VOL. 1 / 2010 NO. 1

JOURNAL OF CRIMINAL LAW AND PUBLIC PROSECUTION

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STS SCIENCE CENTRE

VOL. 1 / 2010 NO. 1

JOURNAL OF CRIMINAL LAW AND PUBLIC PROSECUTION

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ISSN 2045-9246

Is the French Public Prosecution Service independent?

Jean-Louis Nadal [1]

I would thus like to dwell on the question of independence of the French Public Prosecution Service. Is the French Public Prosecution Service independent? Should it be? What guarantees should it receive? I will try to answer these questions, and some of the answers may perhaps apply to other public prosecution services.

I would like to note in this context that my today's contribution could not have had a better timing: on May 6, 2009, the Grand Chamber of the European Court of Human Rights examined a trial in which one of the Court's tribunals ruled on July 10, 2008 that a public prosecution services is not a judicial body within the meaning of Article 5.3.c. of the European Convention on Human Rights.

In response to the ruling, the government filed an appeal with the Grand Chamber. The European Court will probably issue a ruling in October.

In this specific situation, I would now like to focus on the issue of independence of the French Public Prosecution Service.

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A few comments by way of an introduction.

Paradoxically, I will not talk about the Public Prosecution Service at the French Cassation (Supreme) Court (*Cour de cassation*). The French Public Prosecution Service has a hierarchical structure and is headed by the Justice Minister who may instruct 35 chief public prosecutors (*procureurs généraux*) at appellate courts and 183 public prosecutors (*procureurs de la République*) at courts of higher instance; I will return to this fact later on. However, the Public Prosecution Service at the Cassation Court is not a part of this structure. It does not have powers in the area of public prosecution, and it is not a part of the hierarchical subordination I have described. It oversees due enforcement of the law. It thus does not fall under the ambit of the Justice Minister at all. The chief public prosecutor at the Cassation Court enjoys an independent status but does not have any hierarchical powers vis-ŕ-vis the chief public prosecutors at appellate courts who are thus subordinated directly to the Justice Minister. I would also like to add that the chief public prosecutor at the Cassation Court further serves as the deputy chairman of the Management Board of the National School for Judges and Public Prosecutors (*Ecole nationale de la magistrature)* and the chairman of the Supreme Council of Judges and Public Prosecutors (*Conseil supérieur de la Magistrature*) – a body with disciplinary powers over public prosecutors. A constitutional law of July 18, 2008 further stipulates that he/she shall further become the chairman of the Supreme Council of Judges and Public Prosecutors which is in charge of the appointment of public prosecutors.

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My contribution on the independence of the Public Prosecution Service will thus pertain only to the independence of public prosecutors at appellate courts and courts of higher instance because as far as I am concerned, I already am completely independent.

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I must mention in this context that the French Public Prosecution Service is currently experiencing a veritable identity crisis, and the issue of independence is the central theme of all debates in this area.

A suspicion of the French Public Prosecution Service relations with the executive power is at the core of its identity crisis.

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In France, a public prosecutor really is in a contradictory, or, if you like, paradoxical position: on the one hand, the public prosecutor collaborates with the judge in the process of law enforcement (1), on the other, he/she is an official serving the public power on the other hand (2).

1. I would now like to go back to the first point: members of the French Public Prosecution Service have a status similar to that of a judge. That means that chief public prosecutors (*procureurs généraux*) and public prosecutors *(procureurs de la République*) obtain the same education as judges at the National School for Judges and Public Prosecutors (*Ecole nationale de la magistrature*). During his/her professional career, a public prosecutor may become a judge, while a judge may become a public prosecutor or chief public prosecutor. Pursuant to Article 66 of the French Constitution, judges are to warrant personal freedoms. The Constitutional Council further resolved, by virtue of its decision dated August 11, 1993, that public prosecutors' responsibility also is to warrant fundamental freedoms. All that forms an institution referred to as the judicial corps of judges

[1] **Jean-Louis Nadal**, Prosecutor General for the Cassation Court in Paris, France.

and public prosecutors (*l´unité du corps judiciaire des magistrats du siěge et du parquet).*

2. The second point leading to the contradiction I have mentioned is the fact that chief public prosecutors *(procureurs généraux*) and public prosecutors (*procureurs de la République*) are hierarchically subordinated. Unlike judges who are completely independent, the status of the public prosecutor is such that *"public prosecutors in the Public Prosecution Service, i.e., chief public prosecutors and public prosecutors, are managed and supervised by their hierarchical superiors, and fall under the ambit of the Justice Minister*". The Justice Minister is thus superior to the chief public prosecutors (*procureurs généraux*) who are in turn superior to the public prosecutors (*procureurs de la République).*

The hierarchical subordination stems from the necessity of ensuring uniform public prosecution throughout the entire country. To that end, the French Criminal Justice Act stipulates that the Justice Minister as a representative of the executive branch directs the public prosecution policy formulated by the government, and supervises its uniform implementation in the entire territory.

The Criminal Justice Act further empowers the Justice Minister to issue general instructions to public prosecutors with respect to the public prosecution process. The general instructions of the Justice Minister apply to all public prosecutors. They are binding on the 35 chief public prosecutors *(procureurs généraux*) at the appellate court who must ensure consistent public prosecution at the respective appellate courts. They may also issue instructions to that end to public prosecutors (*procureurs de la République*) falling under their jurisdiction and subordinated to them, and manage the judicial police for that purpose.

In addition to the general instructions, the Justice Minister may also issue individual instructions solely for the purpose of criminal prosecution: he/she thus cannot issue instructions for the purpose of interim administrative decisions by which the Public Prosecution Service temporarily suspends the process of criminal prosecution while reserving the right to return to the decision before the term for public prosecution lapses due to statute of limitations. Such instructions must be in writing and must be presented in the proceeding.

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The public prosecutor is thus in an ambivalent position: on the one hand, he/she is a member of a judicial body whose independence is guaranteed by Article 64 of the constitution, where the body of judges enjoys statutory independence, while public prosecutors do not enjoy such statutory independence. This brings us to a certain paradox whereby an independent judicial body consists of an independent body of judges, and of public prosecutors who are not independent.

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It is this very contradiction, brutally manifested of late, that is the topic of numerous debates. The importance of this issue, although now new, has grown recently for the following reasons:

– we first need to go back to the specific conditions in France in the 1980's and 1990s which brought an increase in the number of political-financial cases pointing out the ambivalent position of the Public Prosecution Service which is a part of the executive branch but is entrusted with criminal prosecution of persons having a certain relationship to it.
– it further needs to be mentioned that the Public Prosecution Service became more and more involved in the implementation of public policies, and that changes its institutional position.

These already rather significant factors went hand in hand with two changes that need to be taken into account:

– the pregnancy of the notion of fiction stemming from the provisions of the European Convention on Human Rights and its enforcement of the Court of Justice in Strasbourg;
– the granting of competences to the Public Prosecution Service that I would call almost judicial in nature, and that could be said to require an independent status without which no decision can be deemed to be a judicial decision. New procedural means enable the public prosecutor to propose sentences that are confirmed by the judge if the persons being prosecuted accept them. This shows that the role of the public prosecutor is in some respects close to that of the judge.

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Especially at the beginning of the new millennium, some judges discussed these things and called for a separation of the judicial corps and the public prosecution service. These separatist tendencies are based on the view that a judicial body composed of independent judges cannot include public prosecutors who are not independent.

In this atmosphere of a search for the identity of the Public Prosecution Service and rejection of its belonging to the judicial corps, the justice system experienced an event that shook it to its very core: a case where many people were kept in custody awaiting trial, and then found innocent. The process deeply shocked the entire nation. According to some judges, one of the causes of this disaster was the certain "porousness" between the judicial corps and public prosecutors which prevented the performance of the relevant critical supervision. Arguments in favor of the separation of the judicial corps from public prosecutors gained in force.

I myself am an eager proponent of unified judicial corps, not because of a dogma but because of a deep conviction that the public prosecutor, just like the judge, ought to warrant fundamental freedoms. And that is an honor for the Public Prosecution Service – but I will still come back to that.

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So what options are there for the resolution of this contradiction? Should the Public Prosecution Service be independent?

I believe that we should not confuse notions. The independence of the Public Prosecution Service about which we are speaking enables the public prosecutor to adopt decisions not dictated by a party intent, or decisions giving rise to any suspicions. As far as France is concerned, I think we have to recognize that the executive branch is entitled to implement a single public policy in the entire country. However, such implementation needs to be impartial and independent.

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How to achieve independence in the implementation of public policies, and what measures did France adopt to that end?

I can perhaps say that the confusion at the root of the identity crises of the French Public Prosecution Service is caused by an accumulation of two facts:

– on the one hand, the fact that the Justice Minister is authorized to issue individual instructions
– on the other hand, the fact that the Justice Minister directs the career of public prosecutors.

Public prosecutors in France are appointed upon a proposal made by the Justice Minister and a mere expression of the opinion of the Supreme Council of Judges and Public Prosecutors. Chief public prosecutors (*procureurs généraux*) at appellate courts are currently appointed by the Council of Ministers. Following a constitutional reform I have mentioned, they will have to be appointed on the basis of the opinion of the Supreme Council of Judges and Public Prosecutors.

I thus think that the concentration in the hands of the Justice Minister of the power to issue instructions and make nominations with respect to which the Supreme Council of Judges and Public Prosecutors may merely voice their opinions cannot procure independence of the Public Prosecution Service in the implementation of the public prosecution policy by the government.

We really need to realize that the fact that the Justice Minister is authorized to issue instructions in specific cases, may decide about the career of the public prosecutor who receives the instruction to investigate, gives rise to a suspicion regarding the functioning of the Public Prosecution Service.

Two solutions to this problem are available, depending on whether we look at the matter from the point of view of individual instructions or appointments:

– as regards the instructions, this problem could be resolved by the institution of the supreme state prosecutor (*procureur général de la Nation*) as an indisputable and independent figure; he/she would be responsible for the implementation of the public prosecution policy, and would thus be authorized to issue individual instructions.

I personally tend to prefer a different system because the office of the supreme state prosecutor (*procureur général de la Nation*) would in fact be tantamount to the appointment of a second Justice Minister.

– I tend to view the entire matter from the point of view of appointment, and believe that an in-depth change of the management and career of public prosecutors is required: they should fall under the ambit of the revived Supreme Council of Judges and Public Prosecutors, which would help resolve the identity crisis of the Public Prosecution Service.

The solution would thus be to entrust the responsibility for the appointments to the Supreme Council of Judges and Public Prosecutors.

That would eliminate all suspicions of political influence over nominations, and resolve the identity crisis of the Public Prosecution Service. We should always bear in mind that the public prosecutors' task is – through the implementation of the public prosecution policy designed by the government – to oversee the observation of personal freedoms, in particular in the form of supervision and management of the judicial police.

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Aside from these general views, I would like to mention the measures adopted by France.

The French president wished to reform the Constitution to make sure that especially in the case of public prosecutors, no factors other than justice come into play. After all, he did consider establishing the office of the supreme state prosecutor.

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The constitutional reform of July 24, 2008 brought a deep change of the architecture of the organization of our justice system.

The constitutional reform changed the Supreme Council of Judges and Public Prosecutors in order to restrict frequent accusations of corporativism and politization, directed at public prosecutors. Representatives of the civil society thus will once again hold the majority of seats on the Council.

In order to counter-balance the minority of members who are not judges and state prosecutors, the body of judges (*sičge)* from the Supreme Council of Judges and Public Prosecutors now falls under the ambit of the first chairman of the Cassation Court, both as regards disciplinary matters – as before, and newly also as regards nominations; the body of public prosecutors (*parquet*) then falls under the ambit of the chief public prosecutor at the Cassation Court.

While this reform does not lead all the way to independence, it does strengthen the image of an impartial and highly professional Public Prosecution Service because it brings nominations of chief public prosecutors by the Council of Ministers to an end, and makes the opinion of the Supreme Council of Judges and Public Prosecutors mandatory.

The reform confirms the unity of the body of judges and public prosecutors, and puts the first chairman of the Cassation Court at the head of the Council at plenary sessions. I believe that this strengthens the principles of ethics and shared deontology between judges and public prosecutors.

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However, the situation was complicated by the MEDVEDIEV decision rendered on July 10, 2008 by the European Court of Human Rights. The court decided in this particular case that the French Public Prosecution Service is not a judicial body pursuant to Article 5. 3. c. of the Convention, pursuant to which «everyone arrested or detained (…) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power».

This decision follows up on old but constant case law of the European Court of Justice, namely on the decisions in SCHIESSER v. Switzerland of December 4, 1979, HUBER v. Switzerland of October 23, 1990, or PANTEA v. Romania of June 3, 2003.

According to the case law, the following three criteria need to be satisfied in order to become an officer authorized by law to exercise judicial powers pursuant to Article 5. 3. c. of the Convention:

– independence and objective impartiality, as that associated with the status of a judge,
– the power and duty to hear the person in question, – the power to acquit the person.

It is obvious that while the French Public Prosecution Service meets criteria 2 and 3, it does not meet the first one, i.e., independence and objective impartiality, due especially to its status.

I do not place any particular stress on Recommendation (2000) 19 on the role of the Public Prosecution Service in the criminal justice system, issued by the Council of Europe, which recommendation appeals to the neutrality of the Public Prosecution Service, to the recognition of guarantees with respect to its members prosecuting state officials, and a career based solely on objective criteria, such as experience and competence[2].

I would like to end my contribution by this question:

What will the impact of this decision be – provided that the decision in the MEDVEDIEV case is confirmed?

I believe that this decision could quash the case law of the French Constitutional Council which claims that the Public Prosecution Service warrants personal freedoms. As a matter of fact, the Public Prosecution Service could no longer control measures for imprisonment as is the case now, because in France, the Public Prosecution Service is the body controlling the detention of a person for the initial 48 hours, while the judge is a body authorized to decide after the 48 hours elapse.

I am under the impression that this distinction could be impaired, and there is a risk that French, and subsequently European, judges will cease observing it. Should that occur, then in my opinion the unity of the body of judges and public prosecutors would indeed be unsustainable if the Constitution entrusts the basis of the activities of public prosecutors, i.e., warranting personal freedoms, to a judicial body.

You have probably understood that the French Public Prosecution Service is holding its breath!

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If I am to conclude my talk and attempt deriving some more general principles transcending the issues related to the French Public Prosecution Service, I can mention the following principles:

1. The first principle is that the independence of the Public Prosecution Service being discussed here needs to be enforced in the implementation of the public prosecution policy in specific situations, so that the citizen could be certain that the activities of the Public Prosecution Service are not guided by any reasons other than the law.

We have to recognize that other branches, the executive and legislative ones, are authorized to define the state's policy on public prosecution, legitimately so as a result of elections.

2. The second principle is related to securing "independence in prosecution". That is integrally related to the guarantees of appointment and status. Appointment thus advisably should not depend merely on the will of the executive power, and there should be a mandatory opinion of the Supreme Council of Judges and Public Prosecutors where the positions of its members rule out any suspicion of corporativism.

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Albert CAMUS wrote that *«the 17th century was a century of mathematics, the 18th century was a century of physical sciences, and the 19th century a century of biology.»* He ends by saying that: *«Our 20th century is a century of fear».*

What is the 21st century going to be like? What challenges does the new century pose?

One of the 21st century challenges for the Public Prosecution Service will certainly be the fight against evil represented in particular by terrorism and organized crime.

However, such forms of crime that in a way test our justice systems can only be fought with strict and non-violable adherence to basic principles and holy and unalienable human rights, while reserving room for the potential adoption of specific rules warranting effective investigation.

The Public Prosecution Service needs to be the tip of the spear in this fight, without losing sight of the fundamental freedoms it warrants.

From this perspective, the debate about the independence of the Public Prosecution Service is incredibly relevant because the Public Prosecution Service provides public prosecution free of any political or party influences, for the good of the public, and with a guarantee of observation of freedoms.

[2] § 24 in this text contains following recommendations: the minister in his/her office has to act by equal, objective and impartial manner.

The position of the Public Prosecution Service in the Netherlands

Jan Watse Fokkens [1]

In the Netherlands, the Public Prosecution Service is not a civil service department of the Ministry of Justice. Rather, it is part of the judiciary. Its duties are laid down as follows in section 124 of the Judiciary (Organisation) Act ('RO'): the Public Prosecution Service is responsible for enforcing the legal order through the criminal law and for other statutory duties. This means that the Public Prosecution Service is responsible for the investigation and prosecution of criminal offences (article 167ff of the Code of Criminal Procedure) and the enforcement of criminal court judgments (articles 553–578a of the Code of Criminal Procedure).

The members of the Public Prosecution Service – public prosecutors at district courts and advocates general at appeal courts – are judicial officers (section 1 (b) 4ş, 5 ş and 6ş RO), but unlike the members of the judiciary who are responsible for the administration of justice and the members of the office at the Supreme Court, who are not members of the Public Prosecution Service, the judicial officers of the Public Prosecution Service are not appointed for life. They lack the independence enjoyed by judges and the members of the office at the Supreme Court because the Minister of Justice has full authority over and is entirely politically accountable for the Public Prosecution Service. The legislator believed this to be necessary because the activities of the Public Prosecution Service often involve fundamental legal interests in relation to which the public prosecutor enjoys considerable latitude (Explanatory Memorandum to the RO, House of Representatives 1996–1997, 25 392 no. 3, p. 21). This subordination to the Minister of Justice reflects the fundamental principles of a democratic state governed by the rule of law. Every organ of such a state must satisfy two conditions. The first is that no powers may exist without a basis in statute law or the constitution. The second is that no one may exercise powers without rendering account or being subject to scrutiny (see A.D. Belinfante and J.L. de Reede, *Beginselen van Nederlands staatsrecht* [Principles of Dutch constitutional law] 12th ed., p. 21ff. and E.M.H. Hirsch Ballin, *De officier van justitie, magistraat of bestuursambtenaar?* [The public prosecutor: magistrate or civil servant?], Trema 1991, p. 195ff).

To some extent, the courts are responsible for scrutiny of members of the Public Prosecution Service in the exercise of their powers, specifically powers relating to how the Service deals with specific criminal cases which are put before the courts. In such cases the courts scrutinise the decision to prosecute, the use of coercive measures and so on. However, by no means all cases are submitted to the courts. Under the discretionary principle, which applies in the Netherlands, the Public Prosecution Service may decide for itself not to prosecute on public interest grounds (article 167 Code of Criminal Procedure). In addition, in the case of offences for which the maximum penalty does not exceed six years' imprisonment, the public prosecutor may offer the suspect the opportunity to avoid prosecution proceedings by complying with certain conditions (article 74 Criminal Code). The conditions include payment to the State of a sum of money not exceeding the maximum fine which may be imposed in respect of the offence; community service in the form of at least 120 hours of unpaid work or payment of full or partial compensation for the damage caused by the offence. If the suspect does not accept this out-of-court settlement, a trial follows in virtually all cases. Over the next few years settlement offers will largely be replaced by penalty orders imposed by the public prosecutor. The main difference between the two is that a penalty order can be enforced without recourse to the courts if the suspect does not object. If he does object, the case is heard in open court as a normal criminal case (articles 257a to 257f Code of Criminal Procedure). Under article 12 of the Code of Criminal Procedure, a directly interested party may submit a written complaint to the court of appeal in respect of a failure to prosecute a criminal offence, a settlement offer or the issue of a penalty order. This enables an individual whose interests have been affected by a criminal offence to compel the courts to prosecute.

The powers available to the courts to scrutinise the Public Prosecution Service are not in themselves enough to ensure that it is held to account or to ensure scrutiny of its actions in every instance. In the first place, there are many cases in which no complaint under article 12 is lodged, and which are thus not submitted to the courts, either because no one has a direct interest in prosecution proceedings being instituted or because directly interested parties are not prepared to challenge the Public Prosecution Service's decision. Secondly, not everything that the Service does is related to a specific criminal case. The rising crime rate and growing public and political interest in the fight against crime have shifted the emphasis in the work of the Pub-

[1] Jan Watse Fokkens, General Prosecutor, Netherlands.

lic Prosecution Service. As part of this process, the importance of determining and implementing policy on law enforcement has increased. These developments call for clear scrutiny by governmental authorities.

Such scrutiny is exercised by the different layers of the hierarchical structure of the Public Prosecution Service, which is headed by the Board of Procurators General (section 130, subsections 1 and 2 RO). The Board may issue directives concerning the performance of the duties and the exercise of the powers of the Public Prosecution Service (section 134, subsection 4 RO). The heads of the public prosecutor's offices are subordinate to the Board in performing their duties. The other officials working at a public prosecutor's office are subordinate to the head of the office (section 139 RO). In short, the members of the Public Prosecution Service are accountable to their superiors for their actions.

