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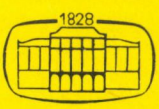

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INDEX

INFORMATIONES

RECENSIONES

VARIA

INTERNATIONALIA

Acta Juridica Academiae Scientiarum Hungaricae, 31/1-2/,
pp. 153-181 /1989/

LEGALITY AND THE PERSECUTION OF CRIMES

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The author makes an attempt to define the notion of legality in criminal justice. In the course of this he points out the differences between legality and officiality /to proceed ex officio/, and also determines the element of the principle of legality. The study deals among these with the duty of the state to investigate crimes, in details. It calls the attention to the constitutional problems being rooted in the selective prosecution of crimes, which also appear as problems concerning the distribution of power between the legislator and the agencies applying the law. The author challenges the principle of mandatory prosecution of all crimes because its enforcement cannot be granted which also raises constitutional tensions.

1. Introduction

Reform proposals urging to accelerate and simplify the administration of justice in criminal cases, arguing for rationalization and efficiency or even appealing to the interests of the defendant, have been presenting themselves more and more frequently in the literature of the law of criminal procedure. The ideas claiming for the increase of the role of the preparatory procedure and the loosening of the principle of legality /mandatory prosecution/ in order to remedy the deficiencies of the criminal procedure have an important place within the reform proposals. As it seems, they are not at all unfounded; instead, they have formulated a tendency from the recent history of criminal procedure. In fact, the absolute obligation of the authorities to prosecute crimes and to bring a charge has been moderated by more and more exceptions in the countries in which the principle of legality has been adopted as the milestone of the administration of criminal jusitce.

By waiving prosecution /non-prosecution/, the authority pro-

ceeding in the pre-trial phase pronounces a judgment on the judicial procedure declaring that the proceeding of a court is not needed in the given case.[1] In addition, the competence of the prosecutor is not limited in many cases to the declaration that a judicial proceeding is senseless. Thus, the prosecutor may be authorized, and the police in some cases as well, to fix competences or to designate the agency that will enforce the penal claim of the state. The more, the prosecutor under the rules of some legal systems is authorized even to place himself to the seat of the judge, to decide on the responsibility of the accused or to inflict a sanction on him, thus questioning the formerly immutable concept claiming an exclusive competence for the court concerning adjudication in criminal cases.

2. War of principles

The problem whether or not the prosecuting authority is entitled to settle a criminal case in its merits, precluding thus the court from pronouncing a judgment, is decided in the various legal systems depending on the preference given to the principle of legality or opportunity /expediency/.

The dispute on the advantages and disadvantages of the two principles has been lasting long since, and it is continued even in our time frequently at the level of speculations, in a manner more recalling duels in rhetoric. Thus, the disputing parties prefer to argue by expressing appreciation for the values which, in their supposition, result necessarily from the principle chosen by them. The birth of a reasonable dialogue is, of course, very difficult this way, as the partisans of

[1] Waiving prosecution is used here not in the sense as it is in paragraph 147 of the Hungarian Code of Criminal Procedure in force, saying that "The prosecutor may waive prosecution for a criminal offence which, compared to the criminal offence of greater weight made the subject of accusation is of no significance." The concept of waiving prosecution should comprise here all cases in which the prosecutor omits to take legal proceedings at a court although the conditions exist for initiating court procedure. The case mentioned above, in which aspects of economy in criminal proceedings are considered, pertains, of course, to the said group.

both camps may equally bring about convincing arguments, having this strength for themselves at least.

Thus, the supporters of the principle of opportunity declare proudly that the principe of expediency is the necessary parallel element of modern, progressive, humanitarian criminal law concepts in the law of procedure, being a means for rationalizing the administration of justice at the same time, making it possible to distribute the resources in a reasonable way, and permitting the authorities to concentrate their efforts to fight crimes that would be particularly dangerous to the society.[2]

On the contrary, the supporters of the principle of legality have no confidence in any kind of discretion. In their view, "the power of discretion involves the risk of arbitrary decisions and the violation of equality. For this reason, opportunity is a doubtful concept for the rule of law from the very beginning."[3] Beyond rejecting the recognition of the discretionary power of the prosecutor, there is a further argument claiming that the aspects serving as bases of discretion have usually an economic or political, i.e. extralegal nature. In this view, the consideration of financial considerations can be easily identified with market-minded bargaining which is evidently incompatible with the dignity of criminal justice and the moral mission criminal law and procedure have to fulfil.[4]

[2]Cf. e.g. RÖSTAD, H.: The Principle of Opportunity /of Expediency/. Considerations of Waiving of Prosecution Related to the Procedural System of Norway. Cahiers de Défense Sociale. Edition franco-anglaise 1984/85. p. 27.; HANSEN, U.: Die Tätigkeit der Anklagebehörde in Norwegen, In: JESCHEK, H.H.: – LEIBINGER, R.: /ed./ Funktion und Tätigkeit der Anklagebehörde im ausländischen Recht. Nomos Verlagsgesellschaft, Baden-Baden, 1979. p. 509.

