of “defamation” (Section 198 of the Criminal Code then in effect) and “incitement” (Section 198a of the Criminal Code then in effect), the same ruling stipulates that: ***“A criminal act according to Section 198a, Paragraph 3 b), of the Criminal Code provides for three forms of the association of perpetrators, with an ascending level of organization – a group, an organization, and an association. The term “group” shall be deemed to denote at least three people joined by a common objective of proclaiming and promoting the ideas stipulated in Section 198a, Paragraph 3 b) of the Criminal Code. The group need not have any organizational structure or a longer duration, which is why it shall not be regarded as a movement, as defined in Section 260, Paragraph 1, of the Criminal Code.”***

A ruling of the Supreme Court dating back to 2008, which deals with ways of proving anti-Semitic intentions of the perpetrator, is also very inspiring and important for the work of forensic experts and the Service of Criminal Police and Investigation of the Czech Police. It stipulates that: ***„A manifestation of an anti-Semitic attitude in itself does not meet the definition of a criminal act according to Section 260, Paragraph 1, of the Criminal Code, unless the perpetrator’s act is not related or linked to a group of people proclaiming or practicing anti-Semitism and representing a movement. Insofar as defamatory statements or behaviour lacking such a relation or link are concerned, it is possible to consider whether they meet the specifications of a criminal act defined in Section 198 of the Criminal Code, i.e. defamation of a nation, ethnic group, race or belief, or depending on the facts of the case at hand, specifications of another crime according to Chapter V of the Special Part of the Criminal Code.”***[27] The court thus clearly expressed that an attitude *per se* is not punishable under the Criminal Code; the attitude has to be linked or related to a specific and current group of people proclaiming or practicing anti-Semitism. This is again a distinct appeal to bodies collecting and subsequently processing supporting information and evidence to choose an appropriate criminal investigation method in order to achieve the desired purpose – i.e. to confirm or disprove whether a criminal act has occurred or not.

Similarly, the Constitutional Court issued a ruling in the matter of proving the perpetration of the crime of “defamation of a nation, ethnic group, race or belief and incitement to national, ethnic or racial hatred”, which reads as follows: ***“The District Court of Prague 7 found the Complainant guilty of a criminal act of defamation of a nation, ethnic group, race or belief and incitement to national, ethnic or racial hatred, for which he was sentenced to twelve months of imprisonment suspended for a period of 2 years. At the same time, the Complainant was prohibited to be involved in activities of a publisher and editor-in-chief of nationwide, regional and district coverage dailies for a period of 5 years. The Complainant committed the criminal act referred to above by having decided, in his capacity of the publisher and editor-in-chief of the “Š.” daily, to include and publish an article written by P.S., an independent journalist, and named “The Murderous Alliance” in the daily’s issue of May 15th, 1999, in which the author accused Jews, Albanian Kosovars, immigrants, aliens and ethnic minorities in the territory of the Czech Republic of causing negative effects in the political and economic sphere, thus creating antipathies, intolerance, hostility and hatred aimed at the subjects listed above; the Complainant agreed with the contents of the article. In this respect, the Constitutional Court agreed with the legal conclusions drawn by the European Court of Human Rights; the latter authority emphasizes the irreplaceable “watchdog” role of media in the democratic society, but also reminds of the journalist’s responsibility for maintaining and upholding ethical and moral standards of his or her profession and for any transgressions in this respect. In cases like this, there has to be a legal sanction reflecting the urgent social need to protect fundamental interests and commensurate to the legal objective being sought. The definitions of criminal acts stipulated in Sections 198 and 198a of the Criminal Code are in full compliance with international standards and international obligations of the Czech Republic in the field of protection of fundamental rights and freedoms. By way of conclusion, the Constitutional Court feels it is necessary to emphasize once again that both Article 10, Paragraph 2, of the Covenant and Article 17, Paragraph 4, of the Charter stipulate that legal limitations imposed upon such rights and freedoms are needed to protect interests of the democratic society.”***[28]

Another aspect which is not irrelevant with respect to the choice and application of a suitable or specific criminal inves-

[25] Ibid.
[26] Ibid.
[27] Supreme Court 7 Tdo 1472/2008.
[28] Constitutional Court of the Czech Republic. 435/01.

tigation method to be employed to prove an extremist motive of a criminal act stems from the fact that definitions of "hate crimes" contained and still contain a large number of specific terms which, however, cover specific activities requiring specific investigation methods. From the viewpoint of a forensic expert's practice, the terms "support", "sponsoring", "promotion" and "manifestation of sympathies" seem to be particularly risky. As the "manifestation of sympathies" has been a part of crime definitions only since the new Criminal Code took effect, it is not found, contrary to the "support", and "promotion", in any judicature, although these terms are often crucial and constitute a cornerstone of evidence use to prove or disprove a potential criminal act with an extremist undertone. ***"The support of a movement aiming at suppressing the rights and freedoms of citizens may be material (e.g. financial donations, donations of technical equipment etc.) or moral (e.g. recruitment of sympathizers, arrangement of an opportunity to publish the movement's intentions or ideology etc.), and consists in acts the purpose of which is to strengthen and/or recruit additional sympathizers for the movement".***[29] ***"The term "promotion" refers to making the movement or its ideology and intentions public or recommending the ideas and opinions the movement is promoting or advocating. The promotion may be overt or covert, the former consisting in publication of opinions, books, paintings or other works of art."***

Although the "manifestation of sympathies" has been a part of crime definitions only since the new Criminal Code took effect, i.e. since January 1st, 2010, earlier judicature is indicative of the opinion of courts regarding manifestations of sympathies to movements (both existing and extinct) based on ideas of racism, anti-Semitism, xenophobia etc. This is, for example, obvious from the text of a ruling of the Supreme Court in the matter of a criminal act falling under Section 261a)[30] of the Criminal Code then in effect, which stipulates that: ***"…The object of the crime in question is the protection of fundamental and civil rights and freedoms, equality of all people regardless of their race, nationality, religion, social appurtenance or origin, in particular the rights and freedoms stipulated in the Charter of Fundamental Rights and Basic Freedoms. Subjectively, the crime in question requires an intention…" "If the accused is to be regarded as criminally responsible according to the definition of the criminal act in question, his or her manifestations of sympathies must be toward an extinct, non-existent movement; in this respect, only the most serious infringements of human rights (genocide, crimes against humanity) are taken into account. It is true the court did not come to a conclusion that the accused juvenile expressly supported existing right-wing extremist organizations; however, through his use of historical symbols of Nazi Germany, repetition and reproduction of ideas of racial exclusivity, intolerance and hatred, the accused had unequivocally expressed his sympathies to extinct movements and their most serious manifestations of violence. The Court of Appeal did not err in qualifying the juvenile's acts as constituting a crime of supporting and promoting a movement aiming at suppressing the rights and freedoms of people, as defined in Section 261a of the Criminal Code."***[31]. Thus, the above ruling even admits that, under certain circumstances, even the promotion of and manifestations of sympathies to an extinct movement or organization may constitute a criminal act of supporting and promoting a movement aiming at suppressing the rights and freedoms of people, providing that the accused promotes (violent) acts of such historical and no longer existing movements a significant feature of which was a strong denial of natural rights of people acknowledged and shared by our civilization. In the case outlined above, the accused was an activist of today's Neo-Nazi scene, who promoted and publicly sympathized with historical organizations and movements of Nazi Germany, which had actively participated in the holocaust of Jews, Romas, Slavs and political or ideological opponents.

It needs to be mentioned that all civilizations and ideological streams, including Nazi and Communist ideologies, contain some positive elements. However, these partial (and often temporary) successes and achievements were outweighed by immense suffering of millions of people. There is even a ruling of the Supreme Court, which presents detailed comments on this phenomenon, often misused especially by today's Neo-Nazi community, namely that partial successes should not be used as a pretext for the glorification of criminal regimes, ideologies or movements. Thus, for example, the Supreme Court stated the following: ***"If some positive features of the movement (e.g. the temporary economic growth) were emphasized and combined with a statement to the effect they had outweighed negative aspects of the movement (e.g. the establishment of concentration camps), such facts would constitute a justification of the movement's crimes, as defined in Section 261a of the Criminal Code. On the other hand, it is obvious that stating some positive characteristics of the movement and placing them objectively in the context of dominant negative aspects (e.g. the economic development and improved standard of living of German citizens before and in the beginning of WW2, but at the expense of property Aryanization and subsequent economic exploitation of occupied countries) will not meet the definition of any criminal act".***[32]

It is unquestionably appropriate to mention another group of terms constituting a part of definitions of almost all "hate crimes" in the Criminal Code presently in effect in this subchapter dealing with criminal aspects of manifestations of right-wing extremism and specific criminological methods used to investigate them, namely the "ethnic group", "movement" and "anti-Semitism". The present judicature only concludes that: ***"An ethnic group … is a historically evolved group of people joined by their common origin, specific cultural features (language), mentality and traditions. Members of an ethnic group feel they belong to the group and, at the same time, are aware of their differences from other communities; they share a common name they have coined themselves or been assigned by others. As***

[29] Supreme Court 5 Tdo 337/2002.

[30] Any person who publicly denies, questions, approves of, or attempts to justify the Nazi or Communist genocide or Nazi and Communist crimes against humanity …

[31] Supreme Court, 8 Tdo 980/2008".

[32] Supreme Court, Tpjn 302/2005.

a rule, an ethnic group forms a minority within another community (e.g. the Roma ethnic group in the Czech Republic). … The fact that the legislator did not have in mind, insofar as the characteristics stipulated in Section 221, Paragraph 2 b), of the Criminal Code[33] are concerned, a case in which another person has suffered bodily harm because he or she stood out in defense of a person belonging to another race, ethnic group, nationality etc. is obvious from a comparison of the definition of the criminal act in question with other provisions of the Criminal Code".[34]

The Supreme Court's ruling also contains an exhaustive and explicit list of movements that can be deemed to belong to today's Neo-Nazi scene, including reasons why these movements have been included. The movements adjudicated by the Supreme Court as movements aiming at suppressing rights and freedoms of citizens according to Section 260 of the Criminal Code[35] thus include ***"Bohemia Hammer Skins", "Blood & Honour", "Národní odpor (National Resistance)", and "Národní alliance (National Alliance)".[36]*** On the other hand, the Supreme Court has not included ***"Fascism, Nazism[37], historical, "dead movements", which, however, may be related to today's Neo-Nazism or Neo-Fascism",*** or ***"Skinheads"[38]***, as ***"…. the Skinheads as a whole cannot be deemed to constitute a movement …. meeting the definition stipulated in Section 260, Paragraph 1, of the Criminal Code, because only some factions and groups existing within the Skinhead community can be viewed as movements,"*** or anti-Semitism. In the opinion of the Supreme Court, anti-Semitism is an attitude rather than a movement.[39]

Other pieces of judicature that may be of interest include the Supreme Court's rulings No. **5 Tdo 337/2002** ("Mein Kampf I") and No. **3 Tdo 1174/2004** ("Mein Kampf II"), as well as the Supreme Administrative Court's ruling in the matter of the dissolution of the Workers' Party (first motion to dissolve the party – rejected) of March 4th, 2009, No. **Pst 1/2008-66**, and another in the same matter, dated February 17th, 2010 (second motion to dissolve the party – the Workers' Party has been dissolved, but the ruling has not yet become effective and enforceable), No. **Pst 1/2009-348**; both of them offer ample information for bodies involved in criminal proceedings and can be used as guidelines for the selection of appropriate specific methods of criminal investigation and documentation of criminal acts.