The hierarchy then extends from the Public Prosecution Service to the Minister of Justice, who is responsible and accountable to Parliament for law enforcement policy. To discharge this responsibility, the minister has the power to issue directives to the Public Prosecution Service (section 127 RO). However, direct intervention by the minister is not always advisable. First, the Public Prosecution Service must be on its guard against politically motivated directives which may be overhasty. Second, in some cases the role played by the Public Prosecution Service in a criminal trial – namely providing unbiased information to the court, which is independent, and protecting fundamental rights and the principles of due process – would call for the minister's role to be restricted. That is why the legislator assigned certain duties and powers to the Public Prosecution Service and thus created a certain distance between it and the minister (Corstens, *het Nederlands strafprocesrecht* [Dutch law of criminal procedure], 6th ed., p. 112). In other words, legislation allocates to the Public Prosecution Service certain duties and powers – such as investigation and prosecution – which the minister cannot perform or exercise. If the minister wishes to achieve anything in these fields, he must act through the Public Prosecution Service. The relationship between the minister and the Public Prosecution Service is set out in more detail in the Judiciary (Organisation) Act. Section 129, subsection 1, for example, states that the Board of Procurators General must provide the minister with the information he needs. The members of the Public Prosecution Service, in turn, must provide the Board with the information it needs (section 129, subsection 2). The provision of information is essential because the minister is politically accountable for the activities of the Public Prosecution Service and he must be able to supply Parliament with the information it requests. The Act also requires the Board to draw up rules on its procedures and decision-making and to submit them for the minister's approval (section 131, subsection 4 RO).

The Board's Rules of Procedure (Government Gazette 1999, 106) regulate, for example, when the Board must submit planned decisions to the minister. These include decisions on allowing trafficking in drugs or to infiltrate a civilian undercover agent. A decision to adopt a general directive on policy on settlements and criminal procedure should be submitted to the minister before it enters into force (article 11, paragraph 2 Rules of Procedure of the Board of Procurators General). The Rules also state that the Board must inform the minister of developments in general and matters having a bearing, in general or in particular, on law enforcement. The Board also is under an obligation to provide information in cases where the minister has indicated that he wishes to be kept informed (article 11, paragraph 1 Rules of Procedure).

The power to issue directives, as laid down in the Judiciary (Organisation) Act, is also relevant to the relationship between the minister and the Public Prosecution Service. Not only the Board of Procurators General (section 130, subsection 4 RO) but also the Minister of Justice may issue directives concerning the performance of the duties and the exercise of the powers of the Public Prosecution Service (section 127 RO). The Service is obliged to act on such directives and the minister's power to issue them is, in principle, unlimited. The minister's directives may be of a general nature, concerning the policy to be pursued by the Public Prosecution Service, or may concern a specific case. The question of how far the power can extend in a specific case is often disputed. It is generally agreed that the minister should exercise this power with restraint and should not as a rule intervene in specific criminal cases, for the intention behind the Act is not for the exercise of the Public Prosecution Service's duties and powers to be influenced by political factors in individual cases. Accordingly, the minister usually keeps a distance between himself and the Public Prosecution Service. To ensure that the minister is not influenced by public opinion to issue a specific directive without due consideration – a risk that the legislator could not rule out in view of the growing interest in crime prevention – the legislator attached procedural rules to the power to issue specific directives (Explanatory Memorandum to the RO, House of Representatives 1996–1997, 25 392 no. 3, p. 26).

Before the minister issues a directive on the investigation or prosecution of a particular offence, he will meet the Public Prosecution Service to discuss the best course to take. As a rule, the outcome is consensus. If agreement is not reached and if the minister intends to issue a directive, he will give the Board written notice of the proposed directive and the reasons for it (section 128, subsection 2 RO). He will also give the board an opportunity to state its views (section 128, subsection 1). This procedure compels the minister to weigh up the various arguments carefully once again, on the basis of the Public Prosecution Service's expert opinion, before taking his decision. It also obliges both the minister and the Public Prosecution Service to be meticulous in wording their opinions, from a procedural point of view, on the intention to issue a specific directive (Explanatory Memorandum to the RO, House of Representatives 1996–1997, 25 392 no. 3, p. 26).

The minister may not issue any directive that would compel the Public Prosecution Service to break the law. In exercising his power, therefore, the minister is bound by rules deriving from statute law, treaties, unwritten law and the principles of proper procedure. The latter include the protection of legitimate expectations, equality before the law, and the ban on abuse of power and arbitrariness. Nor may he give the Public Prosecution

Service binding instructions in advance on what sentence to recommend or how to phrase the prosecution's closing speech. This would undermine the importance of the examination during the trial. The court is supposed to deliberate on the basis of the court hearing (articles 348 and 350 Code of Criminal Procedure). Since the public prosecutor and the advocate general also have an advisory role to play, they too should take account of any new facts or circumstances that come to light at the trial. This restriction on the minister's power to issue directives derives from the Code of Criminal Procedure (Explanatory Memorandum to the RO, House of Representatives 1996–1997, 25 392 no. 3, p. 25). In other words, before issuing a specific directive the minister must review it carefully in the light of the law.

If such a directive results in criminal proceedings, the directive and the views of the Board of Procurators General must be included in the documents in the case. The only exception is if this would be incompatible with the interests of the State, in which case a declaration showing that a directive has been given is added to the documents (section 128, subsection 5 RO). The aim here is to ensure openness about the minister's intervention. In addition, adding the directive to the documents in the case allows the parties and the court to exercise a degree of scrutiny over ministerial intervention in individual criminal cases.

During the trial the public prosecutor is obliged wherever possible to act, to present arguments and to demand sentence in accordance with the directive. However, he is at liberty to draw attention to matters that the court should, objectively speaking, take into account in forming its opinion. Accordingly, he may point to factors that influenced the thinking on whether or not to prosecute. If the court finds that the directive contravened the law, it may attach consequences to this conclusion for the criminal case. Directives to prosecute are thus – to a certain extent – subject to judicial scrutiny.

The minister may also direct the Public Prosecution Service not to prosecute. Even more caution should be applied in dealing with such a directive than in the case of a directive to investigate or prosecute. The need for scrutiny is greater, because a directive not to prosecute will not be reviewed by a criminal court. For this reason, if the minister issues a directive not to investigate or prosecute a case or to discontinue an investigation or prosecution, he must give notice of the directive and the views of the Board to both Houses of the States General as quickly as possible (section 128, subsection 6 RO). In a case of this kind scrutiny is exercised by Parliament. Moreover, an interested party may lodge a complaint under article 12 of the Code of Criminal Procedure with the appeal court, which may order prosecution proceedings to be instituted nonetheless.

The terms of the relationship between the minister and the Public Prosecution Service serve both to confirm the relative independence of the Service and to forestall the risk of an independent Public Prosecution Service that is not subject to democratic scrutiny (Corstens, *het Nederlands strafprocesrecht* [Dutch law of criminal procedure], 6th ed., p. 113). In practice, a degree of tension between ministerial accountability and the Public Prosecution Service's independent status cannot always be avoided, although few clashes have arisen in the Netherlands.

In 2001, the question of the limits of the minister's power over the Public Prosecution Service arose in the case of fraud by construction companies employed by Schiphol Airport. It came to light that the companies had made price-fixing agreements and divided the work among themselves in contravention of European law on the award of contracts. This had involved producing false invoices, keeping two sets of books, and bribing civil servants. The Public Prosecution Service had decided not to prosecute the construction companies but to offer an out-of-court settlement as a means of avoiding costly proceedings, whose outcome would be uncertain, while guaranteeing the repayment of a substantial sum to the State. It turned out that the Public Prosecution Service had not informed the minister of this decision in time. In response to a motion in the House of Representatives, the minister took the position that he could not reverse the decision to offer a settlement and that he could not issue a directive to prosecute since the right to prosecute had lapsed when the companies accepted the out-of-court settlement (article 74, paragraph 1 Criminal Code). See the minister's letter of 26 November 2001, House of Representatives 2001–2002, 28 093 no. 8. Under pressure from the House of Representatives, the minister agreed to a procedure obliging the Public Prosecution Service to inform the minister if it intends to offer an out-of-court settlement of over €45,000 or in sensitive cases or those involving matters of principle (Parliamentary Papers II 2001–2002, 28 093, no. 20). In such cases the minister will assess whether the Public Prosecution Service could reasonably have decided that the case need not be brought before the courts. In other words, the Public Prosecution Service had to sacrifice part of its independence.

To avoid further disputes about the Public Prosecution Service's decisions or activities, the minister, the Service and Parliament must each make allowances for the others' position under constitutional law (Explanatory Memorandum to the RO, House of Representatives 1996–1997, 25 392 no. 3, p. 25). If the Dutch system of checks and balances is to work properly, it is essential for the procedures laid down in legislation to be adhered to. This applies not only to the rules on the duty to inform but also to the rules governing specific directives. The legislator devoted much careful thought to the position of the Service and the system of checks and balances and put in place sound safeguards to strike a correct balance between the political world and the Public Prosecution Service.

The independence of the Public Prosecutor's Office and European Union

Renata Vesecká [1]

Since 1989, due to the social economic transformation of the country, Czech justice has undergone many fundamental changes. These changes had a significant impact on the competences, organization and personnel issues. After the split of the Czechoslovak Federal Republic two different ways were established, in which the new states assign the bodies of public prosecution. The concept proposed in 1993 was based on the idea that the Czech Republic cannot adapt the unsuitable model of public prosecution to the social changes which had taken place here. The idea to constitute a model of public prosecution inspired by foreign adaptations on one hand, and the Czech legislation before 1948 on the other, was implemented. The aim was to overcome the existing model of prosecution whose historical development from 1948 had been moving away from the approach customary in democratic countries.

Especially at the beginning, public prosecution had to fight the entrenched attitudes perceiving this institution as a powerful authority. This was an attempt to get rid of the totalitarian concept of public prosecution, not to present it as a body with direct links to constitutional bodies, carrying out, under the cloak of objectivity, the wishes or orders of the representatives of the power centre.[2] But even today, considering the frequently distorted media presentation of the position and activity of public prosecution, it is essential to mention the importance and the irreplaceable role of public prosecution in society.

It can be noticed that legislative changes that concern, though only remotely, the activities of the prosecution, are taking place at all times. Currently the changes are concerned with the re-codification of criminal law, substantive and procedural, as well as a complete reform of Czech justice. Such changes are perceived by the citizens relatively intensely because they influence the ways of protection and enforcement of their rights. Yet, the envisaged reform of justice cannot be aimed solely at the system of courts. For the reform to be effective it is necessary not to concentrate on partial aspects only, but to respect the interconnectivity of the outcomes of all criminal justice bodies – namely courts, prosecution, the police and probation and mediation services. As a result of the judicial reform it is possible to achieve shortening of trial proceedings in criminal matters, which would be futile if preliminary proceedings lasted several years due to the poor performance of the supervising prosecutor. But even if the preliminary proceedings were shortened to a minimum, nothing would change, provided the criminal proceedings were conducted in a careless and unqualified manner. The situation requires a complex approach.

Discussions concerning the appointment of senior probation officers are also underway in the Czech Republic. They mainly concern time limitations of the performance of duties of the Chief Public Prosecutor and the manner of expressing agreement with his/her appointment. These considerations are an attempt to consolidate a prosecution system, independent of other institutions, by means of a transparent and well-defined appointment of senior probation officers. The idea of providing the chief prosecutor with the power to decide in matters of routine administration while maintaining his/her accountability to the bodies of executive power is also being considered.[3] Last but not least, the issue of budgetary autonomy is also being debated, with the aim of extricating public prosecution from financial dependence on the Ministry of Justice.

The leading topic of this conference is the independence of the prosecution. In this respect I assume that the key point is the legislative entrenchment of public prosecution. According to the idea of Tripartite by Charles Louis Montesquieu,[4] there are three powers: legislative, judiciary and executive. This division of power is to be understood as an initial and defining idea that has not been fully accomplished and to which there are numerous exceptions in each state.[5] Defining the contents of legislative and judiciary powers is not problematic and also their holders can be clearly identified. But defining the contents of executive power is not very transparent. Usually it is stated that activities which are not included elsewhere belong here. It seems to be some sort of remainder of power attributes of the state that remains after deducting the attributes of legisla-

[1] JUDr. Renata Vesecká – General Prosecutor of the Czech Republic.

[2] Compare: Speech of the President of the Supreme Court of the Czech Republic Iva Brožová. Slavnostní setkání k 10. výročí státního zastupitelství. Státní zastupitelství, 2004, No. 7, p. 12.

[3] Vesecká, R. Aktuální problematika veřejné žaloby v právní úpravě České republiky. Státní zastupitelství, 2008, No. 11–12, p. 55.

[4] Charles Louis Montesquieu. De l´esprit des lois", 1748.

[5] Knapp, V. Velké ústavní systémy. Úvod do srovnávací právní vědy. Praha: C.H.Beck, 1996, p. 83.

tive and judiciary powers.[6] A constitutional definition of public prosecution (and its relation to executive power in particular) is a problem.

The constitution of the Czech Republic recognizes the independent position of public prosecution, ranking it among ministries and other executive bodies of state power. The assertion that public prosecution is without any doubt a part of executive power is subject to wide-ranging discussions. Two groups of opinion can be identified. The first group of authors unconditionally accepts public prosecution as part of executive power, where public prosecution has to respect the government's policies. There is no need for public prosecution to have independent links to constitutional bodies as it is part of executive power whose performance is the responsibility of the government. The other opinion group is not in favour of such radical approach. Public prosecution is understood as a sui generis body, merging the features of both executive and judiciary powers. The approach where public prosecution is meant to implement a unified policy of the state is considered to be misleading and inaccurate since it suppresses the true nature of public interest and leads to bureaucracy.[7,8] This approach points out the scope of public prosecution's activities, defined by standards in various branches of law, the law on public prosecution in particular, and legal regulations governing general rules for court proceedings. No other executive body is in such close contact with the courts as the public prosecutor during criminal proceedings and has such an influence on decisions on the merits.

We may agree that there are many features in which public prosecution differs from administrative bodies. Public Prosecutor's Office is not an administrative office issuing individual administrative acts within administrative proceedings and it does not issue generally binding decrees for the implementation of laws. It can be stated, in accordance with legal science, that the core activity of public prosecution is representing public action and therefore this activity can be characterized as an activity of judiciary character, determined by the character of public prosecution as an office.[9] Public prosecution has the character of a judicial authority that does not exercise judicial power but whose judicial acts have a character similar to the exercise of jurisdiction. The authority to carry out acts of judicial character makes public prosecutor's office into a preliminary step necessary for exercising judicial power, by means of which a certain connectivity is stressed between the activities of public prosecution and the courts that are dependent on public prosecution carrying out its exclusive authority in the field of criminal law.[10] With respect to the number of controversial parts of the current legislation concerning public prosecution it is necessary to consider adopting a new law that would change the current situation in this field.

Apart from the legislative entrenchment of public prosecution it is also necessary to devote our attention to factors of factual character. These factors can significantly influence the activities of public prosecution and thus mould the enforcement of its independence.

This concerns above all the activities of the media. It is the role of mass media to search for, process and provide information in various forms from a wide range of sectors of society. The press, radio, television and the Internet make a quick access to information possible, forming thus public opinion, linked to the content and form of the mediated news. It has been proven in many empirical studies that mass media tend to influence most such standpoints that are related to fields in which the respondents are not sufficiently well-versed. The decisive factor in choosing and using information is its attractiveness that increases the sales and / or viewership of commercial media and brings the required profit.

The effort to pander is a problem, concerning the character and form of crime coverage. Frequently criminal matters are being followed "from the beginning to the end", where the whole process of criminal proceedings is mediated[11]. Culprits are subject to social condemnation even before they are taken to court and in spite of the final wording of the verdict. On the other hand, a certain strong and long-lasting fascination with the culprit can be observed. In case of long-term cases, in particular those concerning crimes of extreme gravity, culprits enter the minds of the public to such an extent that they sometimes enjoy a status that is not far from that of "media celebrities".

Taking into consideration the scope of activities of the public prosecutor's office it is no wonder that mass media devote so much attention to them. It is necessary to realize the fact that media cannot be ignored. It is an obligation of state authorities, and thus of the public prosecutor's office as well, to provide information to the citizens in an appropriate manner. There are, however, certain limits or even barriers within the process of providing information from criminal proceedings – on both sides – on information input and output. It is often characteristic of public prosecution that statements and assessment of ongoing cases are given, although they are only in the stage of pre-trial proceedings. Thus the success of an investigation of a given matter can be strongly influenced in a negative way. It can also be noticed that media products from abroad often create distorted and erroneous ideas about the system of Czech justice, mostly by infiltrating elements of Anglo-Saxon legal culture. Many citizens then perceive the adjudicated cases in a distorted way: they assume that the matter is treated "in a non-standard" way though the reality is different and has nothing in common with the presented TV entertainment.

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[6] Pavlíček, V. a kol. Ústavní právo a státověda. I. díl. Obecná státověda. Praha: Linde, 1998, p. 282.

[7] Fenyk, J. Veřejná žaloba. Díl první. Historie, současnost a možný vývoj veřejné žaloby. Praha: Institut Ministerstva spravedlnosti České republiky pro další vzdělávání soudců a státních zástupců, p.148.

[8] Fenyk, J. Úvahy o ústavním postavení českého státního zastupitelství. Státní zastupitelství. 2003, No.

[9] Kocourek, J., Záruba, J. Zákon o soudech a soudcích. Zákon o státním zastupitelství. Komentář. 2. doplněné a přepracované vydání. Praha: C.H.Beck, 2004, p.394.

[10] Kocourek, J., Záruba, J. Zákon o soudech a soudcích. Zákon o státním zastupitelství. Komentář. 2. doplněné a přepracované vydání. Praha: C.H.Beck, 2004, p.394.

[11] Vesecká, R., Chromý, J. Glosa: Prezentace kriminality v médiích aneb O čem se (ne)mluví. Státní zastupitelství, 2008, No. 10, p.14.

In connection with the discussed topic of independence of public prosecution it is also important to deal with the selection procedure for persons interested in working for the public prosecutor's office. Only an appropriately managed selection of applicants interested in working for the public prosecutor's office, based on an expert evaluation of their psychological profile, knowledge background and experience can be a pre-condition for the targets of public prosecution to be met properly. Only persons with a sufficiently integrated personality, mentally mature, responsible and strong-minded, are capable of accepting the demands placed on a public prosecutor and are thus able to resist the undesirable influences that will occur in their work. Achieving the proclaimed independence of the public prosecutor also means to acquire work habits, orientation in life and social values, to take over and accomplish the role of the body for protection of public interest, an appropriate measure of self-discipline and behaviour in accordance with the respective legal and ethical rules.

Recently a greater permeability among legal professions has occurred, both within the field of justice as well as outside. The original idea of a definitive profession chosen immediately after the graduation from the Faculty of Law has been changed. So far a rather reserved approach to switching between legal professions has been observed in the Czech Republic. Nowadays more and more young (and also experienced) lawyers are interested in working for the public prosecutor's office. It seems that the earlier aversion against the profession of a public prosecutor (or prosecuting counsel) has been overcome and that this profession is becoming more and more prestigious. Nevertheless, it is still true that many accused (and the general public too) ascribe the responsibility for a condemnatory sentence not to the judge but to the public prosecutor. It is not the judge, although he decides about the guilt and punishment, but the public prosecutor who is perceived as the instigator of the criminal proceedings with the mentioned outcome. The judge is usually considered to be the fair arbiter by the accused, whereas the public prosecutor is described as the party responsible for both the conviction and its method.

Let us admit that the heated discussions concerning the independence of public prosecution as a specific body for the protection of public interest will never end. This follows from the character of the public prosecutor's activities, in particular the prosecuting of criminal activity, being in the centre of interest of general public, as well as subject to pressure from various involved parties. It is not possible to deceive oneself in this respect. As long as these invectives cannot be eliminated I consider it necessary the public prosecution be granted such a legal status that will provide the means of effective resistance. I find it important to stress that promoting independence strengthens confidence in justice and contributes to the improvement of the citizens' confidence in the legal system as such.

Changes in the position of the Public Prosecutor's Office in the Czech Republic

Zdeněk Koudelka [1]

Since the transformation of the Prosecution into the Public Prosecutor's Office in Bohemia, Moravia and Silesia (Czech Republic), it has been discussed whether the current model is correct and what both the internal relations between the individual levels of the Public Prosecutor's Office hierarchy and the external relations of the Public Prosecutor's Office as a system with other supreme administrative bodies should be like. Supporters of various models can find foreign examples of these models because the patterns of functioning of the Public Prosecutor's Offices in various European countries are different.

