

Selected Problems of Czech Criminal Law

Introduction – Criminal Liability in the Czech Criminal Law

Criminal Law's Reform after 1989

- The reform of criminal law started in **1990**, after the „Velvet Revolution“ in November 1989
- 2 phases of the reform
 - **phase of amendments** – numerous amendments to Criminal Code a Code of Criminal Procedure reflecting the democratic and social changes and also the fact that Czech Republic became a Member State of EU in 2004 have been accepted since 1990
 - **phase of recodification** – the concept of three penal laws (codes) was introduced

The Most Important Changes

- **Abolition of death penalty** 1990 + introduction of new conception of exceptional punishment:
 - imprisonment over 15 to 25 years and life imprisonment
- **Abolition of 33 criminal offences** based on the ruling ideology of the Communist party
 - Leaving of the Republic, Dishonouring of the Socialistic State, Subversion of Republic, the extended protection of socialistic property...)
- A new conception of criminal liability **in the case or the culpable insanity**

The Most Important Changes

- Introduction of **new criminal offences** responding new social phenomena a changes
 - especially in the area of economic crimes, for example Insider Trading, new forms of fraud, crimes connected with public tenders,
- Promoting the idea of **alternative punishment and restorative justice**
 - introduction of probation, community service, diversions in the criminal proceedings (conditional suspension of the criminal prosecution, settlement)

Recodification

- A concept of three criminal laws
- **Criminal Code** (or “CC”) – since January 1, 2010
- **Juvenile Justice Act** – since January 1, 2004
- **Criminal Liability of Legal Persons Act** – since January 1, 2012.

Juvenile Justice Act

- This act gives coherent legal regulation of criminal liability and punishment of juveniles together with the legal regulation of criminal proceedings in cases of juvenile and also deals with matters of minors
 - juveniles – 15-18; minors – under 15
- This law extended the application of the new **principle of restorative justice** into Czech criminal law
- The system of sanctions for juveniles is based on the **united system of measures**
 - educational, protective and criminal measures
 - purpose is to create conditions for sociable and personal development of the juvenile, protection from the negative effects and prevention from committing other transgressions.

General Characteristics of the New CC

- Introduction of a **formal concept** of a criminal act
- The categorisation of offences based on **bipartition**
 - misdemeanour and felony
- **Extension of the system of sanctions**
 - new alternative punishments – house arrest, prohibition of entry to sporting, cultural and other social events, protective detention)
- **Stricter punishment** in cases of the particularly serious felonies and plural criminal activity
- **New systematic arrangement** of the Special Part of Criminal Code following human rights attitude
- Introduction of **new offences**
 - for example new type of a murder, manslaughter, harm to health out of excusable motives,...

The Principle of Legality

- ***Nullum crimen, nulla poena sine lege*** – „only the law shall determine which acts constitute an offence and what penalties or other detriments to rights or property may be imposed on them“ (Charter of Fundamental Rights and Freedoms, Article 39)
 - **Prohibition of retroactivity** to the detriment of the perpetrator
 - **Prohibition of analogical interpretation** to the detriment of the perpetrator
 - **Prohibition of bylaws** as a source of criminal law
 - **Prohibition of customs** as a source of criminal law

Criminal Act in the CC

- According to Section 13 para 1 of the NCC, ***an offence shall be an unlawful act which is described as criminal in a criminal statute and the features of which are laid down in such a statute.***
- This definition is supposed to express a **formal concept** of the criminal act.