Conclusions

It is possible to conclude that criminal sanctions imposed upon perpetrators of hate crimes in the Czech Republic are consistent with the opinion of that part of the Czech democratic society which rejects manifestations of extremism, such as racism, xenophobia and anti-Semitism, i.e. of right-wing political extremism, generally known as the Neo-Nazi concept. The criminal sanctions have their support in the Constitution and are in line with international principles and rules applying to criminal sanctions.

It must also be concluded that the Czech Republic's legal framework allowing manifestations of right-wing political extremism to be prosecuted and punished is at a high level and reflects experience of bodies involved in criminal proceedings and courts; its efficiency seems to be adequate for the purpose of dealing with growing manifestations of extremism. The same applies to the quality and nature of definitions of "hate crimes", as well as to the quantity and character of available rulings and other sources, including published ones, the subject of which are criminal sanctions aimed at manifestations of right-wing political extremism.

As mentioned in the above comparison, the situation in Slovakia is considerably less clear, both in legislation and in judicature. The Czech Republic has clearer and more comprehensible legislation, rich publication and scientific activities, adequate judicature and top-quality forensic experts; on the contrary, forensic experts in the field are absent, judicature is practically non-existent and publication and scientific activities are sporadic in Slovakia. The logical consequence is that Slovakia is experiencing a massive increase of crimes with extremist, xenophobic and racial motives, while the Czech Republic is witnessing a decline of activities of right-wing extremist groups (concerts, rallies, marches etc.).

Tools for a correct selection of criminological methods used to prove criminal acts with an extremist undertone, i.e. "hate crimes", include the knowledge of standard criminal investigation methods (documentation and records of crimes) and their optimized combinations, choice of specific criminological methods allowing an analysis or examination of submitted evidence by a forensic expert or forensic institution, as well as regular updates of and new additions to these methods on the basis of judicature representing a feedback from effective and enforceable court verdicts and rulings, in particular of the Constitutional Court, Supreme Court and Supreme Administrative Court. Also interesting are some rulings of lower-level courts, which are not a part of judicature, but have become effective and enforceable; they represent court opinions which are valuable for law enforcement officers investigating less serious extremism-related or -motivated crimes. An example of the rulings referred to above is the verdict of the Municipal Court in Brno, File No. 3T 179/2008, dated November 5th, 2008, in the matter of a demonstration/rally organized by the Neo-Nazi organization "National Resistance" in Brno on May 1st, 2007.

[33] Act No. 140/1961 Coll., the Criminal Code, in the amended version in effect at that time.
[34] Supreme Court, 6 Tdo 1252/2007.
[35] Act No. 140/1961 Coll., the Criminal Code, in the amended version in effect at that time.
[36] Supreme Court Tpjn 302/2005, NS 5 Tdo 79/2006.
[37] Supreme Court Tpjn 302/2005.
[38] Supreme Court 5 Tdo 563/2004.
[39] Supreme Court 5 Tdo 337/2002.

The Completion of the Modern Organization of Public Prosecution in Territory of the Czech Republic

Karel Schelle [1]

1. The Changes of Organization of the Public Prosecution Office during years 1852–1855

On the last day of the year 1851, there were issued the New Year's patents which evoked an open transfer to absolutism. The March Constitution was abrogated and the only guaranteed civil right, from those which had been proclaimed by this constitution, remained the equality of citizens before the Law. The cabinet list that was addressed to Schwarzenberg contained as an attachment the Rules of the organic law (Pravidla v příčině organického zákonodárství), later called the Principles of organic mechanism (Zásady pro organická zařízení).These principles had contained everything that was necessary to establish a new state apparatus.

It was understandable that the organization of judiciary had to be adapted to new conditions. In that time, the judicial system had been grounded in three basic degrees, namely Supreme Land Courts, Land Courts and District Court.[2] The top of this system consisted of the Supreme Court and the Court of Cassation in Vienna[3] which in its last instance tried only civil issues, because this is the only branch of judicial proceedings being countenanced to three-instances procedure, while in criminal issues it functioned as Court of Cassation. Among others, there was a considerable difference among particular district courts in that period of time. At most of them a sole judge tried criminality of the lowest danger to society – minor offences. In minor number of cases the jurisdiction of this instance (meant the district judiciary courts) was extended also up to more serious offences, namely delicts and crimes. The courts called Land Courts were in fact the district ones ("krajské soudy"), that is the reason of their appellation "krajinské". In Bohemia, there were 13 of them and they exercised jurisdiction in the first and also second instance. The Supreme land courts were primarily the courts of appeal and also dealing with criminal agenda (because there was respected the leading rule of two-instance decision-making) as an auditing instance.[4]

In that time, significant changes naturally influenced the position and organization of the public prosecution. The fundamental rules restored inquisition proceedings in the first instance, thus the principle of oral accusation and defence remained respected in procedure only before judiciary courts. The prosecution at judiciary courts was entrusted to the public prosecution office.

According to Emperor´s decree as of January 11, 1852, no. 5 Imperial Code, the jury was abolished, and according to the decree as of January 20, 1852, no.27 Imperial Code, activities of the Public Prosecution were directed nearly exclusively to criminal procedure. Thereby the statutes providing their extended competencies ceased to be valid (especially chapter VI and section 68 of the organic law as of July 10, 1850). According to the ordinance of the Ministry of Justice as of January 21, 1852, no. 24 Imperial Code, the Attorney General at the Highest Court in Vienna was abolished, because the nullity complaints should have been heard in chambers without presence of prosecution and defence.

At the same time, the previous criminal procedure passed through many changes. According to Emperor´s patent as of May 27, 1852, no. 117 Imperial Code, the statute that had been in force since 1803, on prosecution for a criminal offence and felony, in force from September 1, 1852 and the previous act on criminal offences committed by the public press, were abolished. After 1st September 1852, the press affairs should have been considered as any other criminal offence and concurrently the act as of March 13, 1849, no.161 Imperial Code, on abuse of the press, was abolished in all Austrian lands (if the statute was still in force within their legal regulation). According to the aforementioned, the provisions regulating competence of jury and special public prosecution in press issues were definitely abolished. Incoming press patent as of May 27, 1852, no.122 Imperial Code, in force from 1st September 1852, constituted certain number of obligatory periodical printouts for the public prosecution, political offices and also scientific institutes. The legal regulation of public prosecution in issues of journalistic

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[2] See the Act No. 237/1850 Imperial Code – jurisdictional norm, the Act No. 278/1849 Imperial Code, the Act No. 25/1850 Imperial Code, Interim Criminal Procedure Code, the Act No. 258/1850 Imperial Code, internal organization of the courts, the Act No. 290/1849 Imperial Code, on territorial organization for the Bohemia and Act No. 291/1849 Imperial Code, on territorial organization for Moravia and Silesia.

[3] The Act no. 325/1850 Imperial Code.

[4] See the Act No. 10/1853 Imperial Code, the Act No. 251/1852 Imperial Code – jurisdictional norm, the Act No. 81/1853 Imperial Code – internal organization and rules of procedure, the Act No. 165/1854 Imperial Code, – so called criminal instruction. Further see the Act No. 255/1851 Imperial Code – the military courts and statutes No. 57 and 63/1855 Imperial Code.

guarantees remained unchanged, similarly to supervision over promulgation of official reports, judgments in press issues and press corrections, under the pecuniary penalty to publishers. Basically, the press actions should have been directed to the Land Court, or rather to district judiciary court. According to the ordinance of the Minister of Justice as of November 16, 1853, no.14191, the public prosecutor did not have a duty to gather and examine non periodic printed material, because the Governor's Office had to receive it within 3 days after their publication. The public prosecution kept them (similarly to magazines and confiscated printed materials), as long as they were needed, otherwise they were referred to some cultural institutes according to a decision of competent land president.[5]

The fundamental rules of a new organization and competence of the public prosecution were constituted by the Rules of Criminal Procedure as of July 29, 1853, no.151 Imperial Code, which stated again the principle that no one may be punished without a judicial trial. In criminal issues, the action was brought ex officio, if there was not any other possibility provided by a statute. Tasks and position of the public prosecutors in the criminal procedure remained in substance the same from year 1850, but with a difference that there was no hearing before district judiciary courts, thus the proceedings of any torts and crimes came before judiciary courts of the first instance, where the public prosecution was present. Some of these courts, which had their seats in capital cities of lands (Prague, Brno and Opava) retained the name of the district court with criminal jurisdiction rather wider than other judiciary courts of the first instance. The public prosecutors continued to remain independent on the courts and they subjected to supreme prosecutors, those then to the Supreme Court, where the office of public prosecution was not established in this period. Any of the prosecutors could be represented by his substitute. In the event that for some reason there was no public prosecution representative available before the judiciary court, the head of the regional court could give him a temporary substitute from any of its officials. Nevertheless, he had to report it immediately to the supreme prosecutor. Competent public prosecutor was accountable for a service that had been done by the substitutes.[6]

However, competence of the public prosecutors was after all, compared to year 1850, changed. They could help in investigating of offences before municipal delegated courts and before mixed district offices and courts that were otherwise carried out by the authorities of these institutions without an intervention of public prosecution office, because public prosecutorial officials ceased to work in 1855. Public prosecutors could propose a custodial arrest, seizure of post, challenge pleas to expert opinions, suggest the arrest of a falsely testifying expert or witness. They participated also in supervision over the local prisons, filed statistical statements and reports to the supreme prosecutors and held an oversight over employees in disciplinary issues. They could demand for help other offices according to their needs. In event of differing opinions between the public prosecutor and investigating judge, the regional court should have made the decision. When the litigants complained about investigating judge, the public prosecutor should have been heard as well. Exclusion of the public prosecutor in criminal proceedings became more precise so far that he could not operate in cases where he served as a witness, judge, expert or advocate, and may not have been even relative to other employees of the public prosecution and court in the place where he worked.