[3]GERMANN, A.O.: Zum strafprozessrechtlichen Legalitätsprinzip, Schweizerische Zeitschrift für Strafrecht, 1/1961.

[4]Motivation to the Draft Bill of Criminal Procedure, submitted by the Minister of Justice to the House of Representatives, in the fourth session of Parliament 1892/97. Pesti Könyvnyomda RT, Budapest, 1895. p. 155.

Honouring political considerations used to be regarded as risky, for the balance of the branches of power may be thus upset; as a result, the power of the executive may be extended to the prejudice of the legislative and judicial branch, at least in legal systems in which the prosecutor's offices are subjected to the minister of justice. "The rejection to make dependent the application of substantive law on individual considerations or casual reasons of expediency is an elementary truth, to the extent that it is needless to prove it". This is from the motivation of the Hungarian Code of Criminal Procedure of 1896, with the following expoundings: "The law requires its unconditional implementation, and the realisation of its provisions must not depend on the subjective views of anybody. If the legislator demands to take into consideration extra-legal aspects, this has to be declared in the law, including the definition of the cases in question, and it cannot be entrusted to the discretion of the state or its individual agents. The strongest support of the legal order and the true content of the equality of rights appear just in that the aspects and measures of the assessment of diminal acts are constant and binding everybody. For this reason, the possibility of the non--application the criminal law from individual causes is excluded by the concept of the rule of law." The lengthy citation from the motivation of the Code of Criminal Procedure is justified here by the circumstance that the arguments expounded in our time in support of the legality principle are identical with those laid down in the text formulated almost a century ago.

3. Approachment of the two systems

The supporters of the two opposed camps are on the way, however, to judge their own system with a more reasonable approach and with less prejudice in recent time. Evidently, a change took place in the views, i.e. the disputing parties came to recognize that instead of further speculation and rhetorics it makes more sense to observe, without prejudices, the everyday operation of the two principles for which so many arguments

have been put forward in jurisprudence, in order to prove their superior values.

As a result of empirical research, several authors got convinced of the fact that the assumptions formulated by the theoreticians as necessary accessories of this or that principle are frequently not complied with in practice. The more empirical research was not even needed to question the correctness of some of these hypotheses. In fact, it was sufficient to cast a prejudice-free glance to the course of legislation and the practice of the administration of justice.

Several authors studying the principle of opportunity came thus to realize the existence of a difference between principle and the practice of the application of the law. Thus, Ulrich Hansen reported of the loss of the previous attractiveness of the principle of opportunity in the practice of the Norwegian crime control by the 1970-ies, not only in cases of adult perpetrators but of juvenile delinquents as well. The agency authorized to bring a charge is more and more inclined to submit the case to the court, provided that it detected it already and collected the means of evidence, so that the judge should be in charge of selecting the sanction.[5] And this occurs inspite of the fact that the law confers a very broad discretional power to the prosecuting agency. Thus, the prosecutor is allowed to dismiss the charge "if, having assessed the details of the case in a comprehensive way, he came to the conclusion that the overwhelming majority of the circumstances would justify to dismiss the charge".[6]

In a study investigating the changes of the administration of justice in the Netherlands, A.A.G. Peters drew also attention to the differences between principle and practice. Although the prosecutor enjoyed an almost complete liberty, under the provisions of the Code of Procedure, to bring a charge or not, practice made a rule of bringing the charge over a long period of time, and dismissal occurred only exceptionally. As long as

[5] HANSEN: op. cit. p. 530.