The Bipartition of Criminal Acts

- Criminal acts are divided into **misdemeanours** and **felonies**.
- **Misdemeanours** shall be all negligent offences and these intentional offences with a maximal term of imprisonment not exceeding five years.
- **Felonies** shall be all offences which shall not be considered an offences.
 - **Particularly serious felonies** – felonies with a maximal term of imprisonment of at least 10 years of imprisonment
 - particularly serious felonies are a subcategory of felonies, not a separate category
- **Juvenile Justice Act knows only one category - transgression**

Criminal Act in the Former CC

- According to Section 3 para 1 of the former Criminal Code, ***a criminal act shall be an act which is dangerous to the society and the features of which laid down in this Code.***
 - According to Section 3 para 2, an act whose degree of danger to society is negligible shall not be considered a criminal act, even though it may otherwise have elements of a criminal act.
 - The degree of danger to the society was determined in particular by the **significance of the protected interests** affected by such an act, **the manner in which the act is committed** and its **consequences**, the **circumstances under which the act is committed**, the **person of the perpetrator** and the **degree of his culpability** and motives.
- According the **Juvenile Justice Act**, an act whose degree of danger to society **is small** shall not be considered a criminal act.....

The *Ultima Ratio* Principle in the CC

Section 12 para 2

*“The criminal liability and its legal consequences may be only applied **in socially harmful cases** if application of liability under **another legal regulation is not sufficient.**”*

The use of the *ultima ratio* principle

- At first problematic reception by the decision-making praxis
 - social harm = social danger vs. strict formal approach
- Disharmony even at the Supreme Court
- Unifying opinion of its criminal division
 - *ultima ratio* as a **principle of legislation**
 - *ultima ratio* as a **corrective of interpretation**
 - **direct application** of the principle
 - the individual case does not reach even the lower border (threshold) of criminality

Examples: *Ultima Ratio Principle*

- Controversial finding of the Constitutional Court (I. ÚS 3080/2016) - squatting in the homestead “Cibulka”
- the squatters had an written agreement with the owner at first, then he cancelled it because of the breach of the conditions, so a notice period of three months started
- the squatters disagreed and tried to negotiate another deal with the owner during the notice period (they wanted a new place to stay or a longer period to move out etc.), the negotiations allegedly continued even after the expiration of the notice period
- the owner refused and submitted a criminal notice due to suspicion of a crime under § 208 CC

§ 208 - Unlawful interference with another's rights to a house, flat or non-residential space

“(1) Who in a breach of law occupies or uses another person's house, flat or a non-residential space, will be punished with up to two years of imprisonment or with a financial penalty.

(2) The same penalty will be imposed on anyone who in a breach of law obstructs the use of these premises by an authorised person.

(3) Punished with an imprisonment of from six months up to five years shall be anyone who

*a) commits an act according to the par. 1 or 2 as a **member of an organised group***

b) causes damage of large proportions by such an act.”

I. ÚS 3080/16

- *“The CC basically preserved the formal-material concept of the criminal act. The solution contained in the CC is based on a combination of a formal term of a criminal act (sec. 13 par. 1) and a material corrective of the scope of the criminal lawlessness through the subsidiarity of criminal repression (sec. 12 par. 2, sec. 39 par. 2).”*
- This idea contradicts the opinion of the Supreme Court
- Should that mean that the material aspect of a criminal act ought to play the same role as it did in the former CC?

Examples: *Ultima Ratio Principle* *II.*

- Finding of the Constitutional Court (III.ÚS 934/13) – running of the so-called „grow shops“
- shops selling every propriety necessary to grow and cultivate hemp rich in THC
- seeds, soil, fertilizers, pesticides, UV-lamps, bongos, rolling papers, pipes, written instructions and catalogues contain also description of particular seeds‘ effects on human organism etc.
- the documents were accessible from various unrelated serves on-line
- no actual grown plants or crushed pulp was sold
- the court found them guilty of promoting toxicomania according to sec. 287 sec. 1, 2 lit. c) of the CC

Sec. 287 of the CC – Promoting of Toxicomania

*“(1) Whoever tempts another person to **abuse an addictive substance** other than alcohol or supports him therein and/or whoever who **incites or promotes abusing of such a substance** in another way, shall be punished with up to two three years of imprisonment or with an ban on activity.*

(2) A perpetrator shall be punished with an imprisonment form one year to five years or with a financial penalty, if he commits the act stated in par. (1):

- *as a member of an organized group*
- *against a minor*
- *through a press, film, radio, television, publicly accessible computer network or **in a similarly effective manner***

(3) A perpetrator shall be punished with an imprisonment form two to eighth years, if he commits the act stated in par. (1) against a minor under 15.”