The supreme prosecutor kept the right of supervision and administration of the public prosecution within his district in professional and disciplinary issues remained, the right to inspect all criminal files and submit in certain cases his own proposals, to be present at all hearings of the Supreme Land Court (with the exception of deliberations and voting on the confirmation of the judgment), to interfere with the trial before the regional courts, to order any case to another public prosecutor and to suggest to the Supreme Land Court to deprive the regional court of a specific issue and to assign it to another. He had to be heard on the issues of an extradition. In disputes concerning the jurisdiction of regional courts, the Supreme Land Court decided after hearing the supreme public prosecutor (regional courts decided the disputes concerning jurisdiction of the district courts after hearing the public prosecutor). Furthermore, the supreme public prosecutor had to be factored into deliberations on the death sentence, into issues of clemency and since 1858 also into a retrial, if the crime had been erroneously treated as a misdemeanor.[7] He continued to collect and translate statistical data on the public prosecution offices in his district, and processed them for the Ministry of Justice that should has been immediately notified with the reports about certain serious crimes.[8]

The supreme public prosecutors were being appointed by the Emperor and other conceptual officials by the Minister of Justice. The office affairs were being at the office of public prosecution performed by judicial employees of competent judiciary court of the first and second instance, however they were fully available to these authorities. Financial affairs of the public prosecution were arranged by the head of court.[9] According to Emperor´s patent as of January 19, 1853, no.10 Imperial Code, the status and also salary of the conceptual prosecutorial officials were decreased. According to the ordinance of the Minister of Justice as of January 13, 1854, no. 709, there were compared levels of positions of the public prosecutorial conceptual officials to other office levels. The supreme public prosecutors had characters of supreme advisors of land courts with salary of 2000 to 3000 Kronen, their deputies and public prosecutors at land courts obtained degree and allocation with salary of 1200 to 1800 Kronen, and substitutes obtained degrees of assessors with salary of 800 to 1200 Kronen.[10] This patent was related to employees has

[5] Turek, A.: Turek, A.: Státní zastupitelství v českých zemích v letech 1850–1959, Sborník archivních prací, IX, 1959, p. 113.
[6] **Turek, A.**: cit. work, p. 114.
[7] Section no. 21, the Emperor's decree as of May 3, 1858, No. 68, Imperial Code.
[8] **Turek, A.**: cit. work, p. 114.
[9] The ministerial decree as of November 23, 1854, No. 22633.
[10] Turek, A.: cit. work, p. 115.

been appointed in the years 1849 to 1850, and who commenced after 1st July 1850, those were eligible for modification and embodiment for inclusion of services only from the day of onset. According to the highest decision as of January 25, 1854, and to the decree of the Minister of Justice as of October 9, 1854, no.274 Imperial Code, there were systemized in Bohemia only one position of supreme public prosecutor with two deputies, 15 positions of public prosecutors, 28 substitutes (none within the Public Prosecution office of Prague 6, Liberec), 7 accesists, 19 officials and 16 servants. The salaries remained the same as before. Moravia and Silesia had at each public prosecution office only one public prosecutor and one substitute, except of Brno, there were four substitutes and in Olomouc there were two of them. The support staff consisted of one servant, accesor and official (there were two of them in Brno).[11]

Thus, the aforementioned organizational changes meant reducing of the powers of public prosecution offices and reducing of employees, which also coincided with the abolition of the public prosecution at district judiciary courts. In 1850, in the sphere of supreme public prosecution in Bohemia, there were 13 public prosecutions at land courts in České Budějovice, Kutná Hora, Hradec Králové, Cheb, Jičín, Liberec, Česká Lípa, Most, Vysoké Mýto, Písek, Plzeň, Praha and Tábor, then at 30 district judiciary court, namely in Benešov u Prahy, Mladá Boleslav, Německý Brod, Březnice, Nový Bydžov, Děčín, Domažlice, Jindřichův Hradec, Chrudim, Kadaň, Klatovy, Kolín, Český Krumlov, Litoměřice, Litomyšl, Loket, Mělník, N. Město nad Metují, Pelhřimov, Prachatice, Příbram, Rakovník, Rychnov n. Kněžnou, Rumburk, Sušice, Tachov, Trutnov, Turnov, Vrchlabí and Žatec. Area of competence of the Attorney General Office in Brno related to 8 land public prosecutions and to 22 at the district judiciary courts (established by an imperial statute as of June 26, 1849, no. 291 Imperial Code) in Moravia and Silesia. There were the public prosecutions at land court in Brno, Uherské Hradiště, Nový Jičín, Jihlava, Olomouc, Znojmo, Opava a Těšín, and at the district judiciary court in Boskovice, Uherský Brod, Dačice, Holešov, Hranice, Hustopeče u Brna, Moravský Krumlov, Kroměříž, Kyjov, Litovel, Nové Město na Moravě, Valašské Meziříčí, Mikulov, Místek, Šternberk, Šumperk, Moravská Třebová, Vyškov and Zábřeh, in Silesia in Bílsk, Frývaldov (Jeseník) and Krnov.[12]

According to the ordinance of the Minister of Justice as of March 26, 1855, no. 2532 and no. 54 Imperial Code, the seat of the public prosecution should has been henceforth just at the first instance courts and, therefore, the public prosecution in the seats of the district judiciary courts were abolished along with them. Special instructions should have been issued regarding the submission of documents and inventory of public prosecution offices at judicial courts of the first instance. The date of transfer was due to end of their activities. According to the Emperor's decision as of April 6, 1855, No. 63 Imperial Code, the new organization of courts and public prosecution offices in the Czech Republic came into force on 26 May 1855, and in Moravia and Silesia on 28 April 1855.[13] At the same time, the new Rules of Criminal Procedure came into force according to the Emperor's patent as of July 29,1853,[14] to the decree of the Ministry of Justice as of August 3, 1854 on the internal rules of organization and rules of procedure of the public prosecutions[15], the Regulation on Criminal Justice as of June 16, 1854, No. 165 Imperial Code, and finally the decree of the Ministry of Justice as of June 6, 1855, No. 7192 Imperial Code, which stated that each employee of the judiciary and public prosecution offices had to be on 1st June 1855 on the new position. In that meaning, the land organizational committee in Bohemia, composed of representatives of the Governor's Office, the Supreme Land Court and the Supreme Public Prosecutor's Office, decided already on 8 May 1855 that substitutes of public prosecutors in Kolín and Německý Brod should have passed their offices to the public prosecution in Kutná Hora until the 25th May.[16] It was relatively easy to transfer it, because the public prosecution offices of all types were located mostly in buildings of the competent courts. On 15th May, the aforesaid committee ordered that if the public prosecution was abolished or defunct, it should have surrendered its device to competent court or to mixed district court. There was a similar advance in Moravia, where the Attorney General should has passed formally his office to a new Supreme Prosecutor's Office. Public prosecutors should have taken an oath to him, then the substitutes to them (the prosecutors), but many of them left and became heads of the new mixed district offices and courts, or they left to Hungary.[17]

The territorial scopes of competence of the "new" public prosecutions remained, compared to 1850, mostly unchanged. Only in Bohemia, there were created two new regional courts also with public prosecutors, namely in Mlada Boleslav and Litoměřice, so their numbers in the Czech Republic increased to 15. Vysoké Mýto lost these institutions for the benefit of Chrudim, where the public prosecution office remained until the year 1949. In the area of each regional court and the public prosecution (with the exception of Liberec), there were established from two to four district courts for wider territorial range, called the criminal investigative courts, mostly in places where the district judiciary courts had previously their seats, so there were 43 of them in Bohemia.[18] In Moravia, the territorial areas of new regional courts and public prosecutions changed by them only slightly because of shifting several district courts under the other regional courts, so the territorial scope of competence of the regional courts and public prosecutions in Znojmo and Olomouc reduced opposite to the background during 1850–1855, and it increased in Nový Jičín, Jihlava and Uherské Hradiště. In Moravia and Silesia, mostly former district judiciary courts

[11] Turek, A.: cit. work, p. 115.
[12] **Turek, A.**: cit. work, p. 115.
[13] The Act no. 54/1855 Imperial Code.
[14] The Act no. 151/1853 Imperial Code.
[15] The Act no. 201/1854 Imperial Code.
[16] **Turek, A.**: cit. work, p. 115.
[17] **Turek, A.**: cit. work, p. 116.
[18] The decree of Minister of Interior, Justice and Finance as of October 9, 1854, No. 274 Imperial Code.

became the criminal investigative courts, but according to the act as of April 21, 1854, No. 103 Imperial Code, there was added the former district investigative court in Mohelnice, one was abolished in Zábřeh and Holešov, and there was later added one also in Prostějov.[19]

2. The Completion of Organization of the Public Prosecution in the Habsburg Monarchy

According to the ordinance of the Ministry of Justice as of November 13, 1865, No. 8037, the public prosecutors and also the supreme public prosecutors should have voluntarily cooperated in all requests for clemency. The public prosecutor was also a permanent member of the committee supervising over the completion of the service of sentences. According to the decree of the Ministry of Justice as of October 28, 1865, with effect from mid-November in 1865, the supreme public prosecutors supervised over the prisons, which were previously excluded from the jurisdiction of the Ministry of the Interior, and they were assigned to the Ministry of Justice. Public prosecutors still exercised functions of local commissioners in local prisons.

Issuance of the new press act and the act on proceedings of the press issues as of December 17, 1862, No. 6–7 Imperial Code, was for the activities of offices public prosecution more important. This Act regulated responsibilities of publishers and printers on the label, also publishing and reporting of periodicals, placing security deposits, compulsory prints, which had to be given under penalty to public prosecutor if he resided in that district. He also continued to supervise over publication of judgments in press issues, of official reports and corrections. The method of criminal prosecution and suggestions to seizure or cessation of the magazine was specified. The prosecutor had to gain an approval of the court to seize in three days. The state was liable for damages in case of improper seizure or waiving indictment by the prosecutor. Section 14 of the criminal proceedings in press issues stated that the prosecutor conducted the indictment in press offenses, which were being tried by district courts (municipal delegated courts) in the seats of regional courts, and also in other criminal offenses contrary to the press act before the regional courts. Right of private action in press issues remained intact.

The year 1867 became a crucial milestone in the development of the monarchy. Austro-Hungarian settlement transformed the monarchy to union composed of Předlitavsko and Zalitavsko which began to develop from this moment relatively independently. In December 1867, the last Austrian Constitution was adopted for Předlitavsko and it definitely stabilized the constitutional system of the monarchy. In connection with the aforementioned, a stable system of public administration and judiciary was created.

Since 31st August 1868, there was a definite separation of judiciary from state administration. Constitutional amendments relating to the judiciary were included in the State Basic Act concerning judicial power from 1867, which separated the judiciary from the administration in all instances on the basis of separation of powers. The final regulation of organization of justice took place in 1896.

The organization of public prosecution authorities did not pass through any fundamental changes. There were published only additional regulations that affected only particular problems.

There were issued particularly new regulations on disciplinary proceedings against judicial officials, namely through special Boards at the Supreme Land Court and the Highest Court. Although, public prosecutors did not belong to judicial officials, they had to be heard before a decision on an early retirement of judge, his involuntary reassignment, dismissal, etc.

The new notary order as of July 25, 1871, No. 75 Imperial Code, extended again the interaction of the supreme public prosecutor in reassigning and renouncing positions of notaries and notary abolition. Public prosecutors were present by reviewing of bails, by negotiating about the losses of notary stamps, they kept an evidence concerning notaries holidays and disciplinary punishments being imposed by the Chamber of Notaries. In disputes between the public prosecution office and the Chamber of Notaries, the Supreme Land Court should has decided, the Disciplinary Committee should also has imposed the sanctions on notaries after hearing the Supreme prosecutor, who could appeal to the Highest Court. The supreme prosecutor also participated in the disciplinary proceedings against advocates.

According to the new Criminal Code as of May 23, 1873, No. 119 Imperial Code, in force from January 1, 1874, the competence of juries in press issues and crimes, where the punishment was more than 5 years of imprisonment, was extended. Chapter III referred to the public prosecution offices. According to that provision, one prosecutor should have been appointed at each judiciary court of the first instance, the supreme public prosecutor in the second instance and the Attorney General at the Highest Court, all with a certain number of representatives. Their task was to defend primarily the interest of the state, they were independent on court and could represent each other by proxy. Public prosecutors were subjected to supreme public prosecutors, these were along with the Attorney General subjected to the Minister of Justice.

Public prosecutors continued to participate in the preliminary searching and investigating of criminal offenses, in the main trials of offenses and crimes before the judicial panel and juries, and in all appellate proceedings of criminal issues. They could attend the trial before the district courts for offenses by themselves or through their authorities which were appointed, as in the years 1850–1855, from the police and political officials, or from the citizens for a reward. That had to be reliable citizens (considering the conditions of the then state), living if possible in the seat of the district court, knowing the local language. The supreme public prosecutor appointed them pursuant to an agreement with the head of the land political administration.[20]

Legislation of 1873 was in the foundations completed by the public prosecution office during the era of the Austro-Hungarian Empire. Until the end of monarchy, nothing substantive in their organization changed. Nevertheless, some minor changes occurred.