[6] Paragraph 85 of the Norwegian Code of Criminal Procedure of 1887, and paragraph 69 of the Act of 1981 replacing it.

the prosecutor's offices made use of this practice, i.e. proceeded, actually, in the spirit of the principle of legality, the administration of justice was functioning in the Netherlands relatively without frictions, enjoying support and sympathy from the population. Nevertheless, as soon as the prosecutor's offices started to make use of the broad-scale discretionary powers granted them by the law, so that the proportion of the dismissals of charges was increasing, this discretionary power, conferred upon the police and the prosecutor's offices, was regarded more and more as "a suspicious and problematic aspect of the administration of justice in the Netherlands". Quite paradoxically, the prosecutor's offices got exposed to the crossfire of attacks just at the time when they availed themselves definitely of the opportunity to proceed so as to meet the expectations of the legislator.[7]

Furthermore, it became also clear that the objectives of criminal policy, coupled to the principle of opportunity, could be realised not exclusively by means of a broad-scale discretion. Reference was made already in the preceding to the argument frequently expressed in favour of a broad-scale discretional power, claiming that the administration of justice can be more efficiently adopted this way to social changes, not being obliged to take measures against those infringing obsolete statutory prohibitions not having the support of the general public. Nevertheless, it was then proved by the development of codification that the administration of justice could be relieved from this uncomfortable task by legislation itself. It was required to this end to pay attention continuously to the changes in the morale attitude in society, to the validity of the norms of criminal law, and to remove the obsolete provisions of criminal law from time to time.

It was equally upon the effect of the changes that took place in the legislative process that the supporters of the discretionary power of the prosecutor came to understand the non-

[7] PETERS, A.A.G.: Authority in the Dutch Administration of Criminal Justice. Essays in Honour of Professor Shigemitsu Dando, Yuhikaku, Tokio, 1983. p. 180.

-existence of a necessary logical relation between the principle of opportunity and the relative theory of punishment. In fact, a relationship of this kind could be demonstrated only between the absolute theory of punishment and the principle of legality. The restitution of the legal order supposes the infliction of a punishment by the court, and this latter implies the bringing of a charge in all cases. This does not prove, nevertheless, the existence of a similar connection between the principle of opportunity and the relative theory of punishment, as these can be well put into harmony also with the principle of legality. Although it may be compulsory to bring a charge, the judge may be also authorized to meet the requirements of opportunity when fixing the penalty within the limits specified by law possibly by imposing penal measures /instead of a penalty/ or even by omitting to inflict a penalty, provided that this is admitted by the rules of substantive law. The difference between the two systems concerns "only" the division of competences; according to the principle of opportunity, it is the prosecutor who is authorized to assess the utility and expediency of imposing punishment and to take into consideration this when making the decision, while this authorization is conferred upon the court under the principle of legality.[8]

The concept as to which the principle of opportunity as expressing the human treatment of offenders necessarily and at any time, so that an equitable administration of justice must be incompatible with the absolute obligation of bringing a charge, proved to be inappropriate as well. Doubtless to say, humane efforts aimed at an equitable application of the law played a role in the formation of the principle of opportunity.[9]

[8] HEYDEN, F.: Begriff, Grundlagen und Verwirklichung des Legalitätsprinzips und des Opportunitätsprinzips. Hans Schellenberg Verlag, Winterthur, 1961. pp. 15-16.

[9] The fight between legality and opportunity in France is frequently mentioned as an example. According to a widespread opinion, practice favored ultimately opportunity for the rigour of the Code Pénal was thus softened. See: GERMANN: op. cit.

Nevertheless, the circumstances under which the principle of opportunity came into existence can only confirm that, due to the rigour and rigidity of substantive law, the aspects of equity could obtain a role in former times only through the intermediary of procedural law, through avoiding to bring the cases before the court. This is, however, absolutely insufficient to conclude to the immanent value and humanism of the principle of opportunity. On the contrary, the circumstances of birth referred to above give support much more to the view that the principle of opportunity may loose its sense and function with the transformation of substantive criminal law.

Besides, the myth of the necessary connection between opportunity and the equitable and mild treatment of criminals was refuted extensively by practice. As it is known, offenders are not relieved from the interference of social control in all cases by the omission of bringing a charge. In fact, in several cases non-prosecution simply means that an other organ and not the court will proceed in the case of the accused. Furthermore, it is also known, if not from other sources, than from the charges raised against the treatment ideology, that a milder and more humane treatment against the perpetrator is not at all guaranteed only by avoiding a judicial procedure.