III.ÚS 934/13

“The description of an act...contains a whole complex of different actings, put into an objective context. The court of facts has expressed in an transparent, apt and concrete enough way the elements of criminal actings that the accused `offered in the shop and publicly presented materials promoting growing and using of marijuana and of hemp and providing instructions to grow several cultivars of hemp in order to obtain THC in the grown plants in an extent as effective as possible...’ while apart from instructions on growing, there are descriptions of the effects of use of parts of the plants to human organism and namely the quantum of THC in the particular cultivars in the printed materials.`”

Body of a criminal act

- Can be defined as a **complex of formal elements** (characteristics) which has to be fulfilled in order to conclude that a criminal act has been committed
- **Object**
- **Perpetrator (Subject)**
- **Objective part (aspect) – *actus reus***
- **Subjective part (aspect)– *mens rea***

Object

- **Interests, relations** and **values** protected by criminal law
- General – general interest on inhibition of criminality
- Generic – legitimate interest of individuals, society and state
- Group – e.g. freedom (personal, of movement, of religion)
- Class – e. g. property, life, health
- **Individual** (e.g. property entrusted to another, property one has on him/her)
 - individual object is an element of each specific body of a crime

Perpetrator

■ Age

- a person who has not completed **fifteenth year of age** at the time an offence is committed shall not be criminal liable (CC, Section 25)

■ Sanity

- a person who was not able, due to his **mental disorder**, to **recognize the illegality** of his acting **or to control** it, shall not be criminally liable for his act (CC, Section 26)

■ + sufficient level of **intellectual and moral development** by juveniles

- (does not apply on adults)

■ Special attribute, position or relation of a perpetrator

- special attribute – public official, citizen of the Czech Republic etc.
- special relation – debtor of the injured person, mother of the newborn

Perpetrators

- Direct perpetrator
 - Who has fulfilled all the elements of a body of crime, its attempt or its preparation where it is punishable
- Indirect perpetrator
 - „the man behind“, the manipulating mastermind
 - Who **has used another person** thereto, which
 - is not criminally liable due to a lack of age, sanity or error
 - is not criminally liable due to a condition excluding illegality
 - did not act himself/herself
 - lacked the substantive element
 - is criminally liable for a negligent criminal offence
 - is criminally liable for a criminal offence without a specific motive or aim
- Co-perpetrators
 - **Intentional joint** committing by two or more perpetrators

Culpable Insanity

- **Drunkenness:** insanity caused by application of addictive substance + committing an act otherwise classified as offence
- **Actio libera in causa dolosa:** insanity brought upon self with the intention of committing an offence in the state of insanity
- **Actio libera in causa culposa:** committing an offence in the state of insanity which the perpetrator has voluntarily entered while knowing or should and could have known the risk of committing an offence in this state

Objective Part

- **Acting**

- act of **commission** or act of **omission**
- omission – where the perpetrator had a legally relevant obligation to act

- **Consequence**

- **violation** or **endangerment** of an interest protected

- **Causality**

- causal link between the acting and the consequence (acting as a *condition sine qua non* of the consequence)

- **Manner** in which the offence was committed, **place** or **time** of committing, **effect** of the offence

Subjective Part

- **Culpability**
 - intent or negligence
 - **Sec. 13 par. 2 of the CC** *“The intention is required as a regular condition of punishability, unless the Criminal Code expressly provides that the negligence is sufficient for committing a crime.”*
- **Motive** – what has driven the perpetrator
- **Goal** – what he or she wanted to achieve
- **Intention** – what was the perpetrator’s general design (e. g. when he/she commits a criminal act through multiple attacks)