Basically, it is possible to specify several prototypal countries and rank them starting with the one where the Public Prosecutor's Office has the closest connection to the Ministry of Justice and ending with a system characterized by a total separation of these two bodies:

1. *Poland* – Public prosecution is not mentioned in the Polish Constitution at all. The Law on Public Prosecution was changed in the year 2010 and the separated function of the Prosecutor General was established.[2] Prosecutor General is appointed for six years by the President of the republic, the proposal comes from both the Prosecution Land Council and the Justice Land Council. The appointment is not a subject to contrasignation.[3] The Prosecutor General cannot be appointed repeatedly. Both Land Prosecutor for Civil Prosecution who is appointed by the Prime Minister on the proposal of the Prosecutor General and the Supreme Military Prosecutor are subordinated to the Prosecutor General.
   In the period 1990–2010 the Prosecution was subordinated to the Ministry of Justice and the Minister performed the function of the Prosecutor General at the same time.[4] This American model was applied also during the 2. Polish republic 1919–39, when the Minister of Justice performed the function of the Prosecutor General at the same time.
2. *Ireland* – the Supreme Prosecutor is not personally linked to the Government. The Supreme Prosecutor is not a member of the Government. However, he or she is defined as the Government's adviser. He or she is appointed by the President on the proposal of the Prime Minister and is obliged to resign on the Prime Minister's request. If he or she does not step down, the President recalls him on the proposal of the Prime Minister.[5]
3. *Austria* – the Public Prosecutor's Office is a part of the Ministry of Justice department. There is a Supreme Public Prosecutor's Office in Austria with the Supreme Prosecutor at its head. However, the Supreme Prosecutor's Office operates only within the framework of the Supreme Court and is not a part of the common hierarchical system together with the lower High Land Prosecutor's Offices, which are directly subordinated – as well as the Supreme Prosecutor's Office – to the Ministry of Justice. The Minister is superior both in terms of administration and in terms of competence. This model had been applied in our country since the middle of the 19th century until 1952. The Public Prosecution has been ranked to the judiciary since 2008 [6] by the Amendment to the Constitution. Nevertheless, the administration of the public prosecution has not changed.
4. *Czech Republic (Bohemia, Moravia and Silesia)* – there is a system of the Public Prosecutor's Office with the Supreme Prosecutor at its head who is appointed by the Government. Relations of superiority and subordination exist between the hierarchical levels, particularly between two immediately subsequent levels and with respect to superior levels in the areas specified by law. The whole system is a part of the Ministry of Justice department, while the Ministry is not superior to the Public Prosecutor's Office in terms of competence but it is superior in the matters of administration, especially budgetary administration.

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[2] 31. 3. 2010 Andrzej Seremet took the office of the Prosecutor General.

[3] It is a contoversial matter because the decisions of the President of the republic are subject to contrasignation on the basis of a common law. A change of the Constitution is being considered – it should be directly mentioned in the Constitution that the President of the republic appoints the Prosecutor General without the need of the contrasignation of the Prime Minister.

[4] Kudrna, J., Banaszkiewicz, B.: Postavení prokuratury v právním řádu Polské republiky (Position of the Public Prosecutors's Office in the Polish Legal System), *Státní zastupitelství* 11–12/2008.

[5] Art 30 of the Constitution of Ireland. Klokočka, V., Wagnerová, E.: *Ústavy států Evropské unie.* (Constitutions of the EU Member States) 1. Edition, Praha, 1997, 170.

[6] Judiciary itself is ranked as Part B together with Part A (Administration) to the Catch III of the Constitution which is called Executive Power. Art 90a of the Constitution of the Republic of Austria from the 10. 11. 1920 in the statutory text of the Constitutional Law No. 2/2008 BGBl.

5. *Slovakia* – the Prosecution is an independent system of administrative bodies with the Prosecutor General at its head who is appointed by the President on the proposal of the Parliament. The Prosecution has a separate chapter of the state budget. This model had been applied in Bohemia, Moravia and Silesia since 1953 until 1993.
6. *Hungary* – the Prosecution is an independent system of administrative bodies and it is not subordinate to the Government, as in Slovakia. However, the Constitution provides for the accountability of the Prosecutor General to the Parliament, by which he or she is also elected.[7]
7. *France, Italy* – the Public Prosecutor's Office is a part of the judicial authority.

There are a lot of models of the Public Prosecutor's Office, whereas we have only dealt with the aspect of its external relations and not the relations within its internal hierarchy (monocracy, relations of superiority and subordination). However, it is also necessary to point out that discussions take place regarding disadvantages of the existing models and their possible changes in all the aforementioned countries. Therefore, whereas in our country the foreign models – and above all Slovakia, which is historically and geographically closest to the Czech Republic – are given as an example to follow, in other countries, including Slovakia, one can sometimes identify calls for a change according to the Public Prosecutor's Office model which exists in Czech Republic (Bohemia, Moravia and Silesia.) While sometimes this proposed change is meant to weaken the autonomous position of the Public Prosecution (Slovakia), in other cases it is meant to reinforce it (Poland).

It is necessary to emphasize that, from the perspective of the current understanding of a material liberal democratic state, a good administration of public matters, which also concerns the Public Prosecution, is determined by the political regime of the state rather than by the legal characteristics of the individual bodies of public authority. It cannot be denied that the Public Prosecution participated on the commission of judicial crimes in our country in the period between 1948 and 1952, while its legal definition originated in the relatively liberal and legally consistent Austrian state of second half of the 19th century and continued to be in force in the democratic first Czechoslovak Republic (1918–1938). On the contrary, the Public Prosecution established according to the Soviet model by the statutes adopted during the period of the worst totality in 1952 managed to function in an organizationally unchanged form after the end of totality within the framework of the democratic state in Bohemia, Moravia and Silesia until 1993 and continues to function in Slovakia or Hungary until today. The outcome of the activity of a state administration body, including the Public Prosecution, is not primarily determined by its legal and organizational regulation but instead by the essence of the regime of the State; whether it is a democracy, totality, dictatorship or even despotism.

However, if we think about possible changes in the legal regulation of the position of the Public Prosecutor's Office in Bohemia, Moravia and Silesia, we can identify three basic areas of change: one of them is formal – constitutional regulation, and two of them are budgetary and personal administration.

Constitutional regulation

The present constitutional regulation in the Czech Republic is very brief and is limited to one article within the chapter dealing with the executive power in the section regulating the Government.[8] The Constitution provides – without a possibility of the legislator to change it – that the Public Prosecutor's Office:

1. is a part of the executive power and has to have a relationship with the government. However, this relationship is not further specified.
2. represents the Public Prosecution before the criminal courts.

All other areas of regulation are entrusted only to a statute by the Constitution, including the possibility to extend the competence of the Public Prosecutor's Office on non-criminal issues as well, which is actually realized under the current legal regulation.

There is a requirement to extend the constitutional regulation of the Public Prosecution, e.g. according to the Slovakian model. However, briefness of the Constitution can be an advantage for any institution if the Constitution enables the desired situation to be accomplished by an ordinary statute, as in the Czech Republic. Almost all changes of the regulation of the Public Prosecutor's Office can be realized through amendments of statutes without a necessity to amend the Constitution. The Constitution only provides for the criminal competence of the Public Prosecution in criminal proceedings. Although this can seem obvious, for example the Slovak Constitution paradoxically does not provide for such a competence of the Public Prosecution.[9] The absolutely dominant activity of the Slovak Public Prosecution in criminal proceedings is provided for only by a statute. Theoretically, the law could withdraw the criminal competence of the Slovak Public Prosecution and entrust it to a newly established Public Prosecutor's Office. The Slovak Public Prosecution which is provided for in the Constitution could therefore be deprived of its competence by a statute and be left with a minor competence to protect the rights of the people and the State without any further specification of measures available to realize its authority. It would become another Public Defender of Rights (Ombudsman) as it would protest against unlawful actions without a capability to provide a remedy for the unlawfulness as it would only be left with a limited entitlement of the Slovak Prosecutor General to file a petition to the Constitutional Court in Košice[10] e.g. regarding the unlawfulness of generally binding regulations of local self-administration.

[7] Art 52 para 2 of the Constitution of the Republic of Hungary of 1949. Vladimír Klokočka, V., Wagnerová, E.: *Ústavy států Evropské unie,* 2. edition, Praha, 2005, 168.; Halasz, I.: Postavenie generálnej prokuratúry v maďarskom ústavnom systéme po roku 1989 (Position of the General Prosecutor in Hungarian Legal System after 1989), *Státní zastupitelství* 11–12/2008.

[8] Art 80 of the Constitution of the Bohemia, Moravia and Silesia No. 1/1993 Coll.

[9] Art 149 of the Constitution of the Slovak Republic No 460/1992 Coll.

[10] Art 130 para 1 let e) of the Constitution of the Slovak Republic.

Briefness and comprehensibility of the legal language are good qualities of the Czech Constitution. If all the so-called reasonable requirements for amendments of the Constitution (referendum, Supreme Audit Office, local self-administration) were summarized, the Constitution would be extended to the enormous size of the Portuguese Constitution.[11] Moreover, enforcing amendments of the Constitution is always very difficult. Not only the qualified three-fifth majority of all Members of the Chamber of Deputies and the present Senators is required, but the Senate also cannot be outvoted and it is moreover not bound by the 30-day period for discussing the proposal as it is with regard to ordinary statutes. An amendment of the Constitution can therefore easily "fall under the table" without being formally dismissed. This can happen if the Senate does not discuss the proposal until the election of Members of the Chamber of Deputies take place. Due to the principle of discontinuity in the legislative process[12], all the draft laws, including constitutional laws, which had not been discussed until the election of the Members of the Chamber of Deputies have taken place, cannot be discussed in the newly elected Chamber of Deputies. This is also the case with the draft laws returned from the Senate or the laws vetoed by the President of the Republic. The veto of the President or the Senate thus becomes absolute.[13]

Also the statistics shows that everyone who proposes a constitutional amendment asks for its non-acceptance. During the term of office of the Chamber of Deputies from 2002 until 2006, eighteen proposals of constitutional laws have been filed while only three of them have been accepted; two concerning the change of borders with Austria and Germany and one concerning the referendum on the accession of the Czech Republic to the European Union.[14] During the term of office of the Chamber of Deputies from 2006 until 2009, 11 proposals of the constitutional amendments have been filed while none of them has been accepted.[15] This reflects a stability of the Constitution, which is positive. It can be concluded that if it is possible to achieve a certain objective by a statute, it is necessary to do it in this way and not by extending the Constitution. It can be compared to a situation when someone climbs up to the fifth floor while the door is open with the functioning stairs behind it which he or she could use to get to the fifth floor more easily. If we make another comparison with Slovakia concerning the Public Defender of Rights (Ombudsman), whose position is even regulated together with the Prosecution in Slovakia in the common Chapter eight of the Constitution, we can see that there is no difference in the content of competence between the Slovak Ombudsman, whose position is regulated by the Constitution, and the Ombudsman in the Czech Republic (Bohemia, Moravia and Silesia), whose position is regulated by a statute only. No constitutional amendments are necessary for changes in the position of the Public Prosecutor's Office. The present Constitution allows to establish the Public Prosecutor's Office which is identical with the Minister of Justice as in Poland, but also to establish the Public Prosecutor's Office which is independent of the Government to a great extend as in Slovakia.

Concerning the extend of the constitutional regulation, all constitutions are generally very brief and usually, in contrast to the Czech Constitution, contain provisions on the appointment of the Prosecutor General into office while the appointment of other Public Prosecutors as well as other organizational issues are left to be regulated by statutes.[16] This is the case of the Slovak Constitution which regulates the Public Prosecution together with the Ombudsperson in the Chapter Eight,[17] but there are only three articles not subdivided into paragraphs which actually deal with the Prosecution. The text of the one article of the Czech Constitution which deals with the Public Prosecutor's Office, which is however subdivided into two paragraphs, is not much shorter. Moreover, the Slovak regulation actually contains only a provision on the appointment of the Prosecutor General by the President. As regards the content of the constitutional regulation, the Slovak Constitution regulates, if something at all, only a small part of the personal administration concerning the appointment of the chief of the Public Prosecution. Concerning the budgetary administration, constitutions do not regulate this issue.

Budgetary administration

Money makes the world go round but it is not polite to talk about it on solemn occasions. From this point of view, it does not come as a surprise that the constitutions which regulate the basics of the functioning of the State do not mention money very often, with the exception of the state budget procedure. Only a minority of constitutions contains more detailed provisions dealing with financing of the State. Above all, they regulate the relationship between the State and local self-admin-

[11] The Constitution of the Bohemia, Moravia and Silesia has 115 articles. The Constitution of the Republic of Portugal of 2nd April 1976 has 298 articles.

[12] Sec 121 para 1 of the Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies.

[13] Filip, J.: Vybrané kapitoly ke studiu Ústavního práva (Selected chapters. Study of the Constitutional Law), 2. edition, Brno 2001, 283.

[14] Prints of the Chamber of Deputies 4th term of office No. 20, 50, 81, 90, 95, 115, 172, 192, 208, 249, 349, 485, 513, 609, 914, 937, 980, 1130, prints No. 50, 249, 609 have been accepted.

[15] Prints of the Chamber of Deputies 5th term of office No. 16, 42, 134, 146, 169, 192, 332, 381, 524, 747 and 795. Also constitutional law about referendum to particular questions has not been accepted – Prints of the Chamber of Deputies No. 147, 477, 490. Only the constitutional law No. 195/2009 Coll. about shortening of 5th term of office of the Chamber of Deputies has been accepted.

[16] A sole exception is the Art 51 Sec 2 of the Constitution of the Republic of Hungary of 1949 which even establishes the supervision of the Public Prosecutor's Office over the service of a sentence on the constitutional level. In Vladimír Klokočka, Eliška Wagnerová: Ústavy států Evropské unie (Constitutions of the EU Member States), 2. volume, Praha 2005, p. 168.

[17] Moreover, since the Chapter 8 of the Constitution of Slovak Republic No. 460/1992 Coll. came into force until the establishment of the Public Defender of Rights by the Constitutional Act No. 90/2001 Coll., the whole chapter dealt solely with the Prosecution.

istrative units.[18] Constitutions do not regulate the budgetary administration of the Public Prosecution; its regulation is left to statutes. The Public Prosecution as a system of state organs always draws its resources from the state budget which is passed by the Parliament. It is crucial whether the Prosecution has a separate chapter of the state budget or whether it is included in the chapter of the Ministry of Justice. Whatever the personal administration of the Prosecution is, the budgetary autonomy strengthens the position of the Public Prosecution in all models and its absence weakens it on the contrary.

A separate chapter of the state budget for the Public Prosecution allows for a better satisfaction of the needs of the system with regard to a deeper understanding of its problems and prevents the transferring of the saved money outside the system. It actually removes the well-known pressure on spending everything as the savings would otherwise be transferred to satisfy other needs than those of the Public Prosecution. Moreover, a separate chapter of the state budget for the Public Prosecution fulfills the principle of subsidiarity preferred by the European Union[19] which provides that the public authority including the administration shall, if possible, be performed on the level which is concerned. This is usually presented within the framework of local administration[20] but the principle can be applied to the public administration as a whole including the administration of individual government departments.

As the proverb says, let every man praise the bridge he goes over. It is possible that the Public Prosecutor's Office will tend to be more open to the views of the Minister who decides over financing of its needs. This is one of the reasons why it is preferable to introduce an autonomous budgetary administration of the Public Prosecutor's Office through a separate chapter of the state budget. However, administrative autonomy is connected with responsibility for the entrusted financial resources. In that case, the Public Prosecutor's Office would have to perform all the duties of an administrator of a chapter of the state budget and its management would be controlled like the management of other state organs who are administrators of chapters of the state budget, including the supervision of the Supreme Audit Office. The Public Prosecutor's Office would also have to defend its requirements against both the Minister of Finance and the Government when the state budget is being drafted as well as during the subsequent budget procedure in the Parliament. Currently, the Constitutional Court is the only judicial organ which has a separate chapter of the state budget although the number of employees of the Constitutional Court is by far smaller than the number of employees of the system of the Public Prosecutor's Office. The Office of the Public Defender of Rights or the Office for the Protection of Competition, which are also much smaller, have separate budgetary chapters as well because the importance of a certain budgetary autonomy is accented in these areas too.

When introducing the budgetary autonomy it is either possible to establish a single chapter of the state budget under the administration of the Supreme Prosecutor's Office or to establish three chapters with a separate chapter for the Supreme Prosecutor's Office and two other chapters for the High Prosecutor's Offices, a part of which would be the budgetary administration of the subordinated Regional and District Prosecutor's Offices. There is a historical analogy as there was a separate administration of the Supreme Prosecutor's Office and the High Land Prosecutor's Offices (one for Bohemia and one for Moravia and Silesia), to which the Regional Prosecutor's Office was subordinated, during the monarchy and Czechoslovakia although the Supreme and High Provincial Prosecutor's Offices did not have separate chapters of the state budget as they were – independently on one another – connected to the budget of the Ministry of Justice. This was repeated, already with separate chapters of the state budget, in the period from 1969 until 1992 when there was a separate administration of the General Prosecutions of the Republics and their subordinated Public Prosecutions which existed in parallel with the Prosecution General of Czechoslovakia.

Personal administration

A majority of constitutions do not deal with the appointment of lower-level Public Prosecutors and leave this issue to be regulated by ordinary statutes. Prosecutors are appointed to their functions either by the Minister of Justice or by the Prosecutor General. As regards the Prosecutor General, constitutions often contain regulation of his appointment to function. He or she is usually appointed by the Head of State on the proposal of the relevant body. Appointment of the Prosecutor General by the Head of State corresponds to the appointment of other chiefs of supreme bodies in the European countries.[21] Such bodies are usually the Government (the Prime Minister), the Parliament or other body. Even though the subject that makes the proposal

[18] Chapter ten of the Organic Law of the Federal Republic of Germany of 23rd May 1949 which, compared to a standard constitutional regulation, regulates the public finances in great detail, is an exception in this regard. In Vladimír Klokočka, V., Wagnerová, E.: Ústavy států Evropské unie (Constitutions of the EU Member States), 1st edition, Praha 1997, 273–279.

[19] Art 3b of the Treaty on European Union and Protocol on the Application of the Principles of Subsidiarity and Proportionality as amended by the Treaty of Lisbon. In: Novotná, M.: Princip subsidiarity v právu Evropských společenství (Principle of Subsidiarity in the EC Law), *Právník* 3/1995. Marcou, G.: New Tendencies of Local Government Development in Europe, in Local Government in the New Europe, ed. R. Bennett, 1993.

[20] Art 4 para 3 of the European Charter of Local Self-Government No. 181/1999 Coll. determines that the administration of public affairs shall be above all entrusted to the administrative bodies which are closest to the citizens while admitting the responsibility of other subject has to correspond with the scope and character of the task as well as with the requirements of effectiveness and economic efficiency. Slovakia has made a reservation to provide for a non-biding effect of this article because of the strong Hungarian minority in the south of Slovakia. Kadečka, S,: Svobodná normotvorba obcí (Free legislation of the local communities) 1, *Moderní obec* 9/2000, *Právo obcí a krajů*. 8–9.

[21] The Hungarian Prosecutor General, who is appointed by the National Assembly on the proposal of the President, is an exception. Art 52 Section 1 of the Constitution of the Republic of Hungary of 1949 which even provides for a supervision of the Prosecutor's Office over the service of a sentence on the constitutional level. Klokočka, V, Wagnerová, E.: Ústavy států Evropské unie (Constitutions of the EU Member States), 2. Volume, Linde Praha 2005, 168.

differs, the rule for appointing the Prosecutor General provides that an agreement of two subjects is required which ensures greater agreement on the appointment of a particular person. Because the process of removing from office is analogical to the process of appointing, unless it is provided for otherwise, it also ensures greater independence of the appointed person on the appointer as an agreement of a minimum of two subjects is required also with regard to dismissal.

As regards the Czech regulation, a change in the appointment of the Supreme Prosecutor is possible. Currently, the Supreme Prosecutor is appointed by the Government on the proposal of the Minister of Justice.[22] Although these are two subjects as well, they are politically close. A possible change could provide for the appointment of the Supreme Prosecutor by the President on the proposal of the Government. The appointment would be subject to countersignature by the Prime Minister.[23] It is clear, even without an explicit regulation, that the proposal within the Government would be made by the Minister of Justice as a chief of the representing – even though not the governing – department of justice. It is unusual for the Czech statutes to provide explicitly that if the government has a certain right to make proposals, it has to do so on the basis of a proposal of a particular Minister. It is a custom that the suggestion regarding the Government's proposal is made by the Minister of the department which is concerned, however, it is not explicitly regulated in the statutes.[24] When the law provides that the decision of the President of the Czech Republic is conditioned by the proposal of the Government, there is no provision regarding the Government being bound by the proposal of a particular Minister.

Of course it is possible to involve the Chamber of Deputies into the system of appointing as well. However, the experience shows that the appointment to positions which are appointed by the Chamber of Deputies become subject to bargaining between political parties and a part of a political trade-off. So we will elect you the Supreme Prosecutor if you elect our candidates into the Czech Television Council etc. Moreover, the experience has already shown that the Chamber of Deputies is sometimes not able to elect the successor, as in the case of the President and the Vice-President of the Supreme Audit Office.[25] However, even if the Chamber of Deputies was involved in the appointment process, the Government cannot be excluded from it, even though it is only in the position of a proposer, because the Public Prosecutor's Office is subsumed under the Government within the framework of the executive power in the Czech Republic. It is also not possible, under the current model of personal and budgetary administration of the Public Prosecutor's Office by the Ministry of Justice, that the Minister of Justice would not have an opportunity to at least express his or her opinion regarding the appointment of the Supreme Prosecutor. From a long-term perspective, the mutual permanent conflictual relationship between the Minister of Justice and the Supreme Prosecutor, as it was between the Minister Pavel Němec and the Supreme Prosecutor Marie Benešová in the period from 2004 to 2005, is not sustainable. Such a conflict does not lead to a good administration of the Public Prosecutor's Office. The most suitable solution within the framework of the present constitutional regulation is to make a change in the personal administration of the Public Prosecutor's Office so that the Supreme Prosecutor is appointed by the President of the Czech Republic on the proposal of the Government. Two subjects should also be involved into the appointment procedure of other chief Prosecutors. Preferably, they should be from the Public Prosecutor's Office, i.e. the District Prosecutor would be appointed on the proposal of the Regional Prosecutor. The Regional Prosecutor would be appointed by the Supreme Prosecutor on the proposal of the High Prosecutor and the High Prosecutor would be appointed by the Supreme Prosecutor with the consent of the Minister of Justice or by the President of the Czech Republic with the countersignature of the Prime Minister on the proposal of the Supreme Prosecutor. The President of the Czech Republic appoints not only the Presidents of the Supreme Court and the Supreme Administrative Court but also the Presidents of the High Courts[26] (in Prague for Bohemia and in Olomouc for Moravia and Silesia).