Finally, it became equally clear that the broad discretionary power granted to the agencies prosecuting criminal cases was, by itself, insufficient to ensure the rationality of crime control policy. Also in legal systems based on the principle of opportunity, it is mostly "harder" factors, beyond the organs charged with the prosecution of crimes that in fact, will affect decisively the types of criminal behaviour to be revealed and judged by a court. Some of these factors are e.g. the visibility of the act, the possibilities of bringing evidence and first of all, those influencing the population's inclination to report. Accordingly, the scope of the acts that can be, and are actually, prosecuted is determined to a significant extent by the types of injuries which become known to the investigating organs from the injured persons and the population, respectively.[10]

[10] HANSEN: op. cit. p. 512.

At the same time, it became also clear, and again mainly from the results of empirical researches that the hypotheses coupled to the principle of legality were not always valid in pracitce, as the discretionary power of the authorities responsible for the conduction of a criminal procedure cannot be excluded even by the statutory prescription of the mandatory prosecution of criminal cases. First, one must not be a fanatical supporter of the free law school to admit that criminal law contains a number of uncertain concepts with an unclear meaning and their interpretation opens the way, evidently, for discretionary assessment.

The very theatre of discretion is, however, fact-finding and proof-taking. To bring a charge is mandatory namely only if the case is suitable for the judicial proceeding, at least according to the principle of legality in its sense used to be interpreted in our time. However, the degree to which the act in question can be regarded as confirmed by evidence, depends on the discretionary assessment of the authority prosecuting crime First, the members of these authorities will decide on the efforts to be taken in order to bring to light the various types of criminal acts and the intensity devoted to collect evidence. Second, they are vested with remarkable and hardly controllable powers in assessing the weight evidence when deciding whether or not a particular case is "mature" for a judicial treatment. Furthermore, the process of determining the intensity of clearing up and the discretionary assessment of the weight of evidence may be influenced by criminal-policy considerations of the prosecutor's office.

Research findings on the proof-taking activity of the prosecutor's office suggest, furthermore, that the separation of the competences of the branches of power is not guaranteed by the principle of legality. In fact, the prosecutor may deprive the legislator of his competence when, making use of his monopoly of prosecution, or abusing it, respectively, utilizes his authorization to direct the procedure of proof-taking frequently "to decriminalize the lower regions of criminality".[11]

[11]Cf. for Finland e.g.: JOUTSEN, M. – KALSKE, J.: Pro-

Similarly, it has been confirmed by practical experiences that the prescription of mandatory prosecution does not ensure the citizens' equal treatment before the law by itself. On the contrary, there is evidence that a fanatical insistence on the principle of legality may provoke just the opposite effect to what was the original intention. This occurred in Italy where legality was raised to a constitutional principle in 1947, and the code of procedure stipulated that the prosecutor was not allowed to discontinue procedure on his own initiative even in case of the insufficiency of evidence; his only right was to make a motion to the examining judge to terminate the proceedings.

As a result of unflexible regulation, the courts became incapable to comply with the excessive quantity of unsettled work charging them. Ultimately, the capacity of functioning of the administration of justice could be maintained by the cancellation of numerous procedures, for the limitation period having passed, and the parliament granted grace the accused almost without selection. Thus the situation of those subjected to criminal proceedings became, however, still more insecure, and the principle of the equal treatment by the law suffered a breach.[12]

It was equally Italy's example which drew attention to the risks of the formal observance of the principle of legality whereby the legislator might be compelled to introduce institutions which could be still less adopted to the existing legal system than cautious concessions to expediency considerations.

In fact, it is admitted under article 162 of the Italian Criminal Code that the accused of criminal acts of minor weight

secutorial Decision-making in Finland. National Research Institute of Legal Policy. 67. Helsinki, 1984. p. 23.; for the FRG: SESSAR, K.: Legalitätsprinzip und Selektion. Zur Ermittlungstätigkeit des Staatsanwalts. In: GÖPPINGER, H.: – KAISER, G.: /ed./ Kriminologie und Strafverfahren. 12. Ferdinand Enke Verlag, Stuttgart, 1976. pp. 155-156.