[19] Turek, A.: cit. work, p. 116.
[20] Turek, A.: cit. work, p. 119.

Thus according to the Act as of July 9, 1894 No. 161 Imperial Code, some amendments of press criminal law (1863, no. 6 Imperial Code) were made. The journalist guarantee was abolished, but the fines had to be reported (as paid) to the public prosecution in 8 days. The injured party in press criminal proceedings was entitled to compensation. Public Prosecution along with the police had to notify the reason of seizure of all press material or at least part of it, detachable sound parts of the materials did not subject to seizure. The proposal for another change the Criminal Code, whose draft was presented at the 22nd Parliament plenary in Vienna in 1918, was not discussed any more.

The position of public prosecution in civil issues slightly strengthened. Public prosecutors could be authorized to certain tasks as representatives of the poor parties according to section 90 of Act No. 217/1896 Imperial Code. Furthermore, pursuant to section 26 of Act No. 207/1916 Imperial Code, they were authorized to submit a proposal for incapacitation for reasons of public interest.

According to the Act on judicial organization as of November 27, 1896, No. 17 Imperial Code, there was restored a three-year preparatory period of the judges, who could spend in the service of public prosecution office up to half a year. At that time, they subjected as auscultants to the competent professional prosecutors. A member of the committee from officials of the public prosecution remained at judicial exams. Mutual instance monitoring of public prosecution offices and duty of regular periodical reports remained unchanged. The Ministry could review their activities at any time. However, according to the decree of the Ministry of Justice as of March 4, 1902, No. 51 Imperial Code, the service of judicial trainees at public prosecutions was shortened to 3–5 months, and even for use in their internal service. They were allowed as agents of prosecution at district courts to serve only part of this time.[21]

Regulations for the prosecutorial office work[22] provided supporting validity of certain provisions of the Rules of Procedure. At the public prosecution offices, there were established their own registry and submission protocol. The office work should have been brevity, of rapid processing, of removing unnecessary "paperwork", titulatur and accuracy.

Some other changes occurred in this period in the use of an official language. From the origin of the public prosecution offices, their internal language was German, although in 1850, some comments concerning salaries at the Supreme Prosecution office in Prague were written in Czech. Already according to the Act from 1803, the Czech was allowed to use in the official external relations of judicial authorities, if "the German party was ignorant of that language", even in the German language area. However, there were only few of those cases.

The Emperor's Patent as of May 3, 1853, No. 81 Imperial Code, then patent as of August 9, 1854 No. 208 Imperial Code and decree as of October 10, 1854 No. 262 Imperial Code basically confirmed "equal right of all languages in particular lands that are commonly used in negotiations at all judicial offices", also at the public prosecution offices (in the internal office work indeed), but the aforementioned did not apply because, in pursuant to secret decree of the Ministry of Justice on 23rd May and on 30 June 1852, there was allowed exclusively German in an internal office work. This status was being continued. However, language skills of employees were welcomed.

According to the Stremayer's regulations as of April 19, 1880, which affected Bohemia and Moravia regarding the use of languages before the courts and the public prosecution offices with the parties and autonomous authorities, there was regulated only the previous practice. There were the authorities required to maintain linguistic equality according to section 19 of the December Constitution from 1867. The government did not intend to deviate from previously valid regulations at judicial offices in both lands. The right of Czech language became equal with the right of German when bringing actions, receiving applications, writing reports, issuing decisions and judgments and in the conduct of criminal proceedings: concerning Bohemia, the Ministry invoked earlier legislation and regulations from the years 1803, 1848, 1852, 1861 and 1864. The aforesaid meant for the public prosecution that the proposals during the main trial had to be held in that speech, in which the criminal proceedings (or rather recording in protocol) had started. Communication of the parties and autonomous authorities was going in both languages as needed, German language remained as the internal official languages for the public prosecution offices. That even pointed out the impaired language resolution of Supreme Land Court in Moravia as of the 19th December 1882, which defined that authority ("navládnictvo") did not state as any of the parties, therefore they had to use German in contact with authorities and courts.[23]

However, the German population was outraged and German deputies demanded to carry out linguistic adjustments by law, not by ministerial decree, and they pointed out certain ambiguities in the styles. The Czechs were not satisfied again, because their rights were not extended in fact.[24]

The breakthrough was brought into that status just by the Baden Regulation as of 22 April in 1897. Czech language was introduced as an internal official language also before courts and prosecution offices in negotiations on issues of parties, and even in contact with authorities except for military offices, for notes pro domo and for questions in these issues at the supreme public prosecution. Both of the languages had to be used in trials with more defendants of both nationalities. If perpetrator was unknown, the proceedings should have been started in language of the probable culprit. However, the German should have been used exclusively in the service, disciplinary, presidium affairs, during applying of statistical reports, register searching for material for offices and in accounting service, as in press issues when they reported for the prosecutors at all levels and the Ministry. Both languages should have been used in contact with the courts and parties in press issues, as in all registers and aids, especially when filing protocol, which the parties could look at,

[21] Turek, A.: cit. work, p. 122.
[22] The decree of the Ministry of Justice No. 114/1897 Imperial Code.
[23] **Turek, A.**: cit. work, p. 123.
[24] **Srb, A.**: *Politické dějiny národa českého, díl 1,* Praha 1899, p. 571 and following.

or could be copied and excerpted. Other devices should have been kept in German, stamps and seals of all public prosecution offices should have been in principle German-Czech. But only that person who handled written and spoken German could become the public prosecutor.[25]

Czech language as an internal official language was used with certain modifications and restrictions until the fall of the Ministry of Thun. According to the Ministerial Decree as of October 14, 1899, the former status from the year 1880 was restored, or rather proportions adjustments from the year 1886 in Moravia, which stated German language as an internal official language and also (with some exceptions and a small extension of Czech) in the external contacts.

Other changes, apart from minor modifications in the territorial scope of competence of some public prosecutions, did not occur till the end of the monarchy.

3. The Public Prosecution in the First Czechoslovak Republic

On 28 October 1918, the presidency of the National Committee declared an independent Czechoslovak state. One of his first tasks was to ensure faultless functioning of the public administration. The solution became as the Reception Act or the act no. 11/1918 Coll. published on the day of declaration of autonomy. According to this Act "*all previous land and imperial laws and regulations remain in force for the time being*", and consequently, there was stated that "*all self-governed, state and municipal offices are subordinated to the National Committee and, for the time being, they perform their offices in accordance with the current applicable laws and decrees*."

Thus, the Reception Act ensured continuity with the Austrian and Hungarian legal order and public administration. In the Czech lands, there were operating the Austrian authorities and significantly paralyzed self-government. At the same time, very different developments in Předlitavsko and Hungary caused in our country a legal dualism, it meant different legal and administrative system in the Czech lands, where the Austrian legal rules were being applied and Austrian administrative offices operated, and in the Slovak Republic – and later in Carpathian Ruthenia, where the Hungarian legal and administrative system has remained. The judicial system along with the public administration authorities was adopted together with the whole administrative system.

Thus the organization of judiciary, as well as the sphere of state administration, continuously followed the Austrian and Hungarian judiciary. No more significant organizational changes occurred, only some new courts were established, as a result of needs of legal practice, titles of some courts were changed. However, the basic organizational structure remained maintained from the monarchy.

The courts, which were operating in the First Republic, can be divided into several groups. At first, it is necessary to mention a group of courts in literature sometimes called as the Public Courts. It is composed primarily of administrative justice, which grounds (as we stated in the previous part) were established already in the Austro-Hungarian monarchy. Only the Highest Administrative Court, created immediately in 1918, remained from the entire expected organization of the administrative justice. However in 1920, the County Act enacted a different system of administrative justice, which should have been decentralized, and where the decision-making bodies should have been judicial panels (consisting of government officials and also representatives of citizens). This project has never been realized. In this context it is necessary to point out that in the First Czechoslovak Republic there was built relatively perfect system of judicial control of the public administration. In addition to the mentioned Highest Administrative Court, also ordinary courts carried out reviews of decisions of administrative authorities. Section no.105 of the Constitution, as a fundamental provision, stated: "*In all issues where the administrative authority decides under the laws for that purpose on the private claims, the party is allowed to claim the remedy by the law after using up all remedial measures*."

We can include among the public courts also electoral court (but not independent, was created as part of the Highest Administrative Court) and the Constitutional Court.

The Constitutional Court was composed of a chairman and two members appointed by the President of the Republic and two members delegated by the Highest Court and the Highest Administrative Court (see Act No. 162/1920 Coll.). However, its real meaning was very controversial, as indicated primarily by the results of its activities, which were nearly zero.

The electoral court was authorized to verification of elections, it was attached to the institution of the Highest Administrative Court, established in accordance with the English pattern. The electoral court did not depend on legislature. The head of electoral court was President of the Highest Administrative Court and its members were 12 assessors (who could not be members of the National Assembly, and/or representatives) and the officers were assigned to the advocates of the Highest Administrative Court (see Act No. 125/1920 Coll.). The electoral court could, besides monitoring the election and incompatibility, remove deputies from their mandates, if they had been expelled from the party "for reasons of low and dishonest." The sanctions were applied this way in case of opposition attitude of deputy towards an order of his own party and nonperformance of obligations contained in the deputy reverse. The electoral court could also remove deputies from their mandates when they were convicted by criminal court.

We can divide the other courts that operated in the First Republic into three basic categories: ordinary criminal and civil courts, extraordinary courts and courts of arbitration. The Czechoslovak Constitution of 1920 became naturally a legal basis, which in its fourth head contained principles typical for a democratic state respecting the rule of law, the independence of judges, legality, public hearing and principle of orality in trial, the principle of prosecution, the principle of liability of the state for damage caused by unlawful decisions, separation of judiciary from the administration, the right of every citizen to be judged by lawful judge, etc. The judiciary could be exercised only by ordinary courts, only extraordinarily, the Constitution permitted the establishment of extraordinary courts in case of the crimi-

[25] Turek, A.: cit. work, p. 124.

nal proceedings, but only in cases stipulated by statute and for a specified period of time. Therefore, the permanent extraordinary courts and also courts established ad-hoc were excluded.

In general, there was applied the principle of three-instance procedure in the whole judicial system of criminal and civil courts. If the first instance was the district court, the regional court held in the second instance. If regional court held as court of the first instance, then the second instance was the Supreme Court. A remedial measure against a decision of the first stool was called an appeal, against a judgment of the second stool it was called an appellate review or an application for revision.

The Czechoslovak judiciary did not pass through many significant reformatory interventions. Only the dualism was partially removed, the response to social needs was succeeded primarily in the branch of labor law. The aforementioned judicial system continued not only during the whole period of the First Republic, but its appearance did not change even in the early post-war years.

In the consequence of realization of the Reception Act, there was adopted also the system of public prosecution offices. Only since the year 1919, the title of the Attorney General and the Supreme Attorney General was being removed, it was officially used for the last time in the registry plan of the Ministry of Justice as of March 24 in 1920.[26]

There was another formal modification, the head of the Supreme Public Prosecution renamed to the Supreme Prosecutor and the heads of state prosecutions renamed to the prosecutors, while other conceptual officials continued to have the titles of the public prosecutors.[27]

A formula of previous oath was modified in pursuant to the decree of the Ministry of Justice as of 2 December 1919, no.13 and no.34 m.d. as of 1920, to a concise oath to the Republic.