[22] Sec 9 of the Public Prosecutor's Office Act, No. 283/1993 Coll.

[23] Art 63 paras 2 and 3 of the Constitution of Bohemia, Moravia and Silesia.

[24] E.g. the President appoints the Chief of the General Staff on the proposal of the Government, without being explicitly provided, that it is the Minister of Defense who initiates the proposal in the government; it is a legal custom. Sec 7 para 4 of the Armed Forces Act No. 219/1999 Sb.

[25] The President, Lubor Voleník, died on 19th June 2003 and his successor, František Dohnal, was appointed by the President only on 4th November 2005 on the proposal of the Chamber of Deputies of 26th October 2005. The Vice-president, Dušan Tešnar, resigned on 10th September 2007 while the Chamber of Deputies elected the candidate on his position, Miloslav Kala, only on 30th October 2008 and he was appointed by President of the Republic on 13th November 2008.

[26] Art 62 let f) of the Constitution of Bohemia, Moravia and Silesia. Sec 13 para 2 of the Administrative Justice Code No. 150/2002 Coll. Sec 103 para 1 of the Courts of Justice and Judges Act No. 6/2002 Coll.

The Origins of Public Prosecution in Territory of the Czech Republic

Karel Schelle [1]

1. The Origins of First Public Prosecution Authorities

The historical development of the public prosecution authorities on the Czech territory is associated with the development of the judicial system and the judicial proceeding. In the old ages, the judicial proceeding was united, its differentiation to civil and criminal proceeding being the product of the modern times. Therefore, the proceeding was always characterized by the private-action feature, even in the criminal issues. The trend to the public prosecutor constitution is always apparent with the increased integration of the society. Mentioned trend was fully reflected in the office of the Crown Prosecutor.[2]

The Emperor Sigismund established the office of the crown prosecutor in our lands in the year 1437. Vilém of Žlutice, whose task was to plead for the king in the judicial proceeding, was appointed as the very first crown prosecutor. The pragmatic reason for the establishment of this particular post was the effort of the king for the return of the king´s estates disrupted during the Hussite wars. The Emperor Sigismund most probably found the inspiration for the establishment of the office in more developed Western Europe, especially France, where the crown prosecution office had been established already in the 14th century. The influence of the Roman law perception is indisputable, too. Procuratores fisci vel caesaris represented the interest of the state administration ("fisci") and the emperor already in the ancient Rome.

The sphere of activity of the crown prosecutor quickly spread; soon he took over the representation of the property interests of the crown at the courts. Moreover, he assisted in the criminal offence fine collection, flowing into the crown chamber. These fiscal reasons resulted in the fact that at a certain point of the beginning of the 16th century the crown prosecutors started to prosecute the criminal offences, which the private prosecutor did not prosecute. The crown bailiffs played the similar role with regards to the municipal courts. Nevertheless, the vast majority of the criminal offences were still prosecuted on the grounds of the private initiative.

The sphere of activity of the crown prosecutor further expanded in the 16th century. Besides the protection of the interest of the state and the representation of the public prosecution, the crown prosecutor provided the monarch with the advice, participated in the legislative activities and sat on certain courts. In the age of the House of Hapsburg the prosecutor acted as the public interest protector. He represented the liege people in the disputes called out by the suzerain oppression, which very frequently prevented the liege people from the fulfillment of their obligations towards the landlord. In connection with the increase of the agenda, at the end of the 16th century the prosecutor took on the assistants; consequently, the office, where only the chief of the office – a prosecutor – represented the real representative of the monarch, was born. These offices were called the prosecutor chamber offices ("prokurátorské komorní úřady"), or the fiscal offices. The Revised Ordinance of the Land ("Obnovené zřízení zemské") confirmed the position of the crown prosecutor as the public prosecutor, and the obligation to prosecute all criminal offences was assigned to him. Thus, we can assume that the way to the constitution of the public prosecution authorities was completed by the Revised Ordinance of the Land. Nevertheless, the importance of this authority as the public prosecution authority faded into the background. The reason was the fact that already in the 17th century the inquisitorial system of law started to be extensively applied in our lands. This form of the proceeding had its origin in the Roman proceeding of the Emperor´s time, and was introduced into our system of law through the canon law. The inquisitorial proceeding is not outlined as the dispute of the party, and we can doubt whether it represents the contentious proceeding. The nature of the legal relationship among the individual parties and the court rather indicates the special type of the non-litigation proceeding. The inquisitorial judge actively plays the role of the plaintiff, judge and defender. The prosecutor does not exist in the inquisitorial system at all. Should be the proceeding initiated to the suggestion of a person, such a person would be called "denunciant" ("informer"). From the legal-political point of view, such type of the proceeding represents united, internally non-differentiated state authority, typical of the absolutistic government. In the 18th century the

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[2] The position of the royal prosecutors see Dřímal, J., Stupková, M.: *Česká finanční prokuratura,* Praha 1970; Dřímal, J.: *Královský prokurátor a jeho úřad do r. 1765,* Sborník archivních prací, XVIII, 1968; Dřímal J.: *Královský prokurátor a jeho úřad v letech 1765–1783,* Sborník archivních prací, XX, 1970; Jurášek, S.: *500 let finanční prokuratury v Praze,* Prague 1937. See also the entry *Finanční prokuratura* in Slovník veřejného práva československého, Brno 1929, volume I.

inquisitorial proceeding absolutely prevailed in spite of the fact that the adversial system of law formally existed, though in a very limited scope, until the publication of the court criminal code of the Emperor Joseph II. in 1788.

Should not the inquisitorial court demand the prosecutor for the opening of the proceeding, it was clear that the importance of the public prosecution authorities stepped back. The development of the title of the crown prosecutor is linked with a.m. Whereas in the 17th century the office was named as the "prosecution office", later the title "crown fiscal office" started to be used, and in the 18th century only the "fiscal office".[3] However, the criminal agenda of the fiscal offices did not cease to exist until the year 1850, when the offices were cancelled. Their obligations were namely the prosecution of the false noblemen, the oppression of the liege people by the suzerain, prosecution of the usury and contraband.

2. Formation of Prosecution after 1848

A dramatic change in the development occurred in the year 1848. The revolutions against the feudalism system were reflected nearly immediately in all spheres of the state organism of the monarchy as well as in all fields of the life of the society. The April Constitution was proclaimed as a consequence of the defeat of the feudal regime, the peasants were freed from the labor duties as well as the corvée and the landlord authorities. Thus, the space for the establishment of the new administration system was opened, for the establishment of the new authorities of the public administration as well as for the development of the territorial self-government. One of the requests of the revolutionary forces was the elimination of the influence of the absolutistic government over the justice performance. The expression was the separation of the justice from the administration, introduction of the civil control over the justice execution (public trial, trial juries), elimination of the inquisitorial system of law and its substitution with the adversial proceeding. Furthermore, all these requirements were also reflected in the justice organization. Nevertheless, we should highlight that the separation of the justice from the administration was firstly only theoretical, as the old patrimonial offices, i.e. the courts, had to be hold in the activity until 1850 as well.

Thus, the end of the absolutistic monarchy made the existing method of the state power execution impossible, and the new institutions – very often influenced by the examples from developed Western Europe – came into the existence upon the ruins of the old institutions.

The temporary offices of prosecution were established in the middle of the year 1848, acting in the prosecution of the press issues, judged by the juries. Their status was temporarily modified on March 29, 1848, and later by the Emperor´s patent declared under the number 164/1849 of the Imperial Code. The legal basis for the establishment of the institution of the public prosecutors in the Austrian and Czech lands laid § 103 of the Stadion´s constitution (March Constitution) as of 1849[4], applying the accusatory principle in the criminal process. The inquisitorial proceeding was thus eliminated; on the contrary, the position of the authorities meeting the function of the public prosecution was strengthened.

The existence of the offices of public prosecution was guaranteed in the foundations of the new judicial establishment[5] and transferred into the Emperor´s decisions, implementing the new judicial organization into the individual crown lands. The decree no. 290/1849, Imperial Code, applied to Bohemia, to Moravia and Silesia the decree no. 291/1849, Imperial Code. The organization of prosecution was modified by the "organic law for the prosecutions"[6], clearly identifying the fields of their activities, issued on the basis of the Emperor´s decision as of June 14. 1849. In §§ 29–30 in the authentic German text was entitled "Staatsanwaltschaft" and in the Czech translation "státní návladní" (literally "state prosecutor"). This is a moment when the Czech criminal law terminology recognizes concurrently the titles "prosecution" and "state procuratory" until the beginning of the First Republic.

The organic law for the offices of public prosecution confirmed the position of the staff, the sphere of activities in the civil issues, the influence to the justice administration, supervision over the laws as well as the staff regulations. Minister Schmerling declared in the foreword to the proposal that together with the introducing of the independent courts a body, connecting the courts and government, would be essential; however, on the other hand, the protection of the law would have to be taken into consideration. I.e. trends, concurrently occurring during the introduction or reorganization of the public prosecutions in certain, at that time independent, lands of the German Bund were reflected.[7]

Already the Stadion´s Constitution as of 1849 stipulated the focus of the prosecution activities on the criminal proceedings. The organic law in § 69 also referred to the temporary Rules of Criminal Procedure as of January 17, 1850, no. 25/1850, Imperial Code, coming into force as of July 1, 1850, according to which (see § 51) the prosecutors were to practice in all district judiciary courts ("okresní sborový soud") as well as in all land courts ("Landesjustizstelle"; "zemský soud") with necessary number of the deputies (substitutes), office clerks and attendants. The supreme procurators or the supreme public prosecutors with necessary number of the deputies (general attorneys) were to be assigned for the supreme land courts in the capital cities of the crown lands – in Prague for Bohemia, in Brno for Moravia and Silesia, and in Vienna in terms of the Supreme Office of Justice ("Oberste Justizstellle"; "Kasační soud") in Vienna. Their preparatory activity in the capital cities of the crown lands commenced in spring of the year 1850. For example, from March 1850 till today was continuously preserved the official correspondence of the attorney general in Prague with Prague governor. The office of the general prosecution in

[3] Inquisitorial system in our country see in detail Storch, F.: *Řízení trestní rakouské,* Prague 1887, volume I, page 57 et seq.
[4] Emperor´s patent as of March 4, 1849, no. 150 Imperial Code.
[5] See §§ 29–30 enclosure to the Emperor´s decree dated June 14, 1849, published under no. 278/1849 Imperial Code.
[6] Emperor´s patent no. 266/1850 Imperial Code, as of July 10, 1850.
[7] Turek, A.: Státní zastupitelství v českých zemích v letech 1850–1959, Sborník archivních prací, IX, 1959, page 109.

Brno was certainly effective from April 1850. The prosecution of the individual land and district judiciary courts was mostly built simultaneously with them from April of the year 1850. The offices of prosecution also started to be assigned with the first tasks. According to the writ of the Ministry of Justice dated April 24 and the attorney general from Prague dated May 25, 1850, the prosecution was supposed to supervise the district courts as well as just forming the district judiciary courts, i.e. maintaining of the protocols, proper premises, all officers taking-up their posts, proper taking-over of the judicial dossiers from the former patrimonial officers per the instructions from November 9, 1849, and April 30, 1880 etc. A formal opening ceremony of the activity of the offices of public prosecution was held on July 1, 1850, together with the activation of the newly organized courts.[8]

More or less, the offices of public prosecution copied the examples of the reformed German criminal codes, inspired by the French examples.

The basic task of the offices of public prosecution per the temporary criminal code no. 25/1850, Imperial Code, as of January 17, 1850, was the "ex officio" prosecution of all identified criminal acts, besides those prosecuted only upon the request of the involved person, i.e. the private-suit criminal offences. Out of it results that the main mission of the offices of public prosecution was to defend the interests of the state in the maintaining of the law during the judicial proceedings, the filing of the public penal bills and the representation of the state in the prosecution; however, simultaneously to pay attention to the prevention of the prosecution of the innocent persons. Public prosecutors were supposed to supervise the lawful run of the investigation and to prevent the unnecessary prolongation of the prosecution. They were entitled to inspect the files, to submit proposals both orally and in written, to ask for the assistance the safety and other authorities in the stage of the preliminary investigation, to participate in the court meetings; however, the latter not in voting or pronouncing the judgments, which – in such a case – would had been invalid. I.e., their sphere of activity included their participation in all preliminary investigations for the offences and crimes and in all main sessions of the district judiciary courts as well as land (regional) courts, unless the attorney general in the Supreme Land Court reserved the individual cases for himself. The main sessions of the jury courts fell into the sphere of activity of the offices of public prosecution of those land courts, in the seat of which the juries seated. Nevertheless, the attorney general could assign this work to the prosecutor from any district judiciary court.

§§ 89 et seq. stipulated the position of the prosecutors to the inquisitorial courts of the regional and district judiciary courts. According to these provisions the preliminary investigation of the offences and felonies could be transferred – with the consent of the prosecutor – from the district judiciary court to the district court, in the territory of which the accused person lived. The preparatory proceeding itself could be opened only upon the proposal of the prosecutor; however, the inquisitorial judge was obliged to inform prosecutor about the crime or felony (if he had known it earlier) or in case of emergency to act by himself and to report the prosecutor immediately. In the preparatory proceeding stage the prosecutor could gather documents and proofs, could influence the preliminary investigation; nevertheless, he could not participate in the due examination of defendants and witnesses. However, he could ask judges or safety authorities to investigate the witnesses under the oath; in emergency cases in the absence of the inquisitorial judge the prosecutor could ask the police or judicial authorities to examine the scene of crime, to execute the house searches etc. and to participate personally; nonetheless, he was obliged to pass the acquired information to the inquisitorial judge immediately. Denunciations lodged at the district courts were to be forwarded to the relevant offices of public prosecution at the district judiciary courts. Paragraph 111 stipulated the termination of the criminal proceeding on the basis of the agreement between the public prosecutor and the inquisitorial judge. Unless they reached an agreement, the district judiciary court was entitled to make a decision. In the case of the jury misconduct, the files were submitted to the supreme public prosecutors for their application of the drafts after the preliminary finished investigation in certain terms.

In the main session the public prosecutor was entitled to ask defendant, witnesses as well as experts. Based on serious reasons, he could file a motion for the exclusion of the public from the main hearing, its termination and interruption, for the prosecution of another offence of the same defendant and for the arrest of the witness in the courtroom for the false testimony. He could reject a half of proposed jury members. He was entitled to apply the remedial instruments in the jury cases in three days and to apply them in 14 days; he was to report the complaints into the sentences of the district judiciary courts in 14 days, complaints to the sentences of the district judiciary courts to report in 24 hours and to apply them in 10 days, both for the benefit or detriment of the defendant. The supreme public prosecutor could apply the same on his own at the Supreme Land Court as well as the Highest and Appeal Court.

The activity of the public prosecutor in the press issues deserves a special attention. The safety offices either on the grounds of their powers or on the basis of the command of the public prosecutor could confiscate every printed matter published or distributed, failing to satisfy certain regulations, contained in the press patent, or the content of which established the criminal offence, which could be prosecuted from the point of the public interest. The press offences heard at the district courts, more serious offences and misdemeanors the public prosecutor prosecuted at the judiciary courts, usually district judiciary court. However, the practice was to be applied only till the new criminal code declaration.

Originally, the public prosecution held rather broad authority in the civil court proceeding. As of October 1, 1850, until the further legal regulation, the public prosecutors at the land courts and the attorneys general at the supreme land courts were to co-participate (under the sanction of the invalidity of the particular judicial proceeding) in the hearings regarding the

[8] Turek, A.: *Státní zastupitelství v českých zemích v letech 1850–1959,* Sborník archivních prací, IX, 1959, page 109.

separation, findings of the invalidity of the marriage and the declaration of the deceased for the purpose of the concluding of the new marriage as well as the sessions on the state citizenship loss. Furthermore, they assisted in the sessions of the judiciary courts in the issues of the adoption, identification, custody, in the disputes on the competence among the courts or among the courts and administrative bodies, in the rejection of courts and judges, delegations and complaints syndicate and in all issues of the non-litigation proceeding, namely orphanage, negotiated in the second and third instance.

§§ 70–83 of the organic law and certain provisions of the Emperor´s patent as of January 28, 1850, no. 258/1850, Imperial Code, specified the temporary affiliation and co-operation with the courts in certain administrative cases. A.m. consisted of the participation of one administration officer of the office of public prosecution on the occasion of the judicial, advocacy and notary examinations, decision on the occupation of the places of the judges of land, supreme land and the Highest court, resp. the auditions for the post occupation, compilation of juries, plenary meetings, especially if related to the changes in the organization of justice and legal instructions, cooperation in all disciplinary issues of the judges, judicial officers, lawyers as well as notaries and in the overall supervision over the condition and operation of the judicial administration (maintaining of the files of the staff, attendance sheets, replacements, holidays). Attorneys general of the supreme public prosecutions were to report annually the Minister of Justice on the condition and operation of the justice administration, on found-out defects in the legislative and incorrect judicial practice. The offices of public prosecution of the district judiciary courts and the land courts made detailed lists and sheets, reported quarterly. The public prosecutors of the land and district judiciary courts were to report to the governor every sentence regarding the deportation or expulsion of the alien for the criminal offence in three days.[9]

The supreme public prosecutors executed their offices in the supreme land courts "ex officio".[10] Moreover, they supervised subordinated offices of public prosecution of district judiciary courts and land (regional) courts; these courts were obliged to report the monthly statements on settled and pending criminal issues and in important cases to send those reports with the request for advice or decision. The supreme public prosecutor was obliged to quarterly report to the Minister of Justice on settled and pending cases. The governor could establish the emergency courts, with the cognizance of the relevant supreme public prosecutor, who could then appoint the public prosecutors for such court. The supreme public prosecutor (attorney general) at the Highest and Appeal Court in Vienna participated in all sessions both in criminal and civil issues, he was supposed to supervise the equality of the law and correct application of the law. Each year he reported to the Minister of Justice on the operation of the office and on defects in the legislative or judicial proceedings.[11]

Contrary to the post of the judges, the members of the office of public prosecution were not independent, non-deprivable and non-transferrable. The members of the offices of public prosecution of the lower instance courts, i.e. district judiciary courts and land courts, were subordinated to the offices of public prosecution of the courts of higher instance, i.e. the supreme offices of public prosecution at the supreme land courts. The administrative officers of the offices of attorney general (the supreme offices of public prosecutions) at the supreme land courts and the Highest and Appeal Court in Vienna were subordinated directly to the Ministry of Justice.