12 ZAGREBELSKY, V.: Alternatives to Criminal Proceedings and within Criminal Procedure in a System Where Prosecution is Mandatory. Effective, Rational and Humane Criminal Justice HEUNI Publications No. 3. Helsinki, 1984. p. 257.

may "compensate" themselves from the inconveniences of further proceedings by offering a sum fixed in the law. If the judge accepts the offer, he terminates the proceedings. Up to 1981, this institution made it only possible to handle criminal acts punishable by a fine in this milder way. Nevertheless, its scope of application was then extended to cases in which, beside a fine, detention was prescribed by the law as an alternative punishement.[13] Evidently, no detailed comments are needed to make it feel that this model of sentencing, recalling plea--bargaining as it is known in the American legal system, is absolutely alien to the continental concepts in the law of procedure.

As a result of the relevant recognitions, the systems of procedure based on two opposite principles came somewhat closer to each other in recent time.

The efforts aimed at restricting the extremities that were experienced in the practice of bringing charges confirmed the changed attitude in the systems accepting expediency considerations. Thus, various guiding principles, circulars, etc. were issued by the top instances of the prosecuting agency in England, Wales, Denmark, Luxemburg, and the Netherlands, destined to serve the unification of the practice of bringing a charge, in the name of equality and justice.

At time same time, self-examination can be undoubtedly observed also on the other side. In fact, it seems that the crisis of legality is deeper if the two principles are inspected. This statement is confirmed in that the loosening of the principle of legality is not only in the plans in countries where mandatory prosecution is prescribed by law but minor or major concessions to the demands of opportunity have been already made in almost all of these countries in the form of legislation.

As regards the systems in which the prosecutor has the discretionary right to decide on the expediency of bringing a

[13] AMODIO, E.: Diversion and Meditation /Italy/. Revue Internationale de Droit Pénal, 3/4/1983.

charge, on the other hand, the weak points of the principle of opportunity became, no doubt, clear so that efforts were made with a view to unify the prosecution practice, however, the values inherent in the principle of opportunity have never been questioned, however. Thus, inspite of the actual intentions to set limits to the possible abuses of the prosecuting authorities, the replacement of opportunity by the system of the mandatory prosecution has not been in prospect in any country so far.

Contrary to the afore-mentioned, the view claiming that the prosecution of all criminal acts and the mandatory presentation of an indictment covering all cases would be impracticable and, in addition to it, would imply unbearable consequences, has been expressed quite frequently by scholars in countries adopting the principle of legality. These theories made thus a virtue of what was judged earlier a deficiency. In other words, the said theories declare the fundamental idea of the principle of legality to be worthless. Other views, although not questioning the values assumed to be linked to the principle of legality, consider the principle of opportunity more appropriate for the realisation of these values, strange as this may seem. It is convenient here to quote the closing thought of K. Sessar's study mentioned in the preceding: "... it is questionable whether or not the principle of opportunity, based on the recognition of the necessarily selective character of the prosecution of crime bears in itself the risk of unequal sanctioning as it has been stated again and again. On the contrary, it can be easily thought that it is just the principle of opportunity which would make it possible for the prosecutor to judge the cases in an equality-based way concerning also their content, beyond the only formally equal consideration."[14]

4. Legality and officiality

The principle of legality appears as a command for the prosecuting authorities, prescribing for them that the criminal

[14] SESSAR: op. cit. p. 164.

law is to be applied. Accordingly, the principle of legality states an obligation, i.e. that of the enforcement of the demand of punishment.[15]

On the contrary the principle of officiality, i.e. ex officio procedure, frequently dealt with together with legality, formulates a right. In fact, it gives an authorization the state organs set up for this particular end to enforce the demand of punishment irrespective of the consentment of other persons, the more, even contrary to their will.

Just as officiality, the existence of the principle of legality can be attributed to the changes as a result of which the penal system became part of public law. Both principles can be envisaged only as recently as "the state coupled the concept of social injury to a criminal act"[16] i.e. no more considering it as a private injury.

The common condition of the birth of these principles might be the cause of the inclination, experienced with both the legislation and the jurisprudence, to see a necessary connection between the principles of legality and officiality. The more, these two principles used to be treated as if they had the very same meaning. Thus, it is laid down in paragraph 2. of the Hungarian Code on Criminal Procedure in force that "in the presence of the conditions established under this Act the authorities acting in criminal cases shall be bound to conduct criminal proceedings". Accordingly, the obligation to act is prescribed by the law, and this under the pretext of ex officio proceedings, i.e. replacing the principle of legality by that of officiality. Evidently, the legislator adopted here the theoretical concept arguing for the unity of rights and duties in the prosecution of crime. In fact, this view can be traced in the literature, its summing up reading that once the state acquired the exclusive right of the prosecution of crime, it is bound,

[15] SZABÓNÉ, N.T.: A büntető igazságszolgáltatás hatékonysága /Efficiency of the administration of criminal justice/. Közgazdasági és Jogi Könyvkiadó, Budapest. 1985. p. 35.