As we have already stated, The Highest Court with jurisdiction for the whole territory of Czechoslovakia was established after the coup in accordance with the Act as of November 2, 1918 No. 5 / 1918 Coll., and there was also appointed the Attorney General beside with the necessary number of representatives, at that time called the general advocates, from 1st January in 1929 they had a title of deputies of Attorney General or public prosecutor.[28] According to the act as of April 16, 1919, no. 216/1919 Coll., the Highest Court was along with the Attorney General transferred from Prague to Brno, where both of the institutions remained until 1949. The Attorney General was not directly an authority of the public prosecution and did not belong to the public prosecution system: the public prosecution offices at the judiciary courts of first and second stool were not subjected to him. He could not withdraw a remedial measure of the supreme public prosecutor. He participated in trials before the Highest Court, but did not have a status of a party in the criminal proceedings. He could bring a nullity complaint against provisions of all courts in criminal issues and also even if both parties agreed with the judgment, either on his own initiative or on the initiative of the Ministry of Justice, which he was subject to, and whom he had to hand an annual report.[29] According to the ordinations by Presidiums of the Supreme Public Prosecutions in Prague and Brno of early November 1918, the Czech language was established as an internal official language within all public prosecution authorities. Only if necessary, some documents could be translated into German.

Soon there were also caused territorial changes in the scope of competence of the regional courts and competent public prosecutions. Already in 1918, there was a reflection to divide districts of regional court and public prosecution in Nový Jičín to part of the "Wallachian" with a seat in Nový Jičín and a part of Ostrava. Implementation of this proposal was accelerated by the events of Těšínsko in the first half of year 1919, where a part of the land was occupied by Poles. In the second half of July of year 1920, the regional court was transferred along with the public prosecution from Těšín to Moravská Ostrava. It had a title of "Public Prosecutor of Těšínsko in Moravská Ostrava," in November changed to "Public Prosecutor in Ostrava, Department of Těšínsko". After dividing the country, it was organized individually for the western division of Těšínsko and it also kept individual journals and registers. At the same time, there was also in pursuant to the ordinance of the Ministry of Justice as of April 18, 1920, No. 14215/20, established "Department of the Public Prosecution Office of Nový Jičín in Moravian Ostrava" in force from 1st July 1920. The district of its competence included the judicial district in Moravian Ostrava and in Místek. According to the government decree as of May 21, 1921, No. 194/1921 Coll., there was a new district court in Český Těšín for the western part of former judicial district of Tešín added to the 5 remaining judicial districts in Těšínsko, and on the same day, the establishment of a new regional court and Public Prosecution in Moravian Ostrava for district of the former regional court and the Public Prosecution of Těšín were proclaimed, if it belonged to Czechoslovakia and to the district of the public prosecution branch and the Regional Court of Nový Jičín in Moravian Ostrava.[30] They ceased to operate by the 15th March 1922 when a new public prosecution in Ostrava and also regional court with a division of 8 judicial districts came into life.[31] On 23rd July in 1920, there occurred an incorporation of Valticko and Vitorazsko, which caused an extension of districts of regional courts and public prosecutions in Znojmo and České Budějovice. The area of Hlučínsko, jointed to Czechoslovakia in 1920 and previously subjected to judiciary (regional) court in Ratiboř and the Supreme land court in Vratislav and also to competent prosecutors, was assigned to the Land court and public prosecution in Opava with an effect from the 31st May 1921.[32]

[26] The ordinance of the Ministry of Justice No. 15/1920 m.d. in departments I/5-6 on the filling of posts of the authorities from rank class of no. 5 up to 9.
[27] The Act no. 201/1928 Coll., in force from 1st January 1929.
[28] The Act no. 201/1928 Coll.
[29] Turek, A.: cit. work, p. 120.
[30] The Act no. 195/1921 Coll.
[31] The ordinance of the Ministry of Justice, on the establishment of the Public Prosecution in Ostrava as of April 27, 1922, No. 18617.
[32] The Act as of January 30, 1920, on incorporation of Hlučínsko, government decree as of March 11, 1920 and the Czechoslovakia-German Convention on transfer of the justice to Hlučínsko 152-1920 No. 76 and No. 253/1921 Coll.

According to the government decree as of August 11, 1921, no.277/1921 Coll., a new regional court and public prosecution in Klatovy were established, to which there were assigned four district courts from the Pilsen division and also three from the Písecký part. Both institutions came into life according to the decree of the Ministry of Justice as of March 20 and 29, 1928, in force from 1st April 1928.[33] It is also necessary to point out that the autonomy Land Criminal Court in Prague[34], established in accordance with the government decree no. 513/1919 Coll., issued by an act no. 451/191 Coll., started its activities on 1st August in 1920, thereafter it was established also in Brno, to which the competent public prosecutions were brought.

The internal competence of the public prosecution offices pass through modifications as well. According to the government decree as of November 11, 1919, no. 597/1919 Coll., which implemented the act as of October, 17, 1919, no. 567/1919 Coll., on the people's courts for the punishment of war usury, a cooperation of the public prosecution authorities was defined. For an issuance of the criminal order against usury in administrative and judicial procedures, it was necessary to have an order by official of the public prosecution, who had to decide in the hasty trial whether the evidence that had been taken out was sufficient to a conviction. According to the government decree as of May 20, 1920, No. 365/20 Coll., there was fully restored the jury, whose work had been suspended at the First World War and also immediately after.

According to the Act as of December 18, 1919, No. 1 / 1920 Coll., their influence and the influence of the Prosecutor General were regulated when considering applications for clemency for members of the courts before which they had to be heard.

According to the ordination of the Ministry of Justice as of December 22, no.60 738, all of the administrative and supervisory activities of the supreme public prosecution over the prison (that had been handled by it since 1865) were transferred to the Ministry of Justice. The conceptual officials of the public prosecution continued to remain among domestic commissioners of prisons.

Public prosecutors were not allowed to be members of the state court that had been established in accordance with the Act No. 51/1923 Coll. and with its implementing regulation No. 91/1923 Coll. for prosecution of some crimes against the state under the Act on the Protection of the Republic No. 50/1923 Coll. The plaintiff, however, was the Supreme Prosecutor or his deputy in the seat of the state court that could bring appellate complaint against the defendant's. According to the Act of 4 April 1935, No. 68/1935 Coll. state courts were established in the supreme courts in Prague and Brno, the public plaintiffs along with the public prosecutors stood by them. These held also the position of plaintiff before elder courts ("kmetské soudy") that had been established for the press criminal offences at judiciary courts of the first stool (No. 124/1924 Coll.), whose activity continued intermittently until 1946.

According to the government decree as of July 14, 1922, No. 198/1922 Coll., the public prosecution became an office from 1st January 1923 for the management of criminal records, consisting of three divisions: 1. for criminal lists of unconditional convicts and warrants; 2 of conditional convicts and paroles; 3 of discarded conditional convictions. At the Public Prosecution Office in Brno, there should have been kept registers about persons who were born abroad or persons of unknown birthplace and also about all convicted Gypsies in the whole country. Records of unexecuted punishments within 3 years from the legal power of judgments pronounced by courts of the Czech lands were allowed to be struck from the record only with the consent of public prosecutions (No. 9 / 1937 m.d.). The public prosecutor could also according to the law of 24 June 1928, No. 111/1928 Coll. suggest obliteration of conviction up to 1 year, in certain cases up to 5 years, at the request of the party, but he could also cancel the obliteration if some circumstances that would otherwise thwart the obliteration occurred subsequently.

According to the act as of May 3, 1934, no. 91/1934 Coll., the task of the public prosecution offices and the Attorney General became more precise on issues of death sentences. Pursuant to the act on protection of honor, no. 108/1931 Coll., certain issues could be heard by the public prosecution, but also with a requirement of authorization.

A significant role was assigned to the public prosecution in accordance with the Act as of March 11, 1931, No. 48/1931 Coll., and the government decree as of December 11, 1931, for its implementation, also with the act No. 105/1931 Coll. in the criminal judiciary of juvenile over age 18. For case of juvenile crimes, there were established the three-member "judicial panels of youth " at district courts, while at district courts, there was specifically appointed "judge of youth" for juvenile trials, sometimes with the scope of competence also for several judicial districts in division of the same regional court. The prosecutor, within this function called "prosecutor of youth", was allowed to represent public prosecution at the "courts of youth' that had been shared by the regional court and district court in his seat, and to supervise over the activities of agents of public prosecution in issues of juvenile offenders before district courts within whole division of the competent regional court. The prosecutor of youth who was best suitable for this function owing to his properties, activities and education, and also his deputy were appointed by the supreme public prosecutor. The prosecutor of youth could relinquish from prosecution for inexpediency or pettiness of affair and to file a remedial measure in favor of and against the defendant. The Supervisory Board of the youth custody centre and separate juvenile prisons was always headed by a representative of the public prosecution. The supervisory board could impose also other disciplinary penalties, they decided on conditional parole and protective supervision after release.[35]

[33] The decree of the Ministry of Justice No. 49 and No. 59/1928 Coll.
[34] The government decree no. 399/1920 Coll.
[35] **Turek, A.**: cit. work, p. 126 and following.

Einige Bemerkungen zur deutschen Strafgerichtsbarkeit im Protektorat Böhmen und Mähren

Jaromír Tauchen [1]

1. Einführung

Auf dem Gebiet des Protektorats Böhmen und Mähren (1939–1945)[2] galten zwei Rechtssysteme: das Protektoratsrecht (autonomes Recht) und das deutsche Recht (Reichsrecht). In den meisten Fällen war ihre Anwendung davon abhängig, welche Staatsangehörigkeit die Rechtssubjekte besaßen. Für die Protektoratsangehörigen waren das aus der Ersten und der Zweiten Tschechoslowakischen Republik übernommene Recht und die neuen nach 15. März 1939 erlassenen Rechtsvorschriften (Regierungsverordnungen, Verordnungen und Erlässe des Reichsprotektors, Durchführungsvorschriften der Ministerien) einschlägig. Es gaben jedoch auch Fälle (ein typisches Beispiel bildet gerade das Strafrecht), in denen sich die Staatsangehörigen des Protektorats an das Reichsrecht zu halten hatten. Das System der tschechischen Gerichte blieb zwar formell erhalten, jedoch nebenbei wurde die deutsche Gerichtsbarkeit errichtet, auf welche immer mehr Kompetenzen übertragen wurden. In der Abschreckungspolitik der Nationalsozialisten gegenüber der Protektoratsbevölkerung spielte das Strafrecht eine Hauptrolle, denn bei der Verhandlung von politischen Straftaten wurde die Sache der Protektoratsgerichtsbarkeit entzogen und der deutschen Jurisdiktion unterstellt.[3]

Die Grundlage für die strafrechtliche Regelung im Protektorat Böhmen und Mähren bildeten zwei Verordnungen, in denen geregelt wurde, ob die strafrechtliche Handlung nach dem autonomen Recht oder nach dem Reichsrecht verfolgt werden sollte. Es handelte sich um Verordnung über die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren vom 14. April 1939 (RGBl. I., S. 752) und Verordnung über Ausübung der Strafgerichtsbarkeit im Protektorat Böhmen und Mähren vom 14. April 1939 (RGBl. I. S. 754).[4,5]

2. Organisation der deutschen Strafgerichte

In der Zeitperiode des Protektorats Böhmen und Mähren ist die sog. autonome von der Gerichtsorganisation in der Zwischenkriegszeit übernommene Strafgerichtsbarkeit und die deutsche Strafgerichtsbarkeit zu unterscheiden, die aus dem Großdeutschen Reich übertragen wurde.