The organic law on the offices of public prosecution identified the job requirements to the administrative officers of offices of public prosecution. I.e., a person respectable, reliable with passed government judicial examination or government (lawyer) examination. The examination could be waived to the applicants, who passed the examination to the fiscal adjunction, advocate examination or practiced as the public judges. According to the decree of the Ministry of Justice as of August 7, 1850, the passing of the judicial and advocacy examination made applicants capable for the service in the office of public prosecutor. The examination was supposed to be passed in the language common in the territory of the relevant supreme land court; in territories with the co-existence of more nations the examination was supposed to be passed at least in one another language, common in such territory. The provision § 7 then directly ordered the administrative officers of the offices of public prosecution to master the languages of their districts. The Emperor appointed the attorneys general (supreme public prosecutors) and their deputies (general advocates), as well as the public prosecutors of the land courts and their substitutes in the seventh rank class; Minister of Justice appointed other substitutes and the supreme public prosecutor appointed remaining administrative staff. Mentioned substitutes of the public prosecution in the lower rank and salary classes, often younger from the time term service point of view, sometimes operated as the deputies of the public prosecutors at the land courts; however, usually as the chiefs of the offices of public prosecution at the district judicial courts. Because of this, as the public prosecution of these courts they were sometimes incorrectly addressed as the substitutions of the public prosecution, in spite of the fact that their official title always was "public prosecution of district judicial court". Pursuant §§ 25 and 26 of the organic law the attorneys general could lodge – in the temporary period – the expertise on the need of the posts in the public prosecution or to utilize so far capable judicial officers. With respect to the acceptation of the auscultatory staff and legal articled clerks as the future administrative officers – the agreement between the office of the general attorney and supreme land court was necessary. Nevertheless, only the Minister of Justice could order the dismissal or forced pensioning of any clerk of the public prosecution; the general attorney had the same authority over the office attendants. The opinion on the dismissal of the officer prepared the supreme land court or the Highest Court. Only the Minister of Justice made decision on the temporary

[9] See decree of Ministry of Justice dated July 26, 1850, Imperial Code.
[10] Emperor´s patent as of January 17, 1850.
[11] See no. 325/1850 Imperial Code as of August 7, 1850.

degradation of the attorney general; the attorney general on the degradation of other officers. An appeal against the decision in the disciplinary issues coming from the offices of public prosecution could be lodged to the attorney general, the appeal to the decree of the attorney general to the Minister of Justice. Nevertheless, the disciplinary proceeding per the organic law no. 266/1850, Imperial Code, was to be applied to the members of the offices of public prosecution only from July 1, 1851, whereas the decree of the Ministry of Justice dated August 21, 1848, should have been temporarily followed.[12]

The lowest authorities of the public prosecution, i.e. officials of the offices of public prosecution assigned to the regular district courts were not disciplinary subordinated to the attorneys general. They were police commissioners, officers of the district hetman offices or the members of the city managing board, hosting the seat of the particular district court. They were supposed to be the law keepers, protecting the interests of municipalities and state as well as against the courts and the individual members of the staff so as to prevent any mistakes during the session. They were appointed by the attorney general on the basis of the agreement with the governorate. From the professional point of view they were subordinated to the offices of public prosecution of the relevant district judiciary court. However, the public prosecutors of the land and district judicial courts could take part in the offence criminal proceeding, as directly commanded by the Minister of Justice by his decree no. 144, Imperial Code, dated May 14, 1851, in terms of the preliminary investigation of the offences and crimes.[13]

The attorneys general were sworn at the supreme land courts as well as the Highest Court to the Minister of Justice personally, the other administrative staff of the offices of the general prosecution to the attorneys general, the other officers and attendants to their immediate seniors. Scriveners (copyists serving for the daily wage), officers and legal articled clerks took a vow. The salaries of the staff in the prosecutor´s office were rather good: attorney general of the supreme court drew as the basic annual salary 6 000 Kronen and 1 000 Kronen of the office and apartment allowance, the annual salary of the attorneys general in Bohemia and Moravia amounted to 4 000 Kronen, their deputies 2 500 Kronen and 2 000 Kronen, the public prosecutors working in the land courts received 2000–2500 Kronen, the substitutes 800–1 200 Kronen[14], several office staff working in the prosecutor´s office 600–800 Kronen per year, in the countryside 400–500 Kronen, the attendants 250 to 400 Kronen. In average, one or two substitutes, officers, scriveners and one attendant were assigned to each office of public prosecution.[15]

A considerable emphasis was laid to the moral profile of the potential staff of the office of public prosecution. The Emperor patent no. 81/1853, Imperial Code, on the organization of the courts (May 3, 1853), staying in force also in the first Czechoslovakia Republic, stipulated the unacceptability of the hiring a person without perfect moral and good political behavior confirmed by the satisfactory certificate or undoubted in any other way. Above mentioned directive referred to the staff of the offices of public prosecution, too.[16] The officer representing the office of public prosecution enjoyed special position and protection in the court proceeding, sitting at the special table, and the first word next to the chairperson was assigned to him.

In certain cases, the law enabled his disqualification. Namely these were cases of his relationship with a certain party or the cases giving the rise to any harm or benefit to him on the grounds of the proceeding. Of course, acting in the same case as a witness, defender or public prosecutor in the first instance etc. Nevertheless, the party itself could reject the public prosecutor only in the civil proceeding issues.

[12] Decree of Ministry of Justice dated August 7, 1850, no. 328 Imperial Code.
[13] Turek, A.: Státní zastupitelství v českých zemích v letech 1850–1959, Sborník archivních prací, IX, 1959, page 110.
[14] In Bohemia 66, in Moravia and Silesia 33.
[15] See Turek, A.: *Státní zastupitelství v českých zemích v letech 1850–1959,* Sborník archivních prací, IX, 1959, page 111.
[16] Turek, A.: *Státní zastupitelství v českých zemích v letech 1850–1959,* Sborník archivních prací, IX, 1959, page 108.

A Couple of Notes on the Nazi Criminal Law[1]

Jaromír Tauchen[2]

I. The Ideological Foundation of the Nazi Law

It is important to concentrate on the relationship between Nazis on side and judiciary, lawyers and law on the other, so that one could better understand the concept of Nazi criminal law. Such a relationship may be demonstrated on Nazi ideology and legal science. Nonetheless the legal science of the era of National Socialism was not complex, for their ideas were often unclear, incomprehensible and inexplicit. An approach to law and to the status of judiciary were influenced and formed by the following persons:

- firstly, it was the "Fuehrer" and the chancellor of German Reich Adolf Hitler and two head representatives of the Nazi party;
- ministers of Justice and top lawyers, e.g. Reich's fuehrer of law Hans Frank;
- group of legal theorists – the most important legal theorist of the era of National Socialism was Carl Schmitt.

Adolf Hitler was a person who had probably the most significant ideological influence on the view of judiciary and lawyers, for his ideas were the fundamentals that were further elaborated by legal theorists.

The program of the NSDAP of February 24, 1920[3] does not really deal with criminal law – it only mentions law inconsistently in sections 4, 6, 10, 11, 17–19 and 24. Only the section 18 deals marginally with criminal law:

> *"We demand struggle without consideration against those whose activity is injurious to the general interest. Common national criminals, usurers, Schieber and so forth are to be punished with death, without consideration of confession or race."*

According to Hitler's belief, it was important to reshape legislature and judiciary into political weapons of the system. Hitler thought that the main objective of law and judiciary was especially protection of national society. Under the ideology of Nazism, a culprit who committed a crime did not violate rights of an individual, but rather of national community (society). A person accused in criminal proceedings who appeared outside of the national society became an enemy of the people. On the day of four year anniversary of the national socialist's gaining power, Hitler articulated the goals of judiciary as follows:

> *"One of the tasks assigned to the courts is to protect nation against those elements that try to avoid their duties or that commit an offence against interests of society."*

The following excerpt illustrates Hitler's approach to law:

"It is not that we should take into consideration humane feelings. I also cannot spend too much time trying to find who acted with a good will or if someone is guilty… it would be funny to ask me to find only real malefactors among communists. Legal proceedings are only cowardly bourgeois inconsistency. There is only one law – life law of a nation."[4]

During his being a Reich chancellor, Hitler himself interfered with judiciary and the pace of justice. Thus Hitler assumed the right to stand over judiciary and he declared himself to be the supreme justice of the German nation. Hence he could have interfered with judiciary anytime he wanted – there were any obstacles that would have prevented him from so doing.

He revised the decisions made by criminal courts that were according to him too moderate. Since 1938 this would be carried out by issuing an order on the grounds of which certain persons were shot to death or passed to Gestapo. Hitler made such orders without knowing the facts of such particular cases, sometimes only on the grounds of short news published in daily newspapers and without even asking for more accurate report by Ministry of Justice.[5]

There were a couple of prominent lawyers engaged in drafting of national socialistic law and revision of the then actual law and these lawyers held all kinds of functions at NSDAP or Reich's Ministry of Justice. Just to name a couple of them, they

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[1] This article draws upon dissertation thesis of the author, which was published in 2010. Cf: Tauchen, J. *Vývoj trestního soudnictví v Německu v letech 1933–1945,* Ostrava: The European Society for History of Law, 2010, 186 s.

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[3] Published by: Hofer, W. *Der Nationalsozialismus. Dokumente 1933–1945*, Frankfurt am Main: Fischer Verlag, 1957, p. 28–31.

[4] Rauschning, H. *Rozmluvy s Hitlerem*. Translated into Czech by Petr Bláha. Červený Kostelec: Pavel Mertvart, 2006, p. 62.

[5] Weinkauff, H. *Die deutsche Justiz und der Nationalsozialismus. Ein Überblick*. Stuttgart: Deutsche Ver.-Anst., 1968, p. 44.

were: Hans Frank,[6] Roland Freisler[7] or Otto Thierack. Further, there were: Helmut Nicolai, Wilhelm Stuckart or Kurt Rothenberger.[8] These lawyers were spreading the ideas of National Socialism on law and the fundamental ideas of Nazi ideology to members of certain legal professions. This practice was being done by means of print, such as legal journals "Deutsches Recht" or "Deutsche Justiz". They understood the purpose of law as keeping government by Nazis and the idea of National Socialism. In their writings, one can find such pronouncements: *"Law is everything that may serve German nation"* or *"you are nothing but your nation is everything"*.

Even the Academy of German Law seated in Munich was supposed to play certain role in the process of "restoration of law". The Academy, led by Frank, was to reshape the whole legal order in light of National Socialism. As for criminal law, they were working, for instance, on recodification of Criminal Code. For the national socialists did not want to be bound by written legal norms, the works by the Academy were not of significant importance for German law and no such codification was issued.

As for universities, there was a group of law professors led by Carl Schmitt, who were strongly supported by the Nazi party and by teaching law at law schools they influenced education of young lawyers. Moreover they claimed they had monopoly over interpretation of legal norms. Other top representatives of this group were Otto Koellreutter, Hans Gerber and Reinhard Höhn.[9]. Nonetheless, Carl Schmitt was the most famous person of this group and he was called the "crown" lawyer of the Third Reich *(Kronjurist des Dritten Reiches).*[10]

The so-called Kiel school *(Kieler Schule),* which was intertwined with the law school of Christian-Albert University in Kiel, played an important role on the field of criminal law. Especially Georg Dahm and Friedrich Schaffstein were connected with the University's Department of Criminal Law. Nonetheless, the so-called Kiel school disintegrated at the end of thirties when these lecturers and professors were called to other universities in the Reich, for the Nazi regime was in need for politically conscious professors.[11]

II. The Nature of the Criminal Law of National Socialism

It was typical for the national socialistic laws that their goal was not to achieve justice. They openly denied the principle of equality and other fundamental legal principles that had been developed throughout the development of law throughout the history. The Nazi law had changed the relationship between law and state and between law and individuals. Whereas before 1933, individuals had been the ones who were of significant importance and laws had bound both the state and individuals and one of the goals of law had been protection of individuals after the Nazis took over power, situation changed quickly. The task of courts was not to protect interest of individuals, but especially to guard interest of "the entirety". The "entirety" was represented by German nation, which now exercised primary judicial protection. Aside from the traditional written sources of law, there were new sources of law by which a judge was bound. These sources were especially "fuehrer's will" and "the ideology of National Socialism".[12] Notwithstanding that some representatives of the Third Reich were trying to persuade public how independence of judges was important and how such independence ought to be kept, as time went by the judges were being deprived of such independence and there were pushed to apply both the old and new laws in compliance with the ideology of National Socialism.

During the era of their governance, the Nazis denied numerous principles of criminal law which had been developed throughout the history, e.g. denial of such important principles as *"nullum crimen sine lege"* and "*nulla poena sine lege"* and general principles regarding prohibition of retroactivity of laws, which was abolished by means of the Section 2 of an amendment to the Criminal Code of June 28, 1935 (RGBl. I., S. 839). Moreover, "analogy" was allowed to be exercised in criminal law, which means that not only an act that was criminal according to law, but also any act that – according to the fundamental idea of Criminal Code and so-called "healthy" national feeling – was to be punished. As Martin Broszat stated, the principle of analogy was strongly supported by the leading lawyers of National Socialism, such as Frank, Freiser and Rothenberger. Nevertheless judges, who had been educated in the era of positivist mind, did not apply the analogy as the leading representatives of Nazi judiciary would have liked to see.[13]

In this period, there were passed numerous statutes that established "retroactivity". For instance: the Act against Kidnapping Children and Blackmailing of June 22, 1936 (RGBl. I., S. 493); the Act on Road Robbery of June 22, 1938 (RGBl. I., S. 651), the Decree against Violent Criminals of December 5, 1939 (RGBl. I., S. 2378); and the Decree Protecting against Juvenile Criminals of October 4, 1939 (RGBl. I., S. 2000).[14]

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[6] See Frank's works: *Nationalistische Strafrechtspolitik*, München 1939; *Rechtsgrundlegung des nationalsozialistischen Führerstaates*, München 1938; *Im Angesichts des Galgens*, München 1953.

[7] See Freisler's works: *Richter und Gesetz*, Berlin 1935; *Nationalsozialistisches Recht und Rechtsdenken*, Berlin 1938.

[8] See their important works: Nicolai, H. *Die Rassengesetzliche Rechtslehre*. Mnichov, 1932; Nicolai, H. *Der Neuaufbau des Reiches nach dem Reichsreformgesetz vom 30. 1. 1934*. Berlin, 1934; Stuckart, W. *Nationalsozialistische Rechtserziehung*. Frankfurt am Main, 1935; Rothenberger, K. *Der deutsche Richter*. Hamburg, 1942.

[9] See some of the important works: Schmitt, C. *Der Begriff des Politischen*, München, 1927; Schmitt, C. Staat, *Bewegung und Volk*, Hamburg, 1933; Schmitt, C. *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg, 1934; Koellreutter, O. *Der deutsche Führerstaat*, Tübingen, 1934; Koellreutter, O. *Vom Sinn und Wesen der Nationalistischen Revolution*, Tübingen, 1933.

[10] Rüthers, B. *Entartetes Recht. Rechtslehren und Kronjuristen im Dritten Reich*. München: C.H.Beck, 1989, p. 23.

[11] Eckert, J. *Die Kieler Rechtswissenschaftliche Fakultät – „Stoßtruppfakultät"*. In: Ostendorf, H., Danker, U. Die NS-Strafjustiz und ihre Nachwirkungen. Baden-Baden: Nomos Verlagsgesellschaft, 2003, p. 21–55.

[12] Knapp, V. *Problém nacistické právní filosofie*. Reprint of 1947. Dobrá Voda: Aleš Čeněk, 2002, p. 50.

[13] Broszat, M. *Der Staat Hitlers. Grundlegung und Entwicklung seiner inneren Verfassung*. 15 edition München: dtv, 2000, p. 417.

[14] Schorn, H. *Die Gesetzgebung des Nationalsozialismus als Mittel der Machtpolitik*. Frankfurt am Main: Vittorio Klostermann, 1963, p. 73.

Further, in the late thirties, so-called "four-year plan" *(Vierjahresplan)* was tackled and any breach of it was also understood as a crime. Such wrongdoings were not regarded as economic wrongdoings, but rather as political ones and were looked on as betrayal.[15]

National Socialists ensured their governance by these and similar laws and harsh punishments. The judgments that were being passed by German courts can serve as a clear example of unruliness of Nazis, for punishments were disproportional to the scale of offence. This criminal repression was even supported by the fact that it was not difficult to put an accused person in pre-trial custody[16] if "it was not acceptable, with regard to seriousness of a crime, to let such a person go free." Analogous to other legislative measures of Nazis, there were used numerous ambiguous (vague) terms, whose purpose was to interpret law according to National Socialistic ideas. Thus Nazis did not pass a great many of their "own" – typically National Socialistic statutes. They kept in force the laws that had been enacted in the previous era, while adjusting the purpose and meaning of such laws to their own goals.

Even though the new Criminal Code never entered into force, the branch of criminal law was changed significantly in the Third Reich. On the other hand, not all of these changes made after 1933 were based on the doctrine of National Socialism, as some of them were inspired by previous reformatory efforts, which, already at the beginning of the twentieth century, asserted that it was important to carry out reforms of the Criminal Code of 1871, which was based on the Prussian Criminal Code of 1851.[17]

The roughness of the first laws that had been passed shortly before the World War II started signalized that criminal repression, being prepared during that time, was on the rise.

III. Conclusion

The fundamental postulate of the Nazi criminal law was protection of national society. Whereas other systems of law based their legal principles on individuals in order to achieve law of a society, the Nazi law and legal systems influenced by it, inferred individuals' rights from law of society (national community) and demanded that the then actual legal thought be reshaped.[18]

One of the core tasks of a state as a form of community was to establish circumstances of development of national community. One of these circumstances was protection provided by criminal law. The core value protected by criminal law of National Socialism was this so-called national community.[19] Even in economy, community benefit was put ahead of benefits of individuals.[20] It was on purpose that the laws of Nazis used ambiguous legal terms that could have been interpreted widely and thus could have been misused, e.g. such terms as "healthy" national feeling of "good of nation". The principle of analogy (*analogie legis*) in criminal law degraded law and punishment were not proportional – even for bagatelle offences, such an offender could have been sentenced to death.

[15] Dageförde, O. *Die Aufgaben der Richter und Rechtspfleger im Vierjahresplan*. Deutsche Rechtspflege,1937, No. 8, p. 228.
[16] The Act of June 28, 1935 (RGBl. I., S. 844).
[17] Dreier, R., Sellert, W. *Recht und Justiz im „Dritten Reich"*. Frankfurt am Main: Suhrkamp Verlag, 1989, p. 151.
[18] Nýdl, B. *Základy národně-socialistické nauky právní*. Právník, Vol. 78, No. 1, 1939, p. 2.
[19] Nýdl, B. *Základy nacionálně-socialistické nauky právní*. Právník. Vol. 78, No. 1, 1939, p. 1.
[20] This request was already included in the item 24 of the Program of NSDAP of February 24, 1920 „Gemeinnutz vor Eigennutz" (*General interest stands before the interest of an individual).*

Roman provinces – from alterum non leadere to Lex Calpurnia [1]

Miroslav Frýdek [2]

Introduction

Repetundae Pecuniae in its widest sense was the term used to designate such sums of money as the Socii of the Roman State or individuals claimed to recover from magistratus, Judices, or Publici Curatores, which they had improperly taken or received in the Provinciae, or in the Urbs Roma, either in the discharge of their Jurisdictio, or in their capacity of Judices, or in respect of any other public function. Sometimes the word Repetundae was used to express the illegal act for which compensation was sought, as in the phrase "Repetundarum insimulari, damnari;" and Pecuniae meant not only money, but anything that had value. The expression which the Greek writers sometimes use for Repetundae is δίκη δώρων [3].[4]

During the royal period, *crimen repetundarum* could have been committed only by the administrator of Roman nation while he exercised official authority in the province. These were mainly the cases of asking for the "bribe" and appropriation of various things, especially objects of art. The punishment consisted of (as the appellation of the crime itself—*repetundae*—suggests) return of acquitted property. Originally, it was not even possible to appeal to *comitia* because it was the return a property, that had been unfairly acquitted from the inhabitants of the province, that was considered to be the goal of the decision. Later the facts of the cases were supplemented, and a word *repetundae* was used as a reference to the prohibited acts that should be compensated. *Crimen repetundarum* could be, in the later periods, committed also by a judge that accepted a bribe to pronounce a particular verdict [5] or a lawyer that accepted more than 10.000 HS for the pleading.

Rome and provinces

In the third century B.C., Italy was united under the Roman power. Romans extended their influence also to the south part of Italy, and in 276 B.C. conquered the Greek town Rhégia. With this, Romans got to the seaside, which was just a little way from Sicily, a very prosperous island at the time. The eastern part of the island was governed by Greek city states (the most remarkable was Syracuse). From the end of 5th century B.C. onwards Carthage had a few settlements in this eastern part of the island. Sicily had a very favourable strategic position in this regard and both Romans and Carthaginians were conscious of this. Battles between Syracuse and Messana lead to the so called First Punic War. The course of this war will not be discussed as only the result is important for this article. Carthage was defeated and was prohibited to send their boats to the Italian sea. In addition, Carthaginians had to pay reparation to Romans for the following ten years, and they had to retreat from Sicily that was then governed by Romans, with exception of Syracuse and some other cities standing on the Roman side. By this act, Rome acquitted its first province.[6]

Roman provinces from 241 B.C. to 30 B.C.:

- 241 B.C.– Sicily
- 238 B.C.– Corsica and Sardinia
- 203 B.C.– Cisalpine Gallia (in 42 jointed with Italy)
- 197 B.C.– Hispania Citerior and Ulterior
- 167 B.C. – Illyria
- 148 B.C.– Macedonia
- 146 B.C. – Africa
- 129 B.C. – Asia
- 121 B.C. – Transalpine Gallia
- 74 B.C. – Bithynia
- 74 B.C. – Crete and Cyrenaica
- 64 B.C. – Cilicia
- 64 B.C. – Syria
- 59 B.C. – Cyprus
- 51 B.C. – Gallia (divided in 22 B.C.)
- 30 B.C. – Egypt was a personal property of Octavian Augustus and administrated by special vicegerent with title praefectus Augustalis

[1] This contribution was created in the framework of the Roman Criminal Law grant: MUNI /A 1044/2009 Crimen repetundarum.
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[3] Plutarchos: Sulla 5.
[4] SMITH, WILLIAM. *A Dictionary of Greek and Roman Antiquites*. London, 1875, p. 986.
[5] Dig. 48, 11, 3; Dig. 48, 11, 5, Dig. 48, 11, 7 etc.
[6] PEČÍRKA, JAN. red. *Dějiny pravěku a starověku*. Praha 1979. p. 712 and GRANT, MICHAEL. *Dějiny antického Říma*. Brno. 1999 p. 98.

Roman administration of provinces

Romans had to solve the question of administration with the acquisition of the first province. Italian territory that Rome acquitted became an integral part of Roman *civitas*. A different procedure was introduced while administering territories outside Italy. For these territories, an appellation "province" started to be used. *Provincia* in Latin originally determined a function or mission entrusted to an official of Roman nation – army commander. From 227 B.C. it also expressed a territory outside Italy that was administrated by an official. A term province originally did not mean geographically fixed and determined territory, but it represented a territorial scope of an official who exercised his *imperium*.