[16] Motivation to the Draft Bill of Criminal Procedure of 1986. p. 148.

at the same time, to take care of the enforcement of the demand of punishment. Nevertheless, this argument is inappropriate for confirming the coincidence of officiality and legality. In fact, it is only a moral demand or, better, a recommendation, just as saying in for a penny in for a pound, i.e. the obligation of the prosecution of crime would result necessarily from the right of prosecuting crimes.

It seems to be justified to give a separate treatment to the principles of officiality and legality, and this is not a consequence of an inclination of systematizing, frequently reaching an excessive extent with the practitioners of criminal law but the recognition that, instead of showing a necessary interconnection, the two principles are, in fact, just opposite to each other in some aspects. While the principle of officiality gives the basis of the power of the prosecuting mechanism of the state, the concept of legality sets limits to that power.

It is known that officiality, as a necessary element of the inquisitorial process obtained general recognition and use in the canonical procedure at the time when Pope Innocent III set as his purpose the strengthening of the power and authority of the papacy as a condition of the world-wide power of the Church.[17] To confirm officiality, the pope referred to two citations from the Bible. The first, from the Genesis, read as follows: "Then the Lord said, Because the cry of Sodom and Gomorrah is great, and because their sin is very grievous; I will go down now, and see whether they have done altogether according to the cry of it, which is come unto me; and if not, I will know." The other may be found in Luke's Gospel in the parable on the untrue steward, saying: "And he said also unto his disciples, There was a certain rich man, which had a steward; and the same was accused unto him that he had wasted his goods. And he called him, and said unto him, How is it that I hear

[17] For a comprehensive commentary to the formation of officiality and the inquisitorial procedure cf. MÓRA, M. – KOCSIS, M.: Magyar büntetõeljárási jog /Law of Hungarian criminal procedure. A university textbook./ Tankönyvkiadó, Budapest, 1961. pp. 67-68.

this of thee? give an account of thy stewardship; for thou mayest be no longer steward.[18]

It needs no more explication that, just as it is clear from the two citations from the Bible, only the right of prosecuting crime is formulated in the institution of inquisition of the Church and no mention is made of the obligation of prosecution.

The principle of officiality gained ground later also in the secular administration of justice as it proved to be appropriate for strengthening political power. By analogy with the central power within the Church, the absolutism as developed at the end of the Middle Ages saw in the principle of officiality only a means to remove an obstacle to the prosecution of crime. Unwilling to recognize any limit for itself, it expropriated the monopoly of prosecuting crime, without undertaking, however, an obligation to exercise it.[19]

The principle of officiality was prevailing in the criminal procedure already long since when, and this happened in the 19th century, the legality was also acknowledged as a fundamental principle of the administration of criminal justice by positive law. This is, evidently, a plain refutation of the view claiming the necessary identity of officiality and legality.

The circumstances of the birth of legality show a clear difference from the conditions and efforts which brought into existence the principle of officiality. Evidently, its content is completely different as well. Legality is an inherent element of the concept of the constitutional state, with a strict separation of the application of the law from legislation, setting limits for the competences of the prosecuting organs. With the declaration of legality the state promised to submit its prosecuting mechanism to the law and the legislator, respectively. In fact, it is pronounced by the concept of legality

[18] SCHULZ, W.: Die geschichtliche Entwicklung des Akteneinsichtsrechts im Strafprozess. Rechts- und Staatswissenschaftliche Fakultät der Philipps Universität zu Marburg. Marburg, 1971. p. 10.

[19] GERMANN: op. cit.

that, once the legislator commanded the punishment of an act, the organs applying the law are bound to avail themselves of their monopoly of prosecution upon the suspicion of a criminal offence, so that the legislator's intention be thus realised. With the obligation of conducting the criminal proceedings, allowing no exceptions, the prosecuting authorities are excluded from the possibility of availing or not availing themselves of their powers, made dependent on their own interests or other extra-legal factors.