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[2] Aus der deutschsprachigen Literatur zur Entstehung des Protektorats und zu seiner Rechts- und Verwaltungsentwicklung vgl. z.B. Schelle, K., Tauchen, J. *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut Verlag, 2009; Schelle, K., Tauchen, J. *Grundriss der Tschechoslowakischen Rechtsgeschichte*. München: Dr. Hut Verlag, 2010, S. 63 ff.; Rill, B. *Böhmen und Mähren. Geschichte im Herzen Mitteleuropas. Band II: Von der Romantik bis zur Gegenwart.* Gernsbach: Kazimir Katz Verlag, 2006, S. 904 ff.; Aus der deutschsprachigen Literatur zur Entwicklung von Staat und Recht im Protektorat zum Beispiel: Brandes, D. *Die Tschechen unter deutschem Protektorat, Bd. 1: Besatzungspolitik, Kollaboration und Widerstand im Protektorat Böhmen und Mähren bis Heydrichs Tod (1939–1942), Bd 2: Besatzungspolitik, Kollaboration und Widerstand im Protektorat Böhmen und Mähren von Heydrichs Tod bis zum Prager Aufstand (1942–1945).* München / Wien 1969–1975; Brandes, D. Tschechoslowakei – vom „Protektorat" zur „Volksdemokratie". In: Ulrich Herbert / Axel Schildt [Hrsg.] *Kriegsende in Europa. Vom Beginn des deutschen Machtzerfalls bis zur Stabilisierung der Nachkriegsordnung 1944–1948*. Essen, 1998, S. 263–78; Brandes, D. / Kural, V. [Hrsg.] *Der Weg in die Katastrophe. Deutsch-tschechoslowakische Beziehungen 1938–1947,* hrsg. für die Deutsch-Tschechische und Deutsch-Slowakische Historikerkommission. Essen, 1994; Kaden, H. (Bearb.) *Die faschistische Okkupationspolitik in Österreich und der Tschechoslowakei (1938–1945). (Nacht über Europa. Die Okkupationspolitik des deutschen Faschismus (1938–1945), 1)*. Berlin (O), 1988; Kárny, M. [Hrsg.] *Deutsche Politik im „Protektorat Böhmen und Mähren" unter Reinhard Heydrich 1941–1942. Eine Dokumentation. (Nationalsozialistische Besatzungspolitik in Europa 1939–1945, 2).* Berlin, 1997; Rohde, G. Das Protektorat Böhmen und Mähren 1939–1945. In: Victor S. Mamatey / Radomir Luza [Hrsg.] *Geschichte der Tschechoslowakischen Republik 1918–1948.* Wien, 1980, S. 314–40; Slapnicka, H. Die böhmischen Länder und die Slowakei 1919–1945, In: Karl Bosl [Hrsg.] *Handbuch der Geschichte der böhmischen Länder, Bd. 4: Der tschechoslowakische Staat im Zeitalter der modernen Massendemokratie und Diktatur*. Stuttgart, 1968, S. 3 –150.

[3] Vlček, E. *Dějiny trestního práva v českých zemích a v Československu*. Brno: Masarykova univerzita, 2006, S. 41.

[4] Aus dem Grunde der Übersichtlichkeit wird die Verordnung über die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren vom 14. April 1939 (RGBl. I. S. 752) weiter nur als *„Verordnung I."* bezeichnet und die Verordnung über Ausübung der Strafgerichtsbarkeit im Protektorat Böhmen und Mähren vom 14. April 1939 (RGBl. I. S. 754) weiter nur als *„Verordnung II."*

[5] Dazu ausführlich Tauchen, J., Schelle, K. [Hrsg.] *Protektorát Čechy a Morava – jedna z nejtragičtějších kapitol českých novodobých dějin (vybranné problémy).* Brno: The European Society for History of Law, 2010, S. 62 ff.; Vlček, E. *Dějiny trestního práva v českých zemích a v Československu*. Brno: Masarykova univerzita, 2006, S. 42; Miřička, A., Solnař, V. *Nová úprava trestního soudnictví v Protektorátu Čechy a Morava*. Praha: Melantrich, 1939.

Die Grundnorm, die den Aufbau und Zuständigkeit der deutschen Strafgerichte im Protektorat regelte, stellte die schon oben erwähnte Verordnung über die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren vom April 1939 *(Verordnung I.)* dar. Diese Verordnung ging vom Grundprinzip aus, dass die deutschen Staatsangehörigen der deutschen Gerichtsbarkeit im Protektorat Böhmen und Mähren unterstanden. Die Personen, die nicht deutsche Staatsangehörige waren, unterstanden der deutsche Gerichtsbarkeit wegen der Straftaten:

a) auf die das deutsche Strafrecht[6] Anwendung fand,
b) die im Wege der Privatklage verfolgt wurden, wenn ein deutscher Staatsangehöriger die Privatklage erhob.

Die Personen, die keine Staatsangehörigen waren, unterstanden der Gerichtsbarkeit des Protektorats, soweit nicht die deutsche Gerichtsbarkeit durch gesetzliche Vorschriften begründet wurde. Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren war gegenüber den Gerichten des Protektorats eine ausschließliche bis auf eine Ausnahme, die die nach dem Strafrecht des Protektorats verfolgte Straftat darstellte, welche in einem Gebäude, einem Raum oder einer Anlage der deutschen Besatzungsmacht begangen wurde. Diese Räumlichkeiten mussten den Zwecken der deutschen Wehrmacht oder einer Dienststelle des Reichs, der NSDAP oder einer ihrer Gliederungen oder den Zwecken der NSFK dienen. In diesem Falle waren die deutschen Strafverfolgungsbehörden zuständig, sofern sie nicht die Sache an die Strafverfolgungsbehörden des Protektorats abgaben.[7]

Genauso wie im Deutschen Reich, wurden zur Ausübung der deutschen Gerichtsbarkeit im Protektorat errichtet:

a) die deutschen Amtsgerichte, welche die unterste Stufe der deutschen Gerichtssystems bildete. Sie wurden errichtet in Böhmisch-Budweis *(České Budějovice)*, Brünn *(Brno)*, Deutsch-Brod *(Německý Brod)*, Gitschin *(Jičín)*, Göding *(Hodonín)*, Iglau *(Jihlava)*, Mährisch-Ostrau *(Moravská Ostrava)*, Olmütz *(Olomouc)*, Pardubitz *(Pardubice)*, Pilsen *(Plzeň)*, Prag *(Praha)* und Strakonitz *(Strakonice)*. Diesen Amtsgerichten wurden die Sprengel der einzelnen ehemaligen Kreisgerichte zugelegt, mit denen sie sich im Prinzip deckten;
b) die deutschen Landgerichte Prag und Brünn, welche die zweite Instanz darstellten. Zum Bezirk des deutschen Landgerichts Prag gehörten die in Böhmen, zum Bezirk des deutschen Landgerichts Brünn die in Mähren gelegenen deutschen Amtsgerichte;
c) das deutsche Oberlandesgericht Prag;

Die deutsche Gerichtsbarkeit im Protektorat übten ferner das Reichsgericht in Leipzig und der Volksgerichtshof in Berlin aus. Der Reichsminister der Justiz war berechtigt, die Zweigstellen der deutschen Gerichte zu errichten und anzuordnen, dass Gerichtstage und Tagsatzungen außerhalb des Gerichtssitzes abgehalten werden.

Im April 1941 wurde eine Reorganisation der deutschen Gerichte im Protektorat durchgeführt; in Königgrätz *(Hradec Králové)* und in Tabor *(Tábor)* wurden deutsche Amtsgerichte errichtet. Verlegt wurden der Sitz des Amtsgerichts Deutsch-Brod nach Kolin *(Kolín)*, der Sitz des Amtsgerichts Göding nach Ungarisch Hradisch *(Uherské Hradiště)* und der Sitz des Amtsgerichts Strakonitz nach Klattau *(Klatovy)*. Der Bezirk jedes deutschen Amtsgerichtes im Protektorat erstreckte sich auf den Oberlandratsbezirk, in dem das Amtsgericht seinen Sitz hatte.[8]

Der Unterschied in der Zusammensetzung der Amtsgerichte im Protektorat und im Reich bestand darin, dass keine Schöffengerichte im Protektorat tätig waren. Das Laienelement wurde also aus der Entscheidungstätigkeit ausgeschlossen. Die Verordnung I. errichtete im Protektorat keine Sondergerichte; ihre Zuständigkeit ging auf eine Strafkammer des Landgerichts (Prag, Brünn) über, die mit drei Berufsrichtern besetz war. Auf das Verfahren fanden die im Altreich für das Sondergericht geltenden Vorschriften Anwendung. Zur Änderung kam es im Februar 1940, als die Sondergerichte auch im Protektorat errichtet wurden.[9]

Bei jedem deutschen Gericht im Protektorat wurde eine Staatsanwaltschaft errichtet. Die deutschen Gerichte sprachen das Recht im Namen des Deutschen Volkes. An die deutschen Justizbehörden bezogen sich die reichsdeutschen allgemein geltenden Rechtsvorschriften, die im § 9 der Verordnung I. angeführt wurden:

a) das Deutsche Gerichtsverfassungsgesetz mit Ausnahme der §§ 23, 71, 95 bis 104, 119;
b) das Gesetz über die Zuständigkeit der Gerichte bei Änderungen der Gerichtseinteilung vom 6. Dezember 1933 (RGBl. I., S. 1037);
c) die Verordnung zur einheitlichen Regelung der Gerichtsverfassung vom 20. März 1935 (RGBl. I., S. 403);
d) das Gesetz über die Geschäftsverteilung bei den Gerichten vom 24. November 1937 (RGBl. I., S. 1286).

Vor den deutschen Justizbehörden im Protektorat Böhmen und Mähren fanden Anwendung:

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[6] Zum materiellen Strafrecht im Protektorat vgl. z.B. Lorenz, M. *Das deutsche Strafrecht im Reichsgau Sudetenland und im Protektorat Böhmen und Mähren.* Prag – Berlin: J. G. Calve'sche Univ.Buchhandlung Robert Lerche, 1940; Nüßlein, *Das Strafrecht des Reichs im Protektorat Böhmen und Mähren.* In: Deutsches Recht, 1942, S. 368.

[7] Zum deutschen Strafprozessrecht im Protektorat vgl. Veselá, J., Lepšík, J. *Německé trestní řízení. Německé vojenské trestní řízení*. Praha: Českomoravský kompas, 1939; Hochberger, E. *Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren.* In: Zeitschrift für osteuropäisches Recht 1939–1940, S. 121 ff.; Lorenz, M. *Die Neuregelung der Strafgerichtsbarkeit im Protektorat Böhmen und Mähren*. In: Deutsche Justiz, 1939, S. 177 ff.; Schmidt, *Deutsche Strafgerichtsbarkeit im Protektorat Böhmen und Mähren*. In: Prager Archiv, 1939, S. 1099 ff.; Krieser, H. *Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren – Ausübung und Umfang.* In: Deutsches Recht, 1940, S. 1745 ff.; Nüßlein, *Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren – Strafrechtspflege.* In: Deutsches Recht, 1940, S. 2085; Gabriel, *Der Strafvollzug im Protektorat Böhmen und Mähren*. In: Deutsches Recht, 1942, S. 367 ff.