Every province received its own special statute and its-as we say nowadays-province's constitution – *lex provinciae.*[7] This legislation regulated the main questions concerning administration, property and courts.[8] Romans worked with the local conditions of the province while drawing up the constitution. For example in Sicily, they accepted Syracuse's tax system that was introduced by king Hieron II. This system was based on a direct taxes (fees) equalling the amount of one tenth of the harvest.[9]

First messages about an unfair administrator's behaviour

During the third century B.C., there was no *lex repetundae* dealing with unfair province administrators, and we have no sources describing excesses of province administrators. Livius described,[10] in a beautiful manner, how Roman administrators behaved in provinces and how they had no expenses or special requirements in the provinces. Romans did not inappropriately burden the local inhabitants, and they were thrifty and considerate so that they did not weight down on one city more than the other. They also frequently used a right of hospitable friendship: *"No one before this consul had ever been a burden or expense to the allies. The magistrates were provided with mules and tents and all other requisites simply that they might not requisition anything of the kind from the allies; they enjoyed the hospitality of private citizens whom they treated with courtesy and consideration; and their own houses in Rome were open to those with whom they were accustomed to stay. When officials were despatched to some place on a sudden emergency they only demanded one mule apiece from the towns through which their journey lay. No other expense was incurred by the allies in the case of Roman magistrates."*[11]

One of the first examples of greedy province's administration described in the sources[12] comes from the period of consulate of Publius Lucinius Crassus and Gaius Lucinius Lignus (171 B.C.). It is a complaint of delegates of both of the Hispania provinces that reported "*rapacity and oppression of the Roman magistrates."*[13] Senate that listened to the delegates' pleadings charged the praetor Lucius Canuleius (selected praetor of Hispania by lot) to appoint a commission of five *recuperatores* from *ordo senatorii.* Their mission was to examine the matter. It was probably an extraordinary commission appointed by *senatus consultum*. Livius describes this case in Ab Urbe condita XLIII, 2 as following: *"After this a deputation from the natives of both the provinces of Spain were admitted to an audience of the senate. They complained of the rapacity and oppression of the Roman magistrates, and falling on their knees, begged the senate not to suffer the allies of Rome to be robbed and ill-treated in a more shameful manner than even their enemies were treated. There were other indignities that they complained of, but the evidence bore chiefly upon the illegal seizure of money. L Canuleius, to whom Spain had been allotted, was instructed to appoint five recuperatores drawn from the senatorial order to try each of the individuals from whom the Spaniards demanded redress, and also to give the complainants permission to take whomsoever they pleased as counsel. The deputations were called into the senate-house and the decree was read over to them, and they were told to nominate their counsel. They named four-M. Porcius Cato, P. Cornelius Scipio, L. Aemilius Paulus, and C. Sulpicius Gallus. The recuperatores commenced with the case of M. Titinius, who had been praetor in Hither Spain during the consulship of A. Manlius and M. Junius. The case was twice adjourned; at the third sitting the defendant was acquitted. There was a difference between the deputies; those from Hither Spain chose M. Cato and Scipio as their counsel, those from Further Spain, L. Paulus and Gallus Sulpicius. The former brought P. Furius Philus, the latter M. Matienus before the recuperatores. Philus had been praetor three years previously and M. Matienus in the following year. Both were charged with very serious offences; the proceedings were adjourned and when the whole case was to be gone into again it was pleaded on behalf of the defendants that they had gone into voluntary exile, Furius to Praeneste and Matienus to Tibur. There was a rumour that the complainants were prevented by their counsel from summoning members of the nobility and men of influence, and these suspicions were increased by the action of Canuleius. He dropped the business altogether and began to levy troops, then he suddenly went off to his province to prevent any more people from being worried by the Spaniards. Although the past was thus silently effaced, the senate provided for the future by acceding to the demand of the Spaniards and making a regulation that the Roman magistrate should not have the valuing of the corn, nor compel the Spaniards to sell their twentieths at whatever price he chose, and also that officers should not be forced upon their towns for the collection of taxes and tribute."*[14]

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[7] Author's note: The administrator of Sicily, Rupilius, issued a decree in 131 B.C. that was based on senstuconsultum. It was such a province's constitution that regulated the local circumstances in that way that left all local laws for Sicilians in force. He has only incorporated them into a Roman norm – Lex Rupilia. Mentios of this law were preserved only in the works of Valerius Maximus and in Cicero's Verrinae.

[8] BARTOŠEK, MILAN. *Verrinae Význam Ciceronových řečí proti Verrovi pro základní problémy státu a práva*. Praha. 1977.p. 96.

[9] GRANT, MICHAEL. *Dějiny antického Říma*. Brno. 1999 p. 102 etc.

[10] Livius Ab Urbe condita XLII, 1.

[11] English text from: http://etext.lib.virginia.edu/etcbin/toccer-new2?id=Liv6His.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=88&division=div2 cited 14/11/ 2010.

[12] Livius Ab Urbe condita XLIII, 2.

[13] Livius Ab Urbe condita XLIII, 2.

[14] English translation from: http://etext.lib.virginia.edu/etcbin/toccer-new2?id=Liv6His.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=156&division=div2 cited 14/11/2010.

Conclusion

Iuris praecepta sunt haec: honeste vivere, alterum non leadere, suum cuique tribuere.[15] This sentence from Justinian's Digest defines the basic orders of Roman law. The most important is the second order, *alterum non leadere,* and that became a part of the name of the present article. The aforementioned order is described by Livius in Ab Urbe condita XLII, 1. It had become a part of Roman politics in provinces, but since it failed, it lead to the adoption of several *lex repetundae* that prosecuted unfair province administrators. The first law of this nature was lex Calpurnia, adopted in 149 B.C.

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[15] Dig. 1.1.10.1 Ulpianus 1 reg.

Protection Against the Constitutional Framers of the Constitution

Michal Vaľo [1]

Motto:

"*The development of democratic constitutionality in democratic countries at present emphasizes the protection of values that identify the constitutional system of freedom and democracy, which includes the possibility of judicial review of constitutional amendments.*"

(GÖZLER, K.: *Judicial Review of Constitutional Amendments. A Comparative Study*. Ekin Press, Bursa 2008)

In quite a short history of the independent Slovak Republic there have been attempts to reach constitutionally incorrect solutions to various problems by adopting laws, which would not apply to a certain type of relations for the future in general, but which would rather provide a one-off, ad-hoc solution to a certain politically delicate problem, sometimes even retroactively, and, moreover, sometimes even to such problems that should not have been dealt with by Slovak Parliament, but rather by the judicial or executive power. The Constitutional Court of the Slovak Republic (the "Slovak Constitutional Court") repeatedly ruled that such laws were not only in conflict with the Constitution of the Slovak Republic (the "Slovak Constitution"), but also with the principles and defining characteristics of the state governed by the rule of law, as a consequence whereof it suspended their operation.[2] The Slovak Constitutional Court also repeatedly held that Slovak Parliament can govern some social relations as legal relations only to such extent and only in such manner that is consistent with the Constitution.[3]

In its decisions it also specified some definitional characteristics of a democratic state governed by the rule of law, and it concluded that also the lawgiver is bound by the Constitution and its principles the amendment of which is in its opinion inadmissible under the Slovak Constitution, because they are of constitutive importance for the democratic nature of the Slovak Republic, which is declared in Article 1 of the Slovak Constitution. It therefore ruled that Article 1 of the Slovak Constitution and the principles embodied therein form the substantive core of the Slovak Constitution.

The rule that the lawgiver cannot act arbitrarily, but that it is bound by the principles arising under Article 1 of the Slovak Constitution, should define the limits not only for the creation and making "ordinary" laws, but also for the creation and making the so-called "constitutional laws", i.e. laws which are in terms of applicable procedures passed in the same way as the Constitution. The Slovak Constitutional Court has not ruled yet whether the compliance with these principles in the process of creating and making "constitutional laws" should be self-controlled by Parliament, or whether the compliance therewith may also be assessed by the Constitutional Court. It has so far applied these conclusions to "ordinary" laws, not to any "constitutional law", which may in general amend, supplement and alter the Slovak Constitution.

At present political representation think that certain relations, which have already been governed and regulated by law and which the Slovak Constitutional Court has found to be in conflict with the Slovak Constitution, will be governed and regulated again in a form of a "constitutional law". Its underlying philosophy is the fact that the Constitutional Court cannot assess the conformity of the "constitutional law" with the Constitution.

There have been efforts in several Member States of the European Union (the "EU") to go beyond the "substantive core" of the Constitution.

A year ago the Constitutional Court of the Czech Republic (the "Czech Constitutional Court") by its Finding[4] repealed the constitutional law reducing the fifth term of office of the Chamber of Deputies of Czech Parliament. In the reasoning of its Finding the Czech Constitutional Court pointed to the roots and origin of the modern principle of the protection of constitutionality. It also pointed to historical background of the concept that the self-control of the lawgiver is not sufficient to make sure that amendments, supplements and alterations of the Constitution would not go beyond the principles of democracy and the state governed by the rule of law; this can be

[1] JUDr. Michal Vaľo, CSc., Law Office, Bratislava, Slovak Republic.

[2] E.g. Finding of the Constitutional Court of the Slovak Republic, Case No. PL. ÚS 16/95 of 24 May 1995, published in the Law Reports of the Slovak Republic (the "Law Reports") under Ref. No. 126/1995.

[3] E.g. Decisions of the Constitutional Court of the Slovak Republic, Case No. PL. ÚS 29/95 of 29 November 1995, published in the Law Reports under Ref. No. 2/1996 Case No. I. ÚS 30/1999 of 28 June 1999, published in the Law Reports under Ref. No. 182/1999, Case No. PL. ÚS 17/96 of 24 February 1998 published in the Law Reports under Ref. No. 78/1998 and others.

[4] Finding, Case No. Pl. ÚS 27/09 of 10 September 2009.

achieved only through the concept of control exercised by an independent court of law.

Within Europe, it was **Germany** who first learnt a lesson from this historical experience. In the "Basic Law" (Grundgesetz) dating back to 1949 the "substantive core of the Constitution" was exempted from the scope of powers of the framers of the Constitution. Article 79 Section 3 of the "Basic Law" imposed a ban to amend certain constitutional provisions. Namely, amendments to those provisions of the "Basic Law" affecting basic principles of the division of the Federation into Länder, protection of human rights, protection of the rule of law, sovereignty of the people and the right to civil disobedience [5] are inadmissible. Article 79 Section 1 of the "Basic Law" reads that other parts of the "Basic Law" may be amended only by laws that will be expressly labelled as the laws amending, supplementing or altering the text of the "Basic Law".[6]

Under Section 13(6) of the Act on the Federal Constitutional Court, the Federal Constitutional Court may by a legally binding decision rule on the conflict of the *"Federal law or the law of a Land "* [7] with the "Basic Law", and declare them null and void. Neither the "Basic Law" nor the Act on the Federal Constitutional Court [8] expressly read that the Constitutional Court also has the power to assess the conformity of such laws that are labelled as the laws amending, supplementing or altering the "Basic Law" with the "*substantive core of the Constitution".* However, as it results from the doctrine and from the case-law of the Constitutional Court, the Constitutional Court has the power to decide about the invalidity of the law amending the "Basic Law" in conflict with its Article 79 Section 3.[9]

Even the Federal Constitution of **Austria** includes some provisions which act as a disincentive to the arbitrariness of the lawgiver, even though not in such an unambiguous way as the German Constitution.

The Austrian Constitution does not define what forms its substantive core, and it does not expressly impose bans on its amendments. However, under Article 44 Section 3 of the Austrian Constitution any revision thereof must be submitted to a referendum by the entire nation, if one third of the members of the House of Representatives or the Senate so demands.[10]

Even though the Federal Austrian Constitution does not expressly answer the question what forms its substantive core, according to the constitutional doctrine basic principles of the Constitution are representative democracy, division of the Federation into Länder, liberal state governed by the rule of law and separation of powers.

Similarly as the German Constitution, neither the Austrian Constitution expressly lists forms of legal norms, which are subject to the control of constitutionality by the Constitutional Court. Under Article 140 of the Constitution, Federal laws or the laws of a Land fall within the scope of control of the Constitutional Court.[11] The Austrian Constitution does not expressly answer the question, whether the same applies to "constitutional laws", i.e. laws amending the Constitution.

Similarly as the German Constitutional Court, also the Austrian Constitutional Court despite that assumed the role to review whether the laws which have the form of "constitutional laws" are in conformity with the Constitution. This was motivated by the procedures in Austrian Parliament that adopted "constitutional laws" governing and regulating relations which do not fall within the framework of the constitutional law with a view to circumventing the power of control of the Constitutional Court.

For example, Austrian Parliament in a form of a "constitutional law" adopted and passed such wording on the Act on Public-Sector Contracts, in which it declared that certain provisions of the laws of Lands are not in conflict with the Federal Constitution. The Constitutional Court repealed this provision despite the fact it had the form of a "constitutional law" due to its conflict with the basic principles of the Constitution.

Similarly as the Austrian Constitution, also the Constitution **of Poland** includes some provisions which act as a disincentive to the arbitrariness of the lawgiver; in its Article 235 Section 6 it reads that should the amendment to and revision of the Constitution concern provisions of Chapter One, Chapter Two and Chapter Twelve of the Constitution, it may have to be approved by referendum if so requested by 1/5 of the deputy of Sejm, or Senate (House of the Polish Parliament), or the Polish President.

The Polish Constitution thereby indirectly stipulates that the substantive core of the Constitution is formed by its provisions comprised in Chapter One, Chapter Two and Chapter Twelve. Chapter One reads that the Republic of Poland shall be a democratic state ruled by law, implementing the principles of social justice and respecting international law binding upon it, whereas the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers, and it also lists other basic attributes of the state. Chapter Two deals with *"the freedoms, rights and obligations of persons and citizens".*[12] Chapter Twelve sets out formal requirements for any amendments to the Constitution.

Under Article 188 Section 1 of the Polish Constitution, the Constitutional Court shall assess the conformity of statutes and international treaties with the Constitution.[13] Similarly as the German and Austrian Constitutions, neither the Polish Con-

[5] Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig.

[6] Das Grundgesetz kann nur durch ein Gesetz geändert werden, das den Wortlaut des Grundgesetzes ausdrücklich ändert oder ergänzt.

[7] Bundesrecht oder Landesrecht.

[8] Bundesverfassungsgerichtsgesetz.

[9] Bachof, O.: *Verfassungswidrige Verfassungsnormen?* Tübingen 1951, Pages 35, 47 et seq. (based on the reasoning of the Finding of the Czech Constitutional Court, Case No. Pl. ÚS 27/09).

[10] National Council or Federal Council.

[11] Bundes – oder Landesgesetzes.

[12] wolności, prawa i obowiązki człowieka i obywatela.

[13] zgodności ustaw i umów międzynarodowych z Konstytucją.

stitution expressly stipulates that the Constitutional Court has the power to assess the conformity of "constitutional laws"[14] with its substantive core.

Neither the **Czech** Constitution *expressis verbis* stipulates what should be regarded as its substantive core. In its Article 9 Section 2 it reads that "*any change of fundamental attributes of the democratic state governed by the rule of law shall be inadmissible*", but it does not refer to those provisions, which should be regarded as the fundamental attributes of the democratic state governed by the rule of law.

According to the decision-making practice of the Constitutional Court the fundamental attributes of the democratic state governed by the rule of law shall also be • the fact that the Constitutional Court is bound by its own decisions which may be amended only under certain circumstances[15] • basic principles of suffrage[16] • but "*first of all sovereignty of the people and principles laid down in Articles 5 and 6 of the Constitution, and natural-law provisions of the Charter of Fundamental Rights and Basic Freedoms, which establish the constitutional right to put up resistance (Article 23 of the Charter)*".[17] To emphasize comparative aspects, the Czech Constitutional Court also pointed to Article 79 Section 3 of the German "Basic Law", Article 110 of the Constitution of Greece, and Article 288 of the Constitution of Portugal.

Under its Article 9 Section 1, the Czech Constitution may be amended, supplemented or altered solely by laws labelled as "constitutional laws", the adoption of which (similarly as in other EU Member States) is subject to the pre-defined qualified procedures.[18]

Article 87 Section 1 item a) of the Czech Constitution reads that "*The Constitutional Court shall resolve on the nullification of laws or their individual provisions if they are in conflict with constitutional order*". Neither the Czech Constitution expressly stipulates whether the Constitutional Court has the power to assess the conformity of "constitutional laws" with the substantive core of the Constitution. To answer this question, in the opinion of the Czech Constitutional Court Article 83 of the Constitution is mainly of importance, which reads that "*The Constitutional Court is a judicial body for the protection of constitutionality*", but also Article 9 Section 2 of the Constitution, which reads that "*Any change of fundamental attributes of the democratic state governed by the rule of law is inadmissible*".

The above-mentioned Finding of the Czech Constitutional Court[19] was issued in the proceedings concerning the "constitutional complaint" lodged by an individual citizen on the grounds of the violation of his constitutional rights. The complainant argued that his rights guaranteed by the Constitution were not violated as a consequence of non-constitutional interpretation of such right, but rather as a consequence of the legal rule which is on one hand called "constitutional law", but which is on the other hand in terms of its contents in conflict with the constitutional order that it suspends, *ad hoc*, for a single case, and moreover retroactively, whereby it changes the fundamental attribute of the democratic state governed by the rule of law, that under Article 9 Section 2 of the Constitution cannot be amended.

The Czech Constitution expressly allows the joining of the "constitutional complaint" with the proposal to assess the conflict of law with the Constitution. However, it does not mention the conflict of the "constitutional law" with the Constitution.

In the reasoning of the said Finding the Czech Constitutional Court observed that in the past it already assessed the conformity of the constitutional law with the "*substantive core of the constitutional order",* and – where applicable and possible – the interpretation in conformity with the Constitution was given priority to derogation.[20] However, when assessing the conformity with Article 9 Section 2 of the Constitution, the Czech Constitutional Court always deemed it necessary to subsume the term "*constitutional law*" into the general term "*law*" comprised in Article 87 Section 1 item a) of the Czech Constitution.

In this respective case the Czech Constitutional Court held that it was the "constitutional law" only from the formal point of view, in terms of its substance it is not the law. It is an individual legal act or instrument violating the equality of the constitutional regulation for similar situations. It concluded that "*Not even the law-making body may declare the norm, which does not have the nature of the law (not even of the constitutional law) to be the constitutional law. Anything to the contrary is the arbitrariness that is in conflict with the Constitution. The disqualification of the Constitutional Court from the review of such acts would completely eliminate its role of the protector of constitutionality (Article 83 of the Constitution).*" In the present case, the Czech Constitutional Court then found such individual and retrospective nature of the "constitutional law" inadmissible in the context of the Constitution, it held that it was in conflict with fundamental attributes of the democratic state governed by the rule of law under Article 9 Section 2 of the Constitution, and therefore repealed the same.

The Slovak Constitution does not define what forms its "substantive core", and it does not impose a ban on amending its certain parts. It does not *expressis verbis* set out how it may be amended. However, in practice it is amended by "constitutional laws".

The inalterability of the substantive core of the Slovak Constitution could be derived from its Article 2, Section 2 which reads that "*State bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law.*" This substantive rule should also apply to the legislative power and constituent power of Slovak Parliament. However, under Article 84 Section 4 and Article 86 Section 1 of the Slovak Constitution Slovak Parliament shall have the

[14] ustawa o zmianie Konstytucji.
[15] Finding, Case No. Pl. ÚS 11/02 of 11 June 2003.
[16] Finding, Case No. Pl. ÚS 42/2000 of 6 February 2001.
[17] Finding, Case No. III. ÚS 31/97 of 29 May 1997.
[18] Article 39 of the Constitution.
[19] Note No. 3.
[20] Case No. Pl. ÚS 36/01.

power to adopt the Constitution, amend the Constitution, and adopt "constitutional laws" and other laws. The Slovak Constitution stipulates any such resolution to adopt and amend the Constitution and to adopt "constitutional laws" shall be passed with a qualified majority, however, it does not provide any other requirements for this procedure.[21]

It could be argued (in the context of the substantive understanding of the contents and structure of the Slovak Constitution) that its basic and inalterable core comprises postulates expressed in Article 1 under which "*(1) The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion. (2) The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations*." However, it would be up to the Slovak Constitutional Court to determine which individual legal relations and what forms thereof are decisive and relevant to the democratic state governed by the rule of law.

The Slovak Constitution in its Article 125 Section 1 determines the conformity of which legal norms with higher-ranking norms is to be assessed by the Constitutional Court and with what consequences. Neither under this nor under any other provisions the power and authority to assess the conformity of the "constitutional law" or its bill with the Slovak Constitution is expressly vested in the Constitutional Court.

The Slovak Constitution does not unambiguously answer the question whether the "constitutional laws" once adopted become a part of the Constitution, and whether for that reason their conformity with themselves cannot be thus assessed, or whether the Constitution should be distinguished from "constitutional laws".

Article 152 Section 4 of the Slovak Constitution reads that "*Constitutional laws, laws and other generally binding legal rules shall be interpreted and applied in conformity with this Constitution*." This provision beyond any doubt clearly differentiates the Constitution from constitutional laws. This distinctive line between the two is also drawn in many other provisions of the Slovak Constitution.[22]

On the other hand, several "constitutional laws" have beyond any doubt become a part of the Constitution, when they directly amended, supplemented or altered its text; the wording of some of them was fully transposed to the text of the Constitution and in fact coalesced into one text, the others were incorporated into the Constitution with the heading "constitutional law"[23], which creates an impression as if the Constitution and constitutional law were synonyms.