The differences in the content of the two principles can be demonstrated very spectacularly with the admitted exceptions, although it has been also common to regard them as identical.[20] If the prosecuting organs are invested with power by virtue of the principle of officiality, their power will be evidently diminished by admitting exceptions to the principle. The institution of the private complaint means e.g. that the legislator cuts out a part of the competence of the prosecuting agencies for itself and the injured party. In fact, the legislator delimitates thus the interests deemed worth of excluding the demand of punishment of the state, setting thus a limit to the power of the organs applying the law. With this, the injured party is thus authorized to assess the pros and cos of the enforcement of the claim for punishment together with the right to take the final decision. Accordingly, the enforcement of the claim for punishment depends on the decision of the injured party, i.e. as long as his or her consentment is given, the prosecuting organs are not allowed to proceed.

Contrary to this, the power of the prosecuting organs will increase to the prejudice of the legislator with the breach of the principle of legality. In fact, they are exempted from obedience and are authorized to disregard the decision of the legislator in which some harmful forms of behaviour have been defined as criminal acts.

The examination of the exceptions to the two principles in

[20] SZABÓNÉ, N.T.: /ed./ Magyar Büntetőeljárási jog. Egységes jegyzet /Law of Hungarian criminal procedure. A university textbook/. Tankönyvkiadó, Budapest, 1982. pp. 92-94.

question leads to the point that officiality and legality are concepts replacing each other; nevertheless, they are by no means interconnected. It must be clear from the above said that, with a restriction to any of the two principles, the legislator will recognize aspects or interests that exclude the claim for punishment. The difference comes from the legislator's decision charging this or that party to assess the interests favouring or excluding prosecution.

In case that the legislator takes a stand leaving to take the decision, in the form of a private complaint, authorisation, etc., by those for whom the enforcement of the demand for punishment may be harmful, he may then insist on the principle of strict legality. Conversely, by insisting on the inviolability of the concept of officiality, the rigidity of the penal system may be attenuated by charging the prosecuting authority with the task of assessing the respective interests, loosening thus the rigour of legality through loosening the principle of mandatory prosecution.

With a comparison of the provisions in the legislation of the Scandinavian countries which, besides, show numerous common traits, it can be confirmed that the above expoundings are far from a merely theoretical construction. It is Finland whose law demonstrates the most consequent insistence on the principle of legality, at the "price", however, that the most criminal offences to be prosecuted upon the complaint brought by the victim may be found in the Finnish law within the criminal codes of the Northern countries. As to the number of the criminal acts for which criminal proceedings are conducted upon the complaint of the victim, Sweden is second to Finland. The axiom of legality is laid down here as the rule of the code of procedure but its rigour is attenuated by a high number of exceptions. /It is worth mentioning that, parallel with the concessions to the aspects of opportunity, the scope of the criminal offences to be prosecuted upon the victim's complaint only was restircted in Sweden./ Finally, the line is closed by Denmark and Norway. As the procedural laws of these countries are based upon the principle of opportunity, the number of private complaint

offences is here the lowest.[21]

5. Obligation of detection

As a consequence of the principle of legality, the authorities are bound to prosecute criminal acts. It must be evident from the introduction that this obligation is composed of elements that can be separated from each other. In its broadest, and strictest, sense the precept of legality contains, in fact, the commands that

- the investigating organs should detect all crimes and identify all perpetrators;
- the prosecutor should present an indictment in all cases if the factual and legal conditions of a judicial procedure exist, should demand the decision of the court in all cases and should make full use of appealing;[22]
- the court should impose a penalty on all perpetrators.

The said partial obligations are interrelated but their addressees are different persons or organs, and their contents are not identical either. Accordingly, the distinct elements of the obligation of prosecuting crime can be also examined separately.

The first command resulting from the principle of legality prescribes that no criminal act should remain undetected and without being punished. The authorities are thus expected to trace any injury and to detect all perpetrators of criminal acts.

The irrealistic content of this requirement is already well known. Thus, when the principle of legality is mentioned as a "norm of a programme", the recognition of the existence of the law and the actual possibilities of their fulfilment is, in fact, in the background.

[21] JOUTSEN, M.: Comparative Approaches to Crime Victim Policy in Europe. /Mimeographed material prepared for the annual meeting of the American Association of Criminology San Diego, California, November 13 to 17, 1985./ p. 5.

[22] For the prosecutor's obligation see: LUKÁCS, A.: A bünvádi per előkészitő része /Preparatory part of criminal procedure/. Lepage L., Kolozsvár, 1904. p. 82.