Intent

■ Direct intent

- the perpetrator **is aware** that he (she) could violate or endanger an interest protected by the Criminal Code and **wants to** it

■ Indirect intent

- the perpetrator **is aware** that he/she could violate or endanger an interest protected by the Criminal Code and he or she **is at peace** with the possibility such a violation or endanger could emerge

■ Forethought

- even a brief plan shortly before an act

■ Previous consideration

- more sophisticated premeditation

Negligence

■ Wilful negligence

- the perpetrator **knows** that he (she) could violate or endanger an interest protected by the Criminal Code, but **without adequate reasons** he (she) **believes he (she) won't cause it**

■ Non-wilful negligence

- the perpetrator **does not know** that his (her) acting can violate or endanger an interest protected by the Criminal Code, although, with respect to the circumstances and his (her) personal situation, he (she) **should know and is able to know so**

■ Gross negligence

- negligence that shows **especial ruthlessness** towards the protected interest

Other Forms of Criminal Acts

- According to Section 111 criminal act means also **preparation for a criminal act, attempted offence** (inchoate offences), **organisation, abetment and assistance** (complicity).
- Extension of criminal liability
 - it stems from a committed (completed) offence, i. e. from the fulfilment of all elements of the body of an offence
 - some of these elements are missing in respect to inchoate offences and complicity

Inchoate Offences

- **Attempt** - § 21 CC
 - intentional offences only
 - the perpetrator started to fulfil the body of a particular offence, but hasn't finished yet
 - the perpetrator has removed the last obstacle to fulfill the body of a particular offence
 - there is nothing that prevents the perpetrator from committing the offence
- **Preparation** - § 20 CC
 - only particularly serious felonies where the CC explicitly states so
- Both attempt and preparation are punished **in principle** as committed offences
 - specifics of punishment (e. g. incapable attempt)

Complicity – sec. 24 of the CC

- **Organization**
 - orchestrating or managing of the committing of an offence
 - **Abetment**
 - instilling the idea of committing an offence in another
 - **Assistance**
 - enabling or simplifying of committing an offence by another
 - especially providing instruments, removing obstacles, luring out the victim to the crime scene, patrolling at the crime scene etc.
 - **Accessory principle vs. isolation principle**
 - So-called ostensible complicity
 - the act on which the accomplice takes part is not criminal itself, only the complicity is
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- e. g. taking part on suicide (sec. 144 CC)

Practical Example – criminal cooperation

- O. was a bully, among whose targets was also F. (child under 15)
- F. developed a plan to get rid of O. – he wanted to lure him out into the woods outside their hometown and kill him there
- F. made the necessary preparations – obtained a .22 sporting pistol and dug a shallow grave, but as he was not on good terms with O., he needed to lure him there somehow
- F. contacted J. (a juvenile between 15-18), another O.'s target, and asked him for help with O.'s murder, J. agreed in return for a financial reward
- F. and J. inspected the place of murder, F. showed J. the weapon and they arranged the time of the deed

Practical Example – criminal cooperation

- J. contacted O. and lured him into the woods under false pretenses that a marijuana field was growing there and that he could grab himself as much as he wanted to
- When they reached the place, J. showed O. the direction where the field was supposed to grow, withdrew and observed the rest of the deed from a distance
- F. approached O. from behind and shot four times at him, emptying his magazine by that
- First shot hit O. into a lower back area, second hit O.'s left auricule, the other two shots missed
- O. turned around and was moving towards F., who panicked; at this point, J. shouted: "Finish him off!"