[8] Erlass zur Änderung der Gerichtsgliederung im Protektorat Böhmen und Mähren vom 13. März 1941 (RGBl. I., S. 130).

[9] Verordnung über die Zuständigkeit der Strafgerichte, der Sondergerichte und sonstige Strafverfahrensrechtliche Vorschriften vom 21. Februar 1940 (RGBl. I., S. 405).

- die Verordnung zur Einführung kostenrechtlicher Vorschriften in den sudetendeutschen Gebieten vom 30. November 1938 (RGBl. I., S. 1684);
- die Gebührenverordnung für Zeugen und Sachverständige vom 21. Dezember 1925 (RGBl. I., S. 471).

Bei den deutschen Gerichten im Protektorat gab es keine Selbstverwaltung, die im Reich schon im Jahre 1937 abgeschafft wurde, was damals einen weiteren Schritt der Nationalsozialisten auf dem Wege zur Abschaffung der Justizunabhängigkeit darstellte. Die Gerichtspräsidenten verfügten über ihre Kompetenzen im Bereich der Justizselbstverwaltung nicht mehr (z.B. die Verteilung der Geschäfte einzelner Richter). Dies übten weiterhin nur die Präsidenten der übergeordneten Landesgerichte, ggf. der Oberlandesgerichte aus. Der Reichsminister der Justiz konnte Grundsätze für die Verteilung der Geschäfte bei den Amtsgerichten aufstellen.[10] Die Abwesenheit der Justizselbstverwaltung bedeutete die Unterstellung der Justiz der vollziehenden Gewalt; sie entschied direkt, welchem konkretem Richter die Sache zugeteilt wird.[11]

Das Richteramt, das Amt des Staatsanwalts, die Tätigkeit als Notar und als Rechtsanwalt konnten nur von Personen wahrgenommen werden, die zum Richteramt befähigt waren. Diese Befähigung besaßen alle deutschen Staatsangehörigen, die nach den bisherigen Vorschriften die Richteramts-, Notariats- oder Rechtsanwaltsprüfung im Protektorat mit Erfolg abgelegt haben. Wer zur Ausübung des deutschen Richteramts im Protektorat befähigt war, besaß die Fähigkeit zum Richteramt auch im übrigen Reichsgebiet; wer sie dort erworben hat, war auch zur Ausübung des Richteramtes auch im Protektorat befähigt.

Vor den deutschen Gerichten im Protektorat konnten nur Rechtsanwälte auftreten, die bei einem dieser Gerichte zugelassen waren. Im amtsgerichtlichen Verfahren und als Verteidiger konnten die bei einem deutschen Gericht außerhalb des Protektorats zugelassenen Rechtsanwälte ohne besondere Zulassung auftreten. Zur Änderung kam es im Jahre 1943; die Rechtsanwälte, die außerhalb des Protektorats Böhmen und Mähren zugelassen waren, konnten als Verteidiger vor den deutschen Gerichten im Protektorat nur auftreten, wenn sie als Verteidiger vor diesen Gerichten allgemein zugelassen waren. Über die Zulassung entschied der Oberlandesgerichtspräsident in Prag nach Anhörung des Generalstaatsanwalts. Die Zulassung war widerruflich.[12] Der Reichsminister der Justiz konnte Rechtsanwälte, die vor den Gerichten des Protektorats auftreten durften, ermächtigen, Personen nicht deutscher Staatsangehörigkeit vor den deutschen Gerichten im Protektorat zu vertreten und zu verteidigen. Für die bei einem deutschen Gericht im Protektorat zugelassenen Rechtsanwälte galten die Reichsrechtsanwaltsordnung und die zu ihrer Ergänzung erlassenen Vorschriften.

Im Jahre 1942 wurde die Zuständigkeit der SS- und Polizeigerichte für nichtdeutsche Staatsangehörige im Falle ihrer unmittelbaren Angriffe auf die SS oder deutsche Polizei oder ihre Angehörigen durch die Erklärung begründet, dass besondere SS- oder polizeidienstliche Belange die Aburteilung durch ein SS- und Polizeigericht erfordern. Die Erklärung wurde gegenüber dem Reichsprotektor abgegeben. Das im Einzelfall zuständige Gericht bestimmte der Reichsführer SS und der Chef der Deutschen Polizei. Wurden durch die Straftat gleichzeitig unmittelbare Belange der Wehrmacht berührt, so einigten sich der Reichsführer SS und Chef der Deutschen Polizei und der Chef des Oberkommandos der Wehrmacht darüber, ob das Verfahren von einem SS- und Polizeigericht oder einem Wehrmachtsgericht durchgeführt werden sollte.[13]

3. Sondergerichte im Protektorat

Wenn man über die nationalsozialistische Justiz im Protektorat Böhmen und Mähren spricht, stellen sich die meisten Leute vor allem die Tätigkeit der Sondergerichte und des Volksgerichtshofs vor. Die Sondergerichte gehörten zu den Mitteln, mit welchen die Besatzer ihre politischen Gegner „auf legalem Wege“ unterdrückten. Im Altreich wurden die Sondergerichte unmittelbar nach der Machtergreifung im Jahre 1933 errichtet; ihre Einführung gehörte zu den ersten legislativen Maßnahmen, welche die neue Regierung im Bereich der Gerichtsverfassung der deutschen Justiz einführte.

Die Zuständigkeit der Sondergerichte wurde ständig erweitert und seit 1938 wurde auch auf unpolitische Kriminalfälle ausgedehnt.[14] Seit November 1938 konnte der Staatsanwalt Anklage vor dem Sondergericht erheben, wenn er der Auffassung war, dass mit Rücksicht auf die Schwere oder die Verwerflichkeit der Tat oder die in der Öffentlichkeit hervorgerufene Erregung die sofortige Aburteilung durch das Sondergericht geboten ist.[15]

Roland Freisler, Präsident des Volksgerichtshofs äußerte sich zu Tätigkeit der Sondergerichte folgendermaßen:

> „Die Sondergerichte müssen immer daran denken, dass sie gewissermaßen eine Panzertruppe der Rechtspflege sind. Sie müssen ebenso schnell sein wie die Panzertruppe, sie sind mit ebenso großer Kampfkraft ausgestattet.“[16]

Die eigentliche Aufgabe der Sondergerichte war nicht – repressiv – die Auferhaltung von Sicherheit und Ordnung im Sinne der traditionellen Befriedigungsfunktion des Staates, sondern – aggressiv – die Absicherung der „totalen Mobilmachung“

[10] Verordnung zur Einheitlichen Regelung der Gerichtsverfassung vom 20. März 1935 (RGBl. I., S. 403).

[11] Zur Abschaffung der richterlichen Unabhängigkeit in der NS-Zeit vgl. z.B. Tauchen, J. *Vývoj trestního soudnictví v Německu v letech 1933–1945*. Brno: The European Society for History of Law, 2010, S. 114 ff.

[12] Bekanntmachung des Reichsjustizministers betreffend die Zulassung als Verteidiger vor den deutschen Gerichten im Protektorat Böhmen und Mähren vom 3. Dezember 1942 (3170-VI.b[1] 1058), veröffentlicht in der Zeitschrift Deutsche Justiz, S. 797.

[13] Verordnung über die Zuständigkeit der SS- und Polizeigerichte im Protektorat Böhmen und Mähren vom 15. Juli 1942 (RGBl. I., S. 475).

[14] Broszat, M. *Der Staat Hitlers. Grundlegung und Entwicklung seiner inneren Verfassung*. 15. Auflage. München: dtv, 2000, S. 418.

[15] Verordnung über die Erweiterung der Zuständigkeit der Sondergerichte vom 20. November 1938 (RGBl. I., S. 1632).

[16] Tagung am 24. Oktober 1939 zur Volksschädlingsverordnung; Akten des Reichsjustizministeriums, BA R22/4158; zitiert nach Fieberg, G. *Im Namen des Deutschen Volkes. Justiz und Nationalsozialismus. Katalog zur Ausstellung.* Köln: Verlag Wissenschaft und Politik, 1989, S. 209.

des Volkes im Dienste der nationalsozialistischen Politik.[17] Adolf Schwesinger begründet die Existenz der Sondergerichte folgendermaßen:

„Die Sorge für Volk und Nation ist die Grundlage dieser Gerichte… Der Nationalsozialismus stellt in den Mittelpunkt seines staatlichen und politischen Denkens das Volk. Aus dieser Überzeugung heraus muss er die Straftaten, die sich gegen die Volksgemeinschaft unmittelbar, gegen die organisierte Form des Volkes, den Staat, und gegen die politischen Willensträger des Volkes, die Bewegung richten, als die schwersten ansehen und im Interesse der Volksgemeinschaft eine schnelle und erzieherisch wirkende Sühne verlangen.“[18]

Die Verordnung über die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren vom 14. April 1939 errichtete die Sondergerichte nicht (obwohl sie diese erwähnte) und übertrug ihre Zuständigkeit auf Strafkammer des Landgerichts Prag und Brünn.

Die Verordnung des Generalbevollmächtigten für die Reichsverwaltung über die Zuständigkeit der Strafgerichte, die Sondergerichte und sonstige strafverfahrensrechtliche Vorschriften vom 21. Februar 1940 (RGBl. I., S. 405) brachte die Errichtung des Sondergerichts in Prag für den Bezirk des deutschen Landgerichtes Prag und in Brünn für den Bezirk des deutschen Landgerichtes Brünn. Die Sondergerichte im Protektorat entschieden in der Besetzung mit drei Berufsrichtern, wobei der Vorsitzende und die ständigen Mitglieder durch den Oberlandesgerichtspräsidenten aufgrund des Gesetzes über die Geschäftsverteilung bei den Gerichten vom 24. November 1937 (RGBl. I., S. 1286) bestellt wurden. Der Oberlandesgerichtspräsident setztea auch die Verteilung der Geschäfte fest.

Nach dem Ausbruch des Zweiten Weltkrieges wuchs die Bedeutung der Sondergerichte, von denen man hoffte, dass sie sich vor allem durch Effizienz und ideologische Ausrichtung im Sinne der Machthaber auszeichnen. Deswegen wurde die sachliche Zuständigkeit von den ordentlichen auf die außerordentlichen Gerichte übertragen. Die Staatsanwaltschaft hatte die Möglichkeit, nicht nur bei Verbrechen, sondern auch bei Vergehen Anklage vor dem Sondergericht zu erheben, wenn „durch die Tat die öffentliche Ordnung und Sicherheit besonders schwer gefährdet wurde“.[19]

4. Fazit

Nach der Entstehung des Protektorats Böhmen und Mähren wurde für die deutschen Staatsangehörigen des Protektorats eigene Gerichtsbarkeit errichtet. Im Schrifttum wird oft angeführt, die deutsche Gerichtsbarkeit im Protektorat sei für die Verfolgung von Straftaten deutscher Staatsangehöriger im Protektorat für die gegen die Besatzungsmacht gerichteten Straftaten ausschließlich zuständig. Wie dieser Beitrag gezeigt hat, die deutsche Strafgerichtsbarkeit sei auch für eine Reihe von Straftaten nichtdeutscher Staatsangehöriger zuständig gewesen. Die auch im Protektorat errichteten Sondergerichte zusammen mit dem NS-Strafrecht[20] halfen den Besatzern, die Protektoratsbevölkerung zu unterdrücken.