Several provisions of the Slovak Constitution do not distinguish between the terms "law" and "constitutional law".[24]

To answer the question whether the Slovak Constitutional Court may assess the conformity of the "constitutional law" with the Constitution, two provisions of the Slovak Constitution are the most important. On one hand, it is Article 124 under which "*The Constitutional Court shall be an independent judicial authority vested with the mandate to protect the constitutionality",* from which its power to protect the constitutionality against its violations by constitutional laws could be derived. On the other hand, it is Article 125 Section 1 item a), under which "*The Constitutional Court shall decide on the conformity of laws with the Constitution, with constitutional laws...*" Under this provision, the subsuming of the term "constitutional law" into the general term "law" is prohibited.

When applying the legal positivist approach to the interpretation of the Slovak Constitution, which has always been the practice of the Slovak Constitutional Court so far[25], it is not likely to exercise the power to assess the conformity of "constitutional laws" with the Slovak Constitution.

At the end, attention must be drawn to Art. 2 Treaty on European Union, whereby:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The Union is founded on these core values, which declared as their core values all Member States. That's why I believe that longstanding controversial discussion on this theme will culminate in such development of a constitutional doctrine in the EU Member States that will protect the values defining the democratic rule of law by the form of judicial review of constitutional amendments.

Despite the aforesaid, at present the development of constitutional doctrines in democratic states seems to be aimed

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[21] Except for the constitutional law on joining a union with other states or the secession from it, which shall be under Article 93 Section 1 confirmed by a referendum.

[22] Article 125 Section 1 item a) of the Constitution, which in the beginning reads "*The Constitutional Court shall decide on the conformity of negotiated international treaties...*", Article 128 Section 1 of the Constitution under which "*The Constitutional Court shall give an interpretation of the Constitution or constitutional law if the matter is disputable*", Article 84 Section 4, which in the beginning reads "*For the purpose of adopting or amending the Constitution, a constitutional law, in approving an international treaty...*", Article 86 item a) under which "*The powers of Slovak Parliament shall be particularly the power to adopt the Constitution, constitutional laws and other laws, and to supervise...",* etc.

[23] For example, Article 154a reads that "*According to this constitutional law, the Speaker of Slovak Parliament shall announce the election of the President of the Slovak Republic...*". Similarly also Articles 154b and 154c.

[24] For example, Article 87 uses solely the term "law", when it stipulates who may introduce draft laws, who signs acts, when they enter into force etc. These provisions obviously apply not only to the "ordinary" law, but also to the "constitutional" law.

[25] See the Resolution of the Constitutional Court of the Slovak Republic, Case No. II. ÚS 806/2000 of 16 November 2000, whereby the Constitutional Court ruled that: "*The proceedings concerning the constitutional complaint cannot also involve the decision-making on the conformity of the law with the Constitution of the Slovak Republic. Any decision on the non-conformity of the law with the Slovak Constitution could be drawn by the Constitutional Court of the Slovak Republic only in the proceedings concerning the conformity of legal rules under Article 125 item a) of the Slovak Constitution."* It thereby ruled that the proceedings concerning the conformity of legal rules with the Constitution may be instituted only upon the petition brought by entities with the capacity to bring proceedings, who do not include individual citizens claiming that they have been deprived of their rights guaranteed by the Constitution as a result of a decision.

at the protection of values defining the democratic state governed by the rule of law also in a form of judicial review of constitutional amendments. However, it raises several questions. Is the judicial review by the Constitutional Court of such laws, which were adopted through the procedure prescribed for amending, supplementing and altering the Constitution, admissible at all? If yes, does it only apply to cases where the adopted laws are in conflict with the substantive core of the Constitution? Does the Constitution have to define such substantive core expressly, or can it be derived by the Constitutional Court? [26] Can the Constitutional Court review such laws also from the aspect whether they govern and regulate the "constitutional relations", or whether they are not individual legal acts or instruments, or whether they are not retroactive, or whether they are not otherwise in conflict with the basic values of a democratic state governed by the rule of law enshrined in the Constitution?

Due to the fact the Constitutions usually do not expressly vest the power to review constitutionality of "constitutional laws" in the Constitutional Court, such power may be derived only by interpreting the Constitution by the Constitutional Court, which thus adjudicates on its own powers within the system of the separation of powers; this raises a well-known question "*who is to guard the guardian"*. However, the practice has shown that Constitutional Courts, which have already ruled on their powers in this respect, exercise this power very prudently.

As pointed out by Jan Musil in his dissenting opinion, the German Constitutional Court throughout its entire existence since 1949 has not repealed a single constitutional law. The Austrian Constitutional Court did so only once,[27] when it concluded that the constitutional law flagrantly violated the substantive core of the Austrian Constitution. The Czech Constitutional Court repealed the constitutional law also only once. The Slovak Constitutional Court and the Polish Constitutional Court have not dealt with this problem so far. Despite the existence of certain risks I therefore support the idea of judicial review of constitutionality of all laws, including "constitutional laws", which amend the Constitution.

As far as the Slovak Republic is concerned, in this context I deem it necessary to amend, supplement and alter the Slovak Constitution so that it deals with and includes the following:

1/ Clear, unambiguous definition (as broad as possible) of what forms its substantive core

2/ Provision that this substantive core can be amended or altered only by a constitutional law which will be expressly labelled as the law altering the substantive core of the Slovak Constitution and approved by referendum

3/ *Expressis verbis* powers of the Constitutional Court to assess the conformity of constitutional laws with the Constitution, mainly with its substantive core unless these constitutional laws were approved by referendum.

4/ Duty of the Constitutional Court in the proceedings concerning the "*constitutional complaint*" (i.e. complaint lodged by an individual citizen claiming the violation of his constitutional rights) to review not only the constitutionality of the interpretation of such right, but if so proposed by the citizen, also the constitutionality of the legal basis that was applied to the case at issue.

Sources, Structure, Creation and Resulting Binding Effect of the European Law from the Perspective of Judicial Co-operation in Criminal Matters

Anna Ondrejová [1]

1. Introduction

On April 2004 the European Parliament approved the accession of the Slovak Republic, Czech Republic and other eight candidate countries to the European Union (the "*Union*") as a result of which on 1 May 2004 these countries became the EU Member States. The accession brought about changes not only in the realms of economics and politics, but also in the field of law. Sources of the Community law and Union law became sources of law both in the Slovak and Czech Republics. The accession also resulted in significant changes in the process of drafting and application of law. All branches of national law had to be examined in the light of requirements of the Union law. This process called screening also affected criminal law.

All public bodies including judicial authorities[2], are in the process of drafting and application of law obliged to act in accordance with the European legislation, and in their decision-making practice also apply the European law. Since 1 May 2004 all entities, citizens and public bodies in the Slovak Republic and Czech Republic, which have also been the subject of the Union since then, are obliged to comply with legal rules published in the Official Journal of the European Communities (the "*OJ*") [3] available on the official EU website http://europa.eu.int. www.europa.eu.[4]

In order to be able to handle complex structures of EU legal rules, to be able to assess whether they are binding on us and directly enforceable, we need to know their structure, nature and at least to a minimum extent also powers of the bodies of the Union and of the European Communities in the process of law-making.

All issues involved are complex due to rather a wide range of legal acts adopted by various bodies, moreover, their powers have changed through the timeline and they must be viewed and analysed in the light of their dynamics. Significant interpretation problems are also caused by the imbalance of the terms used. Whereas the European Communities used to be international organizations in which the Member States vested a part of their powers, the Union was until the adoption of the Lisbon Treaty regarded only as a form of international cooperation in the field of the 2nd and 3rd pillars, and it did not even have its own legal personality.

This article aims to trace the development of the European law, and in brief explain and interpret issues related to sources, structure and drafting of the European law, as well as its binding nature derived therefrom with an emphasis on judicial cooperation in criminal matters.

2. European Union Law and Judicial Cooperation in Criminal Matters

2.1 Developments until 1993

Economic, political and military situation in Europe as well as worldwide after the end of the Second World War gave rise to initiatives to unite "*Western*" Europe, which would in the context of close economic cooperation between (on one hand) France and England as the European great powers winning the war and (on the other hand) the defeated Germany prevent future war conflicts initiated by Germany, stand up to ideological attacks of Russian communism, compete with the economic power of the United States of America, and facilitate the restoration, development and growth of economy in all countries in Europe, which were severally damaged by the War.

The main economic problem at that time was the import of cheap coal and steel from overseas countries, which, however, at that time did not affect the then colonial British Empire. Therefore, under the Treaty of Paris signed on 18 April 1851 the European Coal and Steel Community (ECSC) was established by France, Germany, Italy and the Benelux countries.[5] The Treaty entered into force on 23 July 1952, with a validity period limited to 50 years.

The ECSC Treaty is the origin of the four main institutions as we know them today, even though in a modified form, namely the High Authority (later on transformed into the Com-

[1] JUDr. Anna Ondrejova, Head of the EU Affairs Unit General Prosecutor Office of the Slovak Republic.

[2] Courts and prosecution service.

[3] Official Journal of the European Communities published until the end of January 2003.

[4] Legislation published after 1 May 2004 is available in the Official Journal both in the Slovak and Czech languages. Legislation published before 1 May 2004 was published retrospectively in a limited number for the new Member States in 2004.

[5] Belgium, The Netherlands and Luxembourg, which are known as the Benelux countries, already in 1944 established a customs union, and in 1948 they established an economic union.

mission), the Assembly (later on transformed into the European Parliament), the Council of Ministers (later on only the Council) and the Court of Justice (later on transformed into the Court of Justice of the European Communities, nowadays the Court of Justice of the European Union).[6] The Member States gave up a part of their sovereignty to the benefit of the ECSC.

The initiative to establish the ECSC was taken by the French Foreign Minister, Robert Schuman who regarded the ECSC as the first solid groundwork for a European Federation. He anticipated that further integration steps would follow, which was in fact the case. On 27 March 1957 the so-called Treaties of Rome (Treaty establishing the European Atomic Energy Community EURATOM and Treaty establishing the European Economic Community – EEC) were signed. The Euratom Treaty initially aimed to coordinate research programmes for the peaceful use of nuclear energy, mainly in Germany. The EEC Treaty aimed to create a general common market, and to support and ensure harmonious development of the Member States' economies. On 8 April 1965, the Merger Treaty was signed in Brussels, which combined the ECSC, EURATOM and EEC into the European Communities. Shortly thereafter, the signatories established the Customs Union. Denmark, Ireland and the United Kingdom joined the European Communities in 1973, followed by Greece in 1981 and Spain and Portugal in 1986.

Subsequently, the first major revision of the Treaties of Rome was the Single European Act, which entered into force on 1 July 1987. It amended and altered the EEC Treaty, and its main aim and objective was to complete the Single Market in 1993 with the four fundamental freedoms – free movement of goods, services, people and capital (constituting the common market) which in fact happened. The Single European Act brought about also institutional changes. It highlighted the importance of the European Parliament, and it created the European Council[7] as a permanent part of the organisational and policy structure. Moreover, a higher degree of integration was achieved. The range of areas concerning the internal market, in which the Council of Ministers did not have to decide unanimously, increased, and a move was made from unanimous voting to qualified majority voting in a limited number of issues and fields.

However, none of the above-mentioned Treaties, which constitute a primary source of law, dealt with cooperation in the area of justice and home affairs. They were all focused on the economy. It was only the Treaty on European Union, the so-called Treaty of Maastricht, which entered into force on 1 November 1993 that for the first time introduced cooperation in the area of justice and home affairs.

2.2 Treaty of Maastricht

The Maastricht Treaty changed the name of the European Economic Community to the European Community (the "EC"), it transferred the forms of the then-existing cooperation into the so-called "*first pillar of the Maastricht temple*", and it introduced its second pillar (cooperation in the area of foreign and security policy) and the third pillar (cooperation in the area of justice and home affairs), whereby it created a new economic and political structure – European Union.

As a result of the establishment of the three pillars, the European law was divided into the Community law and Union law. The Community law is the EC law, i.e. law in the area of the 1st pillar, the Union law is the law in the area of the 2nd and 3rd pillars.

Under the Treaty of Maastricht, cooperation among the Member States in the area of justice and home affairs was only of information and consultation nature, i.e. Member States should inform and consult one another with a view to coordinating actions of the Member States and their competent authorities.[8]

The only authority of the Union that had the right to issue "*legal rules*" in the area of justice and home affairs was the Council (of the Ministers of Interior Affairs and Ministers of Justice) through adopting "***joint positions***" or by adopting "***joint action***" with a possibility to take measures implementing joint action.[9] These were legally non-binding and otherwise unenforceable joint acts binding on the Member States only politically. They were adopted only provided that by reason of the scale or effects of the proposed and contemplated action, the aims of the Union could be better achieved through a joint action rather than through actions of individual Member States.[10] Decisions on adopting joint positions and on adopting joint actions and on measures implementing the same were made by the Council acting unanimously. However, it could decide that "*measures implementing the joint action*" will be subject to the qualified majority voting.

Proposals to adopt the above-mentioned legal acts could be made by any Member State, in the first six of nine areas specified in Article K.1 they could be made also by the Commission. They could concern the areas of (1) asylum policy (2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon (3) immigration policy and policy regarding nationals of third countries (4) combating drug addiction in so far as this is not covered by 7 to 9 (5) combating fraud on an international scale in so far as this is not covered by 7 to 9 (6) judicial cooperation in civil matters (7) judicial cooperation in criminal matters (8) customs cooperation and (9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office.

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[6] In this paper, the term "Court of Justice" will be used at all stages.

[7] The European Council consists of Presidents and Prime Ministers of the Member States, President of the European Council and President of the European Commission. Journalists and students often mistake the European Council, Council of the European Union (formerly known as the Council of Ministers) and the Council of Europe (independent international organization which is not linked to the EU).

[8] Article K.3 of the Treaty of Maastricht, its Title VI. "*Provisions on Cooperation in the Fields of Justice and Home Affairs*" (this Title consisted of nine Articles).

[9] Article K.3 of the Treaty of Maastricht.

[10] For example Joint Action of 29 June 1998 on the Creation of a European Judicial Network.

Specification of these areas is important in connection with the Schengen Agreement, their integration into *acquis communautaire* under the Treaty of Amsterdam.

2.3 Treaty of Amsterdam

The Copenhagen Summit in 1993 defined criteria for the accession into the Union. Subsequently, in 1995 Austria, Finland and Sweden became the EU Member States. On 2 October 1997 the Treaty of Amsterdam was signed, which amended the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, and it also changed numbers of their Articles.[11] This Treaty entered into force on 1 May 1999. In addition to institutional issues, changes also had an impact on the foreign policy, Union citizenship and the area of freedom, security and law, including cooperation in the area of justice and home affairs.

Article 6[12] lays down the principles on which the Union is founded, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, principle of the rule of law and principles which are common to the Member States. Article 6(2) reads that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as **general principles of Community law**.

Specification of principles of the Community law is not only a political declaration. These principles are a source of law and a rule of interpretation for the interpretation and application of all legal rules of the Community law, and as such they are also used and applied by the Court of Justice. Infringement of these principles by the Member State is for the first time sanctioned by the Treaty of Amsterdam. After procedure laid down in Article 7 the European Council could decide about the suspension of some rights arising for the affected Member State out of the application of the Treaty on European Union, including voting rights in the Council.

The Treaty of Maastricht in its Title VI. laid the foundations for cooperation in the area of justice and home affairs at the inter-governmental (third-pillar) level. The Treaty of Amsterdam took cooperation in the areas specified in Article K1, (1), (2), (3) and (6)[13] of the Treaty of Maastricht from the Treaty on European Union, and it was included in the Treaty establishing the European Community[14] as a result of which it was transferred to the first pillar. Intergovernmental nature of cooperation in these areas changed into cooperation based on the supranational principle (competence pertaining thereto was fully vested in the EC institutions). The area of police and judicial cooperation in criminal matters remained a part of the Treaty on European Union and of the third pillar, based on the intergovernmental principle of cooperation. However, the Court of Justice was vested with some new powers in this area.

Title VI. headed *"Provisions on Police and Judicial Cooperation in Criminal Matters"* in Article 31[15] stipulates what shall be regarded as common action in the course of judicial cooperation in criminal matters. Article 34[16] reads that in the pursuit of the objectives of the Union the Council, acting unanimously on the initiative of the Commission or a Member State, may decide to:

a) Adopt **common positions** defining the approach of the Union to a particular matter
b) Adopt **framework decisions** for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect
c) Adopt **decisions** for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union
d) Establish and draw up **conventions** which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties.

The Council was obliged to consult the European Parliament before adopting any measure referred to hereinabove, however, it was not bound by its opinion.

2.4 Schengen Agreements

Schengen Agreements, i.e. Agreement on the Gradual Abolition of Checks at the Common Borders signed on 14 June 1985, which became valid on 1 September 1993 and effective on 26 March 1993 and the Convention implementing the Schengen Agreement of 19 June 1990 as well as related agreements, conventions, rules and regulations, are considered to be an important legal instrument, and historically the first significant legal act that directly affects the area of judicial cooperation among the EU Member States.

The Schengen Agreements did not come into existence as a part of the Union primary law. They came into existence as intrastate agreements within the framework of the international public law at the time when neither the Union nor the third pillar of cooperation had existed. They preceded the Treaty of

[11] Headings and titles in the form of letters (e.g. K1) were replaced by numbers.
[12] Previously Article F.
[13] Control of external borders, right of asylum, immigration and judicial cooperation in civil matters.
[14] Creation of the new Title IV headed *"Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons"*.
[15] Previously K.3.
[16] Previously K.6.

Maastricht. Event after their entry into force, they existed separately alongside cooperation within the Union. Only after the adoption of the Treaty of Amsterdam the so-called Schengen System was included into the framework of the Union, respecting the fact that Ireland and the United Kingdom are not signatories of the Schengen Agreements. However, upon the accession of new Member States (including the Slovak Republic and Czech Republic) the Schengen acquis was already a part of the acquis communautaire which all candidate countries had to transpose in its entirety. The original signatories of the Schengen Agreements were the Benelux countries, Germany and France, up until now they have been signed by all EU Member States except for Ireland and the United Kingdom.

The main purpose of the Schengen Agreements was to gradually abolish checks at the common borders of the EU Member States. The achievement of this aim and objective poses some security risks, which the Schengen Agreements aimed to deal with by strengthening police and judicial cooperation.

A part of the Schengen System concerning free movement of persons was included in the 1st pillar, and it became a part of the Community law whereas the part concerning police and judicial cooperation in criminal matters was included in the 3rd pillar and it became a part of the Union law.

Upon the entry of the Amsterdam Treaty into force the area of justice and home affairs established under the Treaty of Maastricht was divided into two parts, i.e. area of judicial cooperation in civil matters, visa, asylum and immigration policies that became a part of the first pillar and area of police and judicial cooperation in criminal matters which remained a part of the third pillar.

2.5 Treaty of Nice

The Treaty of Nice was signed on 26 February 2001, and it entered into force on 1 February 2003. Under this Treaty, the agenda of the European Coal and Steel Community[17] was passed to the EC, and it also changed the form of decision-making where a move was made from unanimous voting to qualified majority voting on many matters. Its main purpose was to prepare the Union for the accession of 10 new countries.

As far as the area of cooperation in criminal matters is concerned, the Treaty of Nice amended Articles 29 and 31 of the Treaty on European Union by adding the platform for cooperation through the European Union's Judicial Cooperation Unit ("***Eurojust***") which aims to co-ordinate cooperation among the EU Member States' law enforcement agencies, take part in the investigation of serious cross-border crimes, and cooperation with the European Judicial Network with a view to simplifying procedures of handling letters rogatory and extradition procedures.

The Treaty of Nice did not bring about new forms of legal acts or any significant changes in adoption procedures. It introduced the possibility of the so-called "*closer cooperation*"[18] established under the Treaty of Amsterdam[19] also in the field of cooperation in criminal matters.[20]

In 2004, the Slovak Republic, Czech Republic, Estonia, Cyprus, Lithuania, Latvia, Hungary, Malta, Poland and Slovenia became members of the European Union. In 2007, Bulgaria and Romania joined the European Union.

2.6 Treaty of Lisbon

The Treaty of Lisbon signed on 13 December 2007, which entered into force on 1 December 2009, brought about crucial changes in almost all areas. It abolished the pillar structure of the Union, it amended the existing Treaty on European Union, and the Treaty establishing the European Community was renamed to the Treaty on the Functioning of the European Union. The Union took the place of the European Community as its legal successor Union replaced the European Community and became its legal successor. As a result of the adoption of the Treaty of Lisbon, the Union is based and relies on two Treaties, namely the **Treaty on European Union** (the "*EU Treaty*") and the **Treaty on the Functioning of the European Union** (the "*Treaty on the Functioning of the EU*").