Practical Example – criminal cooperation

- F. manned up, reloaded and shot O. in the head
- O. fell down dead, F. kicked him in the head and shot him once more; then he and J. attempted to drag the body to a grave
- Court of the first instance
 - J. is an indirect perpetrator of a murder for the whole act

Practical Example – criminal cooperation

- Court of appeal
 - there were two acts: luring O. to the crime scene and shouting at F. to finish O. off
 - first act: J. assisted to an act otherwise criminal of F.
 - not guilty for there is no criminal liability
 - second act: J. is indirect perpetration of a murder
- Supreme Court
 - J. is a direct perpetrator of a murder with factual co-perpetrator F.
 - F.'s actions are attributed to J.
- Constitutional Court
 - the Supreme Court was right

Circumstances Excluding Illegality

- An act fulfils the definition of a certain criminal act, but due to these circumstances cannot be deemed as criminal or even illegal in general
- **Extreme emergency**
 - averting an imminent or prevailing danger to an interest protected by a criminal statute
 - subsidiarity + lesser than equal consequences
- **Necessary defence**
 - averting an imminent or prevailing danger attack on an interest protected by a criminal statute
 - no subsidiarity, defence must not be clearly obviously disproportional to the attack
 - of self, another person or even of an object

Circumstances Excluding Illegality

- **Consent of the victim**
 - only regarding the interests at the victim's full disposal
 - does not apply to physical integrity (except for medical intervention)
 - must be freely given, prior or at least along with the activity, can be presumed
- **Acceptable risk**
 - harming or endangering a protected interest while conducting a socially beneficial activity in an accordance to the up-to-date state of knowledge and available information, if the outcome cannot be achieved otherwise

Circumstances Excluding Illegality

- **Legal use of a weapon**
 - in accordance with another statutes (policemen, soldiers etc.)
- **Other circumstances not provided by the CC**
 - unclosed list
 - exercise of rights and duties
 - sport activities conducted according to the rules of the sport
 - exercise of a binding command etc.

Criminal Liability of Legal Persons

- Quite a new idea in the Czech Republic
 - historically the Czech criminal law followed the doctrine *Sociates deliquere non potest*, pressure from the EU and international community instigated a change
- § 6 of Criminal Liability of Legal Persons Act (hereinafter „CLLP“) –
 - **list of legal persons incapable of committing offences** (the state, local government units in exercise of public powers + foreign states and international organizations)
 - otherwise no exceptions (both private and public entities)
- § 7 of CLLP
 - **exhaustive list of offences that cannot be committed by a legal person**
 - e.g. maslaughter, infanticide by a mother, bigamy etc.)

How can a legal person commit a crime?

- Always through a conduct of another person (§ 8/1 CLLP)
- Could be another legal person, but at the end of the chain there always ultimately is a natural person
 - **statutory body** or its member,
 - **another person in leading position** with right to represent the legal entity,
 - **person exercising managing or controlling activity,**
 - **person with decisive influence** (e.g. head of a holding),
 - **employee in relation to his work assignment who was ordered or instructed to conduct in a particular way or who wasn't prevented from doing so** (because of a lack of control and preventive mechanisms)

Accountability Principle

- Quite strict
 - in principle, it is sufficient when some of aforementioned persons commits an offence **in favour** of a legal entity or **in the course of its activities**
 - the criminal liabilities of this person and of the legal entity are **independent** and **separable**
- Conditions for exclusion of criminal liability
 - the legal person must have previously made **all the effort to prevent such an offence from happening** which can be fairly required from it (§ 8/5 CLLP) - compliance programs
 - effective remorse (§ 11 CLLP) – some offences are excluded

Other Modifications under CLLP

- **Succession of criminal liability (§ 10 CLLP)**
 - prevention from disposing of „toxic“ components to one successor
 - the criminal liability follows all successors (none can escape it)
 - when deciding the punishment, the court takes into account the rate to which each of the successor benefited from the criminal act
- **Different list of punishments**
 - stress on types of punishment with economical impact
- **Modification of the scope of the act**
 - to establish the territorial scope of the act it is sufficient when the legal person has its registered office, enterprise, organizational unit, activities or property on the territory of the Czech Republic

Thank you for your attention!

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