[17] Schwarz, A. *Rechtsprechung durch Sondergerichte. Zur Theorie und Praxis im Nationalsozialismus am Beispiel des Sondergerichtes Berlin. Dissertation.* Augsburg, 1992, S. 12.

[18] Schwesinger, A. *Die Entwicklung der deutschen Gerichtsorganisation seit 1879*. Würzburg: Konrad Triltsch Verlag, 1938, S. 64.

[19] Weckbecker, G. *Zwischen Freispruch und Todesstrafe. Die Rechtsprechung der nationalsozialistischen Sondergerichte Frankfurt/Main und Bromberg*. Baden-Baden: Nomos Verlagsgesellschaft, 1998, S. 52.

[20] Zum NS-Strafrecht z.B. Tauchen, J. *Vývoj trestního soudnictví v Německu v letech 1933–1945*. Brno: The European Society for History of Law, 2010, S. 70; Rüping, H., Jerouschek, G. *Grundriss der Strafrechtsgeschichte*. 4. Auflage. München: C.H.Beck, 2002, S. 110; Ostendorf, H. Dokumentation des NS.Strafrechts. Baden-Baden: Nomos Verlagsgesellschaft, 2000, S. 17 ff.

Exilium, Deportatio et Relegatio

Miroslav Frýdek [1]

The article analyzes three types of punishment in Roman law: *exilium, relegatio* and *deportatio*. However, before we can analyze these three types of punishment, it is necessary to define the concept of the Roman criminal law and punishment themselves, or rather the conduct that is punishable.

Roman penal law did not have unified regulation of material and procedural law. Moreover, Roman law did not know a single law that we nowadays call "the penal code." Particular crimes were regulated by special laws that included both material and procedural rules. These laws were then linked in the so called groups of laws dealing with certain crime.

In Title 16, Book no. 50 of Justinian's Digest titled *De verborum significatione* is Ulpinian definition of what is a conduct that is punishable and what is punishment:

Dig. 50.16.131pr. Ulpianus 3 ad l. iul. et pap. *Aliud «fraus» est, aliud «poena»: fraus enim sine poena esse potest, poena sine fraude esse non potest. poena est noxae vindicta, fraus et ipsa noxa dicitur et quasi poenae quaedam praeparatio.*[2]

Translation: Fraud is one thing, and the penalty for it another; for fraud can exist without a penalty, but there cannot be a penalty for it without a fraud. A penalty is the punishment of an offence, a fraud is the offence itself and is, as it were, a kind of preparation for the penalty.[3]

Dig. 50.16.131.1 Ulpianus 3 ad l. iul. et pap. *Inter „multam" autem et „poenam" multum interest, cum poena generale sit nomen omnium delictorum coercitio, multa specialis peccati, cuius animadversio hodie pecuniaria est: poena autem non tantum pecuniaria, verum capitis et existimationis irrogari solet. et multa quidem ex arbitrio eius venit, qui multam dicit: poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic delicto imposita est: quin immo multa ibi dicitur, ubi specialis poena non est imposita. item multam is dicere potest, cui iudicatio data est: magistratus solos et praesides provinciarum posse multam dicere mandatis permissum est. poenam autem unusquisque inrogare potest, cui huius criminis sive delicti exsecutio competit.*[4]

Translation: A great difference exists between a fine and a penalty, for the term „penalty" is a general one, and means the punishment of all crimes; but a fine is imposed for some particular offence, whose punishment is, at present, a pecuniary one. A penalty, however, is not only pecuniary, but usually implies the loss of life and reputation. A fine is left to the discretion of the magistrate who passes sentence; a penalty is not inflicted unless it is expressly imposed by law, or by some other authority. And, indeed, a fine is inflicted where a special penalty has not been prescribed. Moreover, he can impose a penalty upon whom jurisdiction has been conferred. Magistrates and Governors of provinces alone are permitted by the Imperial Mandates to impose fines; anyone, however, who has a right to take judicial cognizance of a crime or a misdemeanor can inflict the penalty.[5]

Poena (Greek, ποινή). The Roman sense of this word is explained by Ulpian Dig. 50.16.131pr at the same time that he explains Fraus and Multa. Fraus is generally an offence, Noxa and Poena is the punishment of an offence, Noxae vindicta. Poena is the general name for any punishment of any offence: Multa is the penalty of a particular offence, which is now (in Ulpian's time) pecuniary.[6]

Ulpian says in his time because by the Law of the Twelve Tables, the Multa was pecuaria or a certain number of oxen and Wheel (Plin. XVIII.3); Festus, *s.vv. Multam, Peculatus*). Ulpian proceeds to say that Poena may affect a person's caput and existimatio, that is, Poena may be loss of citizenship and Infamia. A Multa was imposed according to circumstances, and its amount was determined by the pleasure of him who imposed it. A Poena was only inflicted when it was imposed by some lex or some other legal authority (quo alio jure). When no poena was imposed, then a multa or penalty might be inflicted. Every person who had jurisdictio (this seems to be the right reading instead of judicatio) could impose a multa; and these were magistratus and praesides provinciarum. A Poena might be inflicted by any one

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[2] Dig. 50.16.131pr Ulp.

[3] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D50_Scott.htm#XVI.

[4] Dig. 50.16.131.1 Ulp.

[5] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D50_Scott.htm#XVI.

[6] SMITH, W. A Dictionary of Greek and Roman Antiquites. London, 1875. p. 929.

who was intrusted with the judicial prosecution of the offence to which it was affixed. The legal distinction between Poena and Multa is not always observed by the Roman writers.[7]

Exilium[8]

The word *exilum* is from the Latin term *excilere* – to jump up. The legal term – *exilium* – indicates voluntary and permanent exile, which could help the Roman citizen to avoid even a conviction. The consequence of exile for the Roman citizen was a forfeiture of Roman citizenship – *capitis deminutio media*. The result of *capitis deminutio media* was a seizure of all property – *publicatio bonorum*. Exilium was also possible for other specific reason especially for indebtedness. Extraordinary proceedings brought a new concept of punishment, where exilium was made scaled and did not mean automatically the forfeiture of citizenship and property.[9]

Deportatio

The word *deportatio* means transportation. It is the severest punishment of exile – *deportation in insulam*. The convict was transported to a nearby island by Italy or in the Egyptian oasis. The convict also forfeited the citizenship and freedom.[10]

Relegatio

The word *relegatio* is from the Latin term *relegare* – to send away, to terminate. Relegatio is a milder form of exile. Sometimes, *relegatio* used to be associated with a property punishment, forfeiture of citizenship or even death penalty for unauthorized re-entry. Relegation was very often granted only for a certain period, only occasionally for life. To the punishment *relegatio*, there are related for example these fragments of Title 21, Book no. 47 of Justinian's Digest, where the length of this punishment was being decided in relation to age and position of the offender.[11]

Dig. 47.21.1 Modestinus 8 reg. *Terminorum avulsorum non multa pecuniaria est, sed pro condicione admittentium coercitione transigendum.*[12]

Translation: The penalty for the removal of boundaries is not a pecuniary fine, but should be regulated according to the social position of the guilty parties.[13]

Dig. 47.21.2 Callistratus libro tertio de cognitionibus *Divus hadrianus in haec verba rescripsit: „ quin pessimum factum sit eorum, qui terminos finium causa positos propulerunt, dubitari non potest. de poena tamen modus ex condicione personae et mente facientis magis statui potest: nam si splendidiores personae sunt, quae convincuntur, non dubie occupandorum alienorum finium causa id admiserunt, et possunt in tempus, ut cuiusque patiatur aetas, relegari, id est si iuvenior, in longius, si senior, recisius. si vero alii negotium gesserunt et ministerio functi sunt, castigari et ad opus biennio dari. quod si per ignorantiam aut fortuito lapides furati sunt, sufficiet eos verberibus decidere".*[14]

Translation: The Divine Hadrian stated the following in a Rescript. There can be no doubt that those who remove monuments placed to establish boundaries are guilty of a very wicked act. In fixing the penalty, however, its degree should be determined by the rank and intention of the individual who perpetrated the crime, for if persons of eminent rank are convicted, there is no doubt that they committed the act for the purpose of obtaining the land of others, and they can be relegated for a certain time, dependent upon their age; that is to say, if the accused is very young, he should be exiled for a longer time; if he is old, for a shorter time. Where others have transacted their business, and have furnished their services, they shall be chastised and sentenced to hard labor on the public works for two years. If, however, they removed the monuments through ignorance, or accidentally, it will be sufficient to have them whipped.[15]

Dig. 47.21.3pr. Callistratus 5 de cogn. *Lege agraria, quam gaius caesar tulit, adversus eos, qui terminos statutos extra suum gradum finesve moverint dolo malo, pecuniaria poena constituta est: nam in terminos singulos, quos eiecerint locove moverint, quinquaginta aureos in publico dari iubet: et eius actionem petitionem ei qui volet esse iubet.*[16]

Translation: A pecuniary penalty was established by the agrarian law which Gaius Caesar enacted against those who fraudulently removed monuments beyond their proper place, and the boundaries of their land; for it directed that they should pay to the Public Treasury fifty *aurei* for every boundary mark which they took out or removed, and that an action should be granted to anyone who desired to bring it.[17]

Dig. 47.21.3.1 Callistratus 5 de cogn. *Alia quoque lege agraria, quam divus nerva tulit, cavetur, ut, si servus servave insciente domino dolo malo fecerit, ei capital esse, nisi dominus dominave multam sufferre maluerit.*[18]

Translation: By another agrarian law, introduced by the Divine Nerva, it is provided that if a male or female slave, without the knowledge of his or her master, commits this offence with malicious intent, he or she shall be punished with death, unless his or her master or mistress prefers to pay the fine.[19]

Dig. 47.21.3.2 Callistratus 5 de cogn. *Hi quoque, qui finalium quaestionum obscurandarum causa faciem locorum convertunt, ut ex*

[7] SMITH, W. A Dictionary of Greek and Roman Antiquites. London, 1875. p. 929.
[8] to exile in the Czech law, eg KNOLL,V. Žít „mezi vlky a ptáky" črta z dějin trestního práva na Chebsku. In. Naděje právní vědy. Býkov 2006. p. 269–278.
[9] BARTOŠEK, M.. Encyklopedie římského práva, Praha 1994. p. 109.
[10] BARTOŠEK, M.. Encyklopedie římského práva, Praha 1994. p. 90.
[11] BARTOŠEK, M.. Encyklopedie římského práva, Praha 1994. p. 233.
[12] Dig. 47.21.1 Modestinus.
[13] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D47_Scott.htm#XXI.
[14] Dig. 47.21.2 Callistratus.
[15] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D47_Scott.htm#XXI.
[16] Dig. 47.21.3pr. Callistratus.
[17] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D47_Scott.htm#XXI.
[18] Dig. 47.21.3.1 Callistratus.
[19] English translation from http://web.upmf-grenoble.fr/Haiti/Cours/Ak/Anglica/D47_Scott.htm#XXI.

arbore arbustum aut ex silva novale aut aliquid eiusmodi faciunt, poena plectendi sunt pro persona et condicione et factorum violentia.[20]

Translation: Those, also, who change the appearance of the place in order to render the location of the boundaries obscure, as by making a shrub out of a tree; or plowed land out of a forest; or who do anything else of this kind, shall be punished in accordance with their character and their rank, and the violence with which their acts were committed.

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[20] Dig. 47.21.3.2 Callistratus.