

# **Selected Problems of Czech Criminal Law**

Defense in Criminal Proceedings

# Anglo-American vs. Continental System

- Different approaches
  - depends on the character of the criminal proceedings
  - inquisitorial v. adversary
- Similarities given by the nature of the criminal defense
  - e.g. the standard of proof
  - presumption of innocence

# Anglo-American System

- Thorough equality of arms
  - no preparatory proceedings, the truth comes out of the clash of the parties' statements and evidence (eristic model)
- Jury system
  - makes the trial more unpredictable
  - the prosecution is more willing to negotiate
- System of appeal in favour of the defendant
- So-called „two cases approach“
  - tendency to accept plea bargain if the defense has no case

# Continental system

- Formal equality of arms in the trial phase
  - defense plays more of a reactive and corrective role
  - strong role of the preparatory proceedings
  - no equality of arms outside of court
- Professional judge system
  - “professional deformation”
  - better foreseeability for the prosecutor
- Twofold system of appeal
  - prohibition of *reformationis in peius*
  - right of the prosecutor to appeal to defendant’s detriment

# Defense in the Criminal Proceeding

- Important part of the right to a fair trial
  - basic components (art. 6 par. 1 of CPHR) + few “bonuses” (art. 6 par. 2 and 3 of CPHR)
- Ensuring a possibly effective chance for the defendant to influence the course of the proceedings in his/hers favour
- Division
  - defense in the material sense
  - defense in the formal sense

# Defense in the material sense

- Giving the defendant legal instruments to oppose the prosecution
  - right to make statements
  - right to collect and present evidence
  - right to comment evidence
  - right to propose certain procedures
  - right for legal remedies [to appeal etc.]
  - right to translation and interpretation
- Right to remain silent

# Defense strategies and tactics

- Defense strategies
  - preventing finding of guilt strategy
  - milder verdict regarding guilt
  - milder verdict regarding punishment
- Defense tactics
  - facts based tactic
  - material law based tactic
  - procedural law based tactic
  - „passive“ tactic (remaining silent and uncooperative)

# ***Nemo tenetur se ipsum accusare***

- the defendant as a source of evidence vs. as a subject of the procedure
  - not only what he/she remembers, but also fingerprints, DNA, scars, bruises etc.
  - the law enforcement wants this info
  - the defendant might not want to surrender it
- no one can be forced to attribute to his/hers own conviction
  - ECHR Jalloh v. Germany
  - limits: **active participation**
  - the defendant may be forced to brook investigatorial procedures passively



# Right to lie?

- In most continental systems immunity from perjury
- But not immunity from false accusation
- What about slander, libel, hatespeech or other verbal delicts?
  - ECHR Brandstetter v. Austria
- In most systems crime of obstruction of justice
  - forging, destroying, altering etc. evidence, abetting to commit perjury etc.

# Defense in the formal sense

- Right to be legally represented
  - right to choose one's own attorney [always]
  - obligatory representation by an attorney in certain cases
  - right to be legally represented free of charge in certain cases
- Purpose – to have a legal professional at one's side
  - counseling, recommendations, acting on behalf of the defendant

# Obligatory legal representation

- Obligation to be legally represented **from preparatory proceedings on**
  - in cases of **deprivation of liberty** (custody, prison etc.)
  - **diminished legal capacity**
  - proceedings *in absentia*
  - in the **plea bargaining negotiations**
  - If the judge or prosecutor in the preparatory proceedings **deems it necessary**
  - if the charged crime's statutory maximum **exceeds 5 years**
  - in a procedure against **a juvenile (never for legal entity)**
- + special cases from the start of the trial or in execution
  - e. g. **trial after fast track preparatory proceedings**

# Defense Attorney and the Law Enforcement

- Rights
  - to be present during investigation actions
  - to get access to the file
  - to get access to his/hers client [e.g. in custody] 24/7 without the presence of another person
- Obligations
  - obligation to be present during the trial
  - obligation to follow the instruction of the law enforcement and the court

# Defense Attorney and the Defendant

- Rights
  - to be instructed
  - to be compensated for his work
- Obligations
  - obligation to professionally represent
  - obligation to act only in client's favour
  - obligation to follow the instructions
  - obligation to give counsels and to inform the client
  - obligation to respect the attorney-client privilege

# Defense Attorney and the Bar Association

- Rights
  - to legally represent as a defense attorney [so called “defense monopole”]
- Obligations
  - to keep the dignity of the estate untouched
  - to wear the estate’s robes
  - to be polite to the law enforcement
  - to express himself/herself moderately and up to the point

# Defense Attorney's Robe



# Who may become a defense attorney

- attorney enrolled with the Czech Bar Association
  - „long“ graduate study (5 years, master's degree in law)
  - at least 3 year of praxis as an attorney's trainee
  - successful passing of a bar exam
  - mandatory insurance
  - swearing an oath
- trainee attorney
  - finished legal education
  - enrolled as a trainee with the Bar
  - employee of a specific attorney (supervisor)
  - only cases which are in a jurisdiction of a district court in the first instance



# Limits of the Criminal Defense

- Defense attorney **must**
  - act always in accordance with the law and the estate's regulation
  - consult the case with the client and give his/hers best opinion
  - respect his/hers client's instruction even if they are in discordance with the attorney's best opinion
  - continue the representation until one of prescribed conditions are met

# Limits of the Criminal Defense

- Defense attorney **must not**
  - **truth-examine client's statements** and pieces of evidence
  - **lie or present forged piece of evidence**
  - follow an illegal instruction
  - secure the evidence himself/herself
  - run personal errands for the client
  - restrain from the thwarting of a planned offence or offence in progress
  - report known already committed crimes

# Obstruction of justice – sec. 347a of CC

*„(1) Who for the purposes of initiation of court proceedings, international judicial proceedings or criminal proceedings or in the course of such proceedings presents tangible or written piece of evidence, which has a substantial importance for the decision, while knowing that it has been forged or altered, with an intent for it to be used as genuine one, or who forges or alters such a piece of evidence with intent of it being used as a genuine one, will be punished up to two years of imprisonment.*

*(2) Who on his own or via somebody else provides, offers or promises a benefit to another person or for another person for the purpose of committing a criminal act of false accusation, perjury and false expert's opinion or false interpretation, will be punished by up to three years of imprisonment.“ ...*

**Thank you for your attention!**

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