The EU Treaty contains provisions on democratic principles, institutions of the Union, enhanced cooperation and provisions on external action, including common foreign, security and defence policy. Even though the Charter of Fundamental Rights of the European Union of 7 December 2000, amended on 12 December 2007 in Strasbourg did not become a part of basic Treaties, Article 6(1) of the EU Treaty reads that "*it shall have the same legal value as the Treaties*". The United Kingdom, Poland and the Czech Republic raised some objections.[21]

The Union in Article 6(2) agreed to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Fundamental rights as guaranteed by the European Convention and as they arise out of constitutional traditions common for the Member States represent general principles of the Union law.

The Treaty of Lisbon strengthened the role of the European Parliament as well as of national parliaments also in the field of creating the area of freedom, security and justice, within the framework of which the European Parliament takes part in the

[17] The ECSC was formed on 23 July 1952 with a validity period limited to 50 years, therefore it automatically ceased to exist on 23 July 2002.

[18] Should the Council find out that the aims of the proposed cooperation cannot be achieved within a reasonable period by application of relevant provisions of the Treaty (e.g. unanimous consent to the introduction of the instrument where requested by the Treaty cannot be obtained), at least 8 Member States may subject to the terms and conditions laid down in Article 43 establish "*closer cooperation*" open to all other Member States.

[19] Title VII.

[20] Amended Article 40 and inserted Articles 40a and 40b.

[21] The Charter applies to the United Kingdom and Poland in accordance with "*Protocol 30 on the Application of the Charter of Fundamental Rights to Poland and the United Kingdom*", which constitutes a part of the Treaty on the Functioning of the EU as its Annex. The Protocol stresses that the adoption of the Charter does not result in any changes of national laws and procedures applied in these countries. The Czech Republic annexed the "*Declaration of the Czech Republic on the Charter of Fundamental Rights of the European Union*" No. 35 to the Final Act of the intergovernmental conference, which adopted the Treaty of Lisbon. This Declaration is of no legal relevance, it is to be viewed as the declaration of the Czech Republic on how it understands provisions on the application of the Charter.

legislative process and national parliaments take part in the mechanisms of the evaluation for the implementation of the Union policies in this area and get involved in the political monitoring of Europol and the evaluation of Eurojust's activities.[22]

The Treaty on the Functioning of the EU in its Article 3 sets forth the areas in which the Union shall have exclusive competence. The Member States may be active in these areas only if such competence is conferred on them by the Union and they may also take measures to implement the Union acts.

The Treaty on the Functioning of the EU in its Article 4 sets forth the main areas in which the Union shares competence with the Member States. The Member States may adopt legally binding acts in these areas only to such extent to which the Union does not exercise this competence. The Union must at the same time respect the principles of subsidiarity and proportionality.

Alongside the areas where the Union exercises its exclusive or shared competence there also exist the areas in which the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.[23]

Under Article 4(2) letter j) of the Treaty on the Functioning of the EU the area of freedom, security and justice is one of the areas in which the Union shares competence with the Member States. This area is in a detail governed and regulated in Title V. of the Treaty on the Functioning of the EU into which Title VI. of the former Treaty on European Union was integrated. Title V. headed "*Area of Freedom, Security and Justice*" is divided into five Chapters; Chapter 1 sets forth general provisions, Chapter 2 deals with policies on border checks, asylum and immigration, Chapter 3 applies to judicial cooperation in civil matters, Chapter 4 governs and regulates judicial cooperation in criminal matters and Chapter 5 police cooperation.

Chapter 4 of Title V. of the Treaty on the Functioning of the EU starts with Article 82, which in its paragraph 1 reads that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and other judicial decisions and shall include the approximation of the laws and other regulations of the Member States in the areas referred to in Article 83(2).

Articles 82 through 89 which are comprised in Chapter 4 of Title V. of the Treaty on the Functioning of the EU provide as follows:

The European Parliament and the Council may, by means of **directives** adopted in accordance with the ordinary legislative procedure[24], establish minimum rules to facilitate mutual recognition of judgments and other judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. These minimum rules shall concern mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime and any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a **decision**, the Council shall act unanimously after obtaining the consent of the European Parliament[25] [Article 82(2)].

The European Parliament and the Council may, by means of **directives** adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are under Article 83(1) the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The Council may adopt a decision identifying other areas of crime, in which case it shall act unanimously after obtaining the consent of the European Parliament [Article 83(1)].

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned[26] [Article 83(2)].

Where a member of the Council considers that a draft directive as referred to in Article 82(2) or Article 83 (1) or (2) would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended for a maximum of 4 months. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with the so-called "*enhanced cooperation*" shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Under Article 82(1) letters a) through d) the European Parliament and the Council, acting in accordance with the ordi-

[22] Article 12 letter c) of the EU Treaty.

[23] Article 2(5) of the Treaty on the Functioning of the EU.

[24] Ordinary legislative procedure shall mean adoption of the proposal submitted by the Commission by a qualified majority of the Council and European Parliament. Special legislative (the so-called "*approval procedure*") shall mean a decision made by the European Parliament with the consent of the Council or vice versa, (unanimous) decision made by the Council after obtaining the consent of the European Parliament.

[25] I.e. by the so-called approval procedure requiring the consent of all Member States.

[26] E.g. in the course of implementing the environmental protection policy harmonisation in the area of criminal law proved to be necessary to ensure uniform application of the Community law – see Judgement of the Court of Justice, Case C-176/03 on the annulment of the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law or Judgement, Case C-440/05 in the dispute concerning the annulment of the Council Framework Decision 2005/667/JHA of 12 July 2005 on the enforcement of the law against ship-source pollution.

nary legislative procedure, shall adopt measures to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions, prevent and settle conflicts of jurisdiction between Member States, support the training of the judiciary and judicial staff, facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. However, the Treaty does not prescribe the form of these measures.

Article 84 reads that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

Article 85 deals with the Eurojust's mission and it outlines the Eurojust's tasks. It reads that the European Parliament and the Council, by means of **regulations** adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks.

Article 86 stipulates how the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust, and it outlines its tasks. It reads that even in the case of the establishment of the European Public Prosecutor's Office "*enhanced cooperation*" may be proceeded with, if at least nine Member States so request.

Before the adoption of the Treaty of Lisbon, when adopting decisions in the area of judicial cooperation in criminal matters the Council had to act unanimously. Proposals were submitted either by the Member States or by the European Commission. Before adopting a decision, the Council was obliged to consult these proposals with the European Parliament however, it was not bound by its opinion. The competence of the Court of Justice was under Article 35 of the EU Treaty limited and the Commission could not initiate proceedings for a breach of third-pillar legal rules against the Member State. Under the Treaty of Lisbon, a move was made from unanimous voting to qualified majority voting in a substantial number of issues and fields, legislative proposals are presented either by a group of at least seven Member States or by the European Commission, standard and normal legislative procedure has been introduced, in which the European Parliament is fully involved and after the transitional period of five years the Court of Justice will exercise its general powers also in this area.

3. Development of the Sources of Law of the EU and EC

3.1 Structure, Effectiveness and Binding Nature of the Sources of Law of the EU and EC before the Treaty of Lisbon

The hierarchy of the sources of the Community and Union law is as follows: (a) primary law (b) legal principles (c) external agreements (d) secondary law and (e) case law of the Court of Justice.

Primary Community law consists of basic Treaties among the Member States – Treaties establishing the ECSC, Euratom and EEC as amended and adapted by a variety of other treaties and instruments. Primary EC law encompasses basic provisions on those areas in which the sovereignty was transferred from the Member States to the EC.

Primary Union law until the adoption of the Treaty of Lisbon concerned only common foreign and security policy (the so-called second pillar) and cooperation in the area of justice and home affairs (the so-called third pillar). It consisted of Title I. and V. through VIII. of the EU Treaty. Other parts of the EU Treaty (Titles II. through IV.) only amended or supplemented the founding EC Treaties, therefore they did not represent the primary Union law; they were rather a part of the primary Community law. At present, the whole former Community law is a part of the primary Union law.

The sources of primary law encompass "*constitutional*" law of the Union. They comprise provisions which empower individual authorities to adopt secondary sources of law within the scope of powers vested in them. As its results from the "*constitutional*" nature of the primary law, secondary law must be in conformity therewith.

Legal principles and the case law are the sources aimed to fill "*gaps (loopholes)*" in written codified law. Legal principles are based on provisions of the primary law, principles of international law compatible with the nature of the Union, principles of national legislation applicable in the Member States, principles arising out of the protection of human rights and fundamental freedoms and principles derived from the nature and mission of the Union. The Court of Justice in its decision-making and case practice ruled that in addition to the principles encompassed in the primary law, such general principles shall also comprise the principles of legal certainty and protection of legitimate expectations and transparency.

External agreements are international agreements between the EC as the subject of international law and other subjects of international law, third countries or international organizations, and agreements made among the Member States. Upon their entry into force they became a part of the Community law, and depending on their contents, they can also have direct effect. This applies to three groups of agreements: agreements made solely by the EC, agreements jointly made both by the EC and Member States or agreements, which had been made by all Member States before they actually joined the EU if they concern issues within the scope of powers of the EC provided that the other party agrees with the succession (e.g. GATT).

External agreements could be made also under the EU Treaty, namely its Article 24 of Title V. (Provisions on common foreign and security policy = second pillar) and Article 38 of Title VI. (Provisions on police and judicial cooperation in criminal matters = third pillar). The Council could, acting unanimously, authorize the Presidency in office to open the necessary negotiations with the assistance of the Commission. Then, the Council, acting unanimously, approved the agreement on recommendation of the Presidency in office. Adoption of the approved agreement was binding on the Member States. It did not bind the Member State whose representative declared in the Council that under the national Constitution, the implementation of this agreement requires special procedure or fulfilment of specific conditions and requirements. In such case,

other Member States could agree upon a preliminary (interim) implementation and performance of this agreement. Due to the fact (unlike the EC) up until the adoption of the Treaty of Lisbon the Union was not the subject of international law, it could not be a party to international agreements; these were made by individual Member States in accordance with the external agreement.

Secondary Community law consisted of:

a) Regulations – normative legal acts[27], issued by the European Parliament jointly with the Council, only by the Council or only by the Commission, **having** direct effect, binding in their entirety on the Member States, individuals and legal entities, without the necessity of their implementation, in all their parts directly applicable in the Member States. Individuals and legal entities may claim their rights under this act before national courts. The Member State cannot obstruct the validity of the regulation within its territory; regulation in its entirety shall have priority over the national law.

In addition to these acts named as regulations, this category also comprises general regulations under the Treaty Establishing the ECSC and legal acts which the Court of Justice declared to be regulations in terms of their contents.

b**) Directives –** normative legal acts binding only the Member States to whom they are addressed and only as to the results to be achieved, but they leave the choice of methods to the Member States. Therefore, directives had to be implemented before the expiration of the prescribed period. The Court of Justice ruled that the directive which the state did not implement by the end of the period prescribed for its implementation can also have direct effect, however, only in relation to the state.[28]

Recommendation under the Treaty establishing the ECSC shall also be deemed to be directives.

c) **Decisions –** individual legal acts, binding on entities to whom they are addressed, usually Member States, however, they may as well be addressed to individuals or legal entities. In most cases, they were not published in the Official Journal, but they were directly served on and delivered to entities to whom they were addressed. They were used mainly to deal with particular cases. In addition to these acts named as decisions, this category also comprises a legal act, which the Court of Justice declared to be decisions in terms of their contents, and also judgements of the Court of Justice. On the contrary, acts governing the common foreign and security policy issues adopted on the basis of general guidelines under Article 13(13) of the EU Treaty and acts issued under Article 34(2) letter c) of the EU Treaty even though they are referred to as "*decisions*" are not a legally binding acts.

d) **Recommendations –** non-binding legal acts, requests addressed to the Member States for a certain course of action.

e) **Opinions –** non-binding legal acts, expressions of the opinion, directions or advices, mainly addressed to the Member States.

Moreover, other unbinding acts, such as resolutions, programmes, etc. shall also be regarded as recommendations or opinions.

Secondary Union law comprised various acts of the Union authorities[29], whose titles and nature changed in the course of time. We will focus mainly on the acts of the secondary Union law in the area of the 3rd pillar, i.e. in the area of police and judicial cooperation in criminal matters.

The EU Treaty in its Title VI. set forth specific issues which could be subject to the regulation by the secondary Union law in this area.

Under Article 34(2) of the EU Treaty the Council may, acting unanimously on the initiative of any Member State or of the Commission, adopt or prepare:

a) **Common Positions** defining the approach of the Union to a particular matter. These acts are only politically binding. The Member States were supposed to adopt positions enshrined therein at international conferences and at their national level.

b) **Framework Decisions** for the purposes of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States to whom they are addressed as to the result to be achieved but they shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.

c) **Decisions** for any other purpose consistent with the objectives of Title VI., concerning police and judicial cooperation in criminal matters, however, excluding any approximation of the laws and regulations of the Member States These decisions shall be binding however, they shall not entail direct effect.

d) **Conventions** prepared by the Council, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the applicable procedures within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by a majority of two thirds of the Member States, enter into force for those Member States.

e) **Measures implementing conventions**, which were not adopted unanimously, they were adopted within the Council by a majority of two thirds of the Contracting Parties.

f) **Measures required to implement decisions** at the Union level, which were adopted by a qualified majority.

Before the adoption of the Treaty of Amsterdam, there also existed legally unbinding common acts, which were binding on the Member States only politically and which had a form of adopting **joint positions** or **joint actions** with a possibility to take measures with a view to adopting such joint action.[30]

Judgements of the Court of Justice are binding in that particular case where the Court ruled on questions referred for a preliminary ruling, on the invalidity of a contested legal act, non-applicability of regulations, breach of obligations arising under the primary law, or default on obligations arising under the Statute of the European Investment Bank or obligations

[27] Similar to national laws.
[28] See Judgement of the Court of Justice, Case 148/78 Ratti of 5 April 1979.
[29] E.g., in the area of foreign and security policy General Guidelines, Joint Actions or Common Positions were issued.
[30] Article K.3 of the Treaty of Maastricht.

arising under the Statute of the European System of Central Banks.

Case law of the Court of Justice is not strictly speaking a normative source of law, however, it is highly respected and of extraordinary importance to the application of the Union law and when filling the gaps or loopholes in law (prevention of denegatio justitiae). Case law of European Courts gives added value to the provisions of founding Treaties and of secondary law by interpreting the same. In the area of judicial cooperation in criminal matters, this source of law has been in existence only since the adoption of the Amsterdam Treaty, which established obligatory and facultative competence of the Court of Justice also in this area.

3.2 Structure, Effectiveness and Binding Nature of the Sources of Law of the EU After the Treaty of Lisbon

First of all, it must be noted that under Article 9 of Protocol 36 "*On Transitional Provisions*" annexed to the founding Treaties by the Treaty of Lisbon, legal effect of secondary acts adopted on the basis of the EU Treaty and before the Treaty of Lisbon enters into force will not change until they are repealed, annulled, or amended. The same shall apply to conventions between the Member States and other sources of law. Moreover, the structure and hierarchy of the sources of law (primary law, legal principles, external agreements, secondary law, case law of the Court of Justice) shall not change either. What changes for the future are headings and titles of the secondary law acts which are no longer divided into the Community and Union acts.

Under Article 288 of the Treaty on the Functioning of the EU as amended by the Treaty of Lisbon the institutions shall adopt:

1) R**egulations**, which have general application, which are binding in their entirety and directly applicable in all Member States

2) D**irectives**, which are be binding, as to the result to be achieved, upon each Member State to which it is addressed, but which leave to the national authorities the choice of form and methods 3) D**ecisions**, which are binding in their entirety to the extent specified therein. Decisions which specify those to whom they are addressed shall be binding only on them

4) **Recommendations and opinions**, which have no binding force

5) **Delegated acts**, in which the adjective "*delegated*" must be inserted in the title of a particular delegated act; they may only be adopted by the Commission if such power was delegated to in under a legislative act; they shall be binding within the limits of such delegation

6) **Implementing acts**, in which the word '*implementing*' shall be inserted in their title; they can be issued by the Commission or in some specific case by the Council if such power was delegated to in under a legislative act because it was necessary to ensure uniform conditions for the implementation of the Union legal acts. Their binding nature derives from the act they implement within the limits of their powers

7) Other **innominate acts**, such as resolutions, declarations, conclusions, programmes, rules of procedure etc. They are not legally binding.

4. Conclusion

In the past, the law of the European Communities had two basic attributes:

a) Priority over the national law of the Member States, which means that the Member States shall not adopt new legal rules which are not in conformity with the EC law, and national courts in the Member State shall not apply any national legal rule, which is in conflict with the EC law

b) Direct effect to the national law of the Member States, which in practice means the conferring of rights and imposition of obligations, so being directly and independently, without any involvement of any other legal rule, whereas individuals or legal entities may subsequently invoke and rely on a particular EC legal act directly before the court. In general, the doctrine of direct effect operates on a vertical basis, except for the cases where it may operate on a horizontal basis under a judgement made by the Court of Justice.[31] A condition for the direct effect is as a general rule direct applicability, which denotes that an agreement is self-executing, without the European Union or national legislation being needed to implement it. This is the characteristic feature of the EC law, which means that it is applied without any involvement of any national law.

In the areas governed and regulated by the Union law (including judicial cooperation in criminal matters) the Member States before the adoption of the Treaty of Lisbon did not transfer their competence to the Union, but they rather agreed to cooperate in these areas and proceed jointly. Therefore, the principle of supranationality did not apply, which resulted in a different form of drafting and functioning of the Union law when compared to the Community law. As far as the Union law is concerned, the European Commission did not have a monopoly of law-drafting and law-making initiative, legal acts were adopted with the unanimous consent of the Member States, they did not have direct effect or priority over the national law, therefore, they had to be implemented into national legislation. The Court of Justice acknowledged the so-called indirect effect of the Union law, which means that national courts and law enforcement agencies must in criminal proceedings take a due account of all rules of the national law, and interprets them in the light of the wording and purpose of the Union law.[32]

Under Article 9 of Protocol 36 "*On Transitional Provisions*" annexed to the founding Treaties by the Treaty of Lisbon, legal effect of secondary acts, conventions among the Member States and other sources of law adopted on the basis of the EU Treaty and before the Treaty of Lisbon enters into force will not change until they are repealed, annulled, or amended.

[31] Horizontal direct effect means the possibility to invoke and rely on the Community legislation also in mutual relations between individuals or legal entities. Vertical effect only applies to the relationship between individuals and Member States. It enables to invoke and rely on the Community legislation only against the Member States and their authorities. If the State did not transpose the Community legislation properly, it may be sanctioned for a breach of the EC law.

[32] Judgement of the Court of Justice, Case C-105/03 of 16 June 2005 Pupino.

After the entry of the Treaty of Lisbon into force[33] "*regulations*" of the Union authorities have priority over the national law of the Member State and direct effect. The same applies to "*decisions*" to the extent specified therein.

Moreover, "*implementing acts*" and those "*delegated acts*" also have priority over the national law of the Member State and direct effect, which amend or supplement "*regulations*" or "*decisions*" to the extent to which they have priority over the national law and direct effect.

"*Directives*" have indirect effect. "*Recommendations*", "*opinions*" and innominate acts are not legally binding, however, they must be taken into account in the interpretation of national law in conformity with the Community law.

It would be interesting to discuss the future of the judicial cooperation in criminal matter, new, up-to-date common tools to combat crime, mainly harmonisation of criminal codes and criminal procedure codes applicable in individual Member States, and establishment of supranational institutions (e.g. European Public Prosecutor).

The idea to establish the office of the European Public Prosecutor (the "*EPP*") came to light in 1994. It was proposed by the Financial Control Authority of the Commission (then DG 21), which concluded that the existing level of protecting financial interests of the EC is insufficient, and asked reputable university professors to come up with a more modern solution. This initiative resulted in a detailed proposal of harmonisation of the criminal law in the area of crimes against financial interests of the EC and harmonisation of the related part of criminal procedures, together with a proposal to establish the office of the EPP. The Project was named ***Corpus Juris.*** It was fully supported by the European Parliament which insisted that the protection against fraud should be moved to the 1st pillar. This idea was also supported by the European Council in Nice. The idea of Corpus Iuris was also supported by the Commission, which proposed to insert Article 280a in the EC Treaty that would govern and regulate the establishment of the European Public Prosecutor, his tasks and basic functions. Other aspects should have been governed and regulated in the secondary legislation. The European Council in Laeken asked the Council to review this proposal as soon as practicable, taking a due account of differences in legal systems and traditions. The Council of Ministers for Justice and Home Affairs on 28 February 2002 stated that the implementation of this proposal has extreme constitutional consequences, and that it is not the right time to take such a radical step.

The Treaty of Lisbon opened the door for the establishment of the office of the EPP also if all Member States do not give their unanimous consent. The establishment of this office may be facilitated through "*enhanced cooperation*", and it is likely to happen, only for some (at least 9) Member States.

The Corpus Iuris Project as well as the office of the EPP (even after the possibility to establish the office of the EPP was enshrined in the Treaty of Lisbon) have been facing a number of serious questions relating not only to the role of the criminal law in the Community, but in this context also to further developments and lines of action of the Union as a community of independent states or as a supranational grouping, which has some attributes of the state. Therefore, these are not only significant legal questions, but first of all significant political issues beyond the framework of this article.

33 Article 288 of the Treaty on the Functioning of the EU as amended by the Treaty of Lisbon.