The present degree of knowledge of the mass of hidden criminality and of the proportion of actual perpetrators who cannot be identified and succeed thus in escaping from being punished has considerably contributed, beyond any doubt, to the devaluation of the principle of legality. With the actual tension between the command and the hopelessness of its fulfilment, all further elements of legality are weakened. In plain words, if it is known that a considerable number of criminal acts will never become known to the authorities and an important number of the perpetrators escapes punishment, then the command inviting the prosecutor to present an indictment and the judge to impose a penalty will definitely loose from its convincing and compulsory force.

It may be surprising, at the first glance, that the literature of criminal procedure took, and has been taking, hardly note of the afore-mentioned aspect of the obligation of prosecuting crime. Actually, the obligation of presenting an indictment has been treated traditionally under the pretext of the principle of legality. In fact, it is highly probable that both the degree and the structure of hidden criminality have not been independent from the activity /or inactivity/, of the prosecuting mechanism. Hence, part of the criminal acts remain undetected for the authorities have been deliberately unwilling to take notice of them.[23]

Nevertheless, the absence of scholars of procedural law from this field is understandable. First, for them the term criminal procedure was identical with the court procedure for a long time. In fact, this latter could include, apart from the court trial and the appellate procedure, the examination /Untersuchung/ at most out of the phases of the preparatory procedure, for only this was led by an inpartial judge so that it was indeed contradictory with a litigating character. The investigation /Ermittlung/ represented already an other category. In any case, the subject-matter of the procedure used to be already more or less fixed when the examination is ordered, also the

[23]KIRÁLY, T.: A legalitás a büntetőeljárásban /Legality in criminal procedure/. Manuscript, Budapest, p. 10.

person of the supposed perpetrator is known, consequently a detecting, researching, and revealing activity was here already out of consideration.

Notwithstanding, it is hardly justified to make reproaches to those studying procedural law for their choice, as they examined just what was offered them for research by the positive law. Accordingly, no reproaches are justified, essentially, to the jurisprudence of procedural law of the before 1945 for having missed to deal with the problems of investigation intensively, in view of the fact that the examination has been treated in six chapters with 153 paragraphs in the Code of Criminal Procedure of 1896, and the legislator found 18 paragraphs sufficient for the problem of investigation.[24]

With the subsequent withdrawal of the examination and the recognition of the significance of the investigation no changes occurred, however, i.e. the jurisprudence continued to be disinterested in the point whether or not there was a relationship between legality and the detecting and revealing activity of the authorities, the undetected field and the way the prosecuting organs are proceeding.

The cause of indifference is, however, clear also in this case. True, the investigation is closer to the detecting activity aimed at the delimitation of injuries than the examination, both in time and in its methods. Nevertheless, the subject-matter of the criminal procedure is constituted by the "demand of the state, originating from the perpetration of a punishable act and aimed at the punishment of the perpetrator of the act concerned."[25] Hence, the perpetration of a criminal act, i.e. the existence of the demand for penalty of the state or, more precisely, the supposition of its existence, constitutes a condition of the procedure. Accordingly, the norms of criminal procedure become effective only with the birth of a suspicion that a criminal act was committed. For the law of procedure, suspicion is of interest only as the "final product", i.e. its course

[24] LUKÁCS: op.cit. p. 174.

[25] FINKEY, F.: Büntetőeljárás k. ny. e.n. /Criminal procedure/. pp. 5-6.

of formation is uninteresting, consequently it is not covered by its scope of regulation. Similarly, it is outside the interest of the law of procedure under what circumstances the police obtained the informations that founded the suspicion.[26]

In fact, the rules of the law of criminal procedure do not cover the so-called proactive activity, of a revealing and researching nature, destined to detect injuries that are still unknown. For this reason, the science of the law of procedure cannot be blamed for having omitted to analyze the relationship that may be supposed between the dark field and the authorities' way of functioning.

As a matter of fact, science is at liberty to disregard the frames laid down by positive law. Nevertheless, almost unsurmountable obstacle appears in this case. In fact, this is a field making orientation impossible, in the almost complete absence of published rules which would give the science the required orientation. In view of this complicated and delicate conditions, the interests of prevention, public order and, the more, the success of the prosecution of crime may easily come into conflict with the command of legality. It is, furthermore,

[26]The high attention paid to the starting date of functioning of the law of procedure is spectacularly demonstrared by the Hungarian Code of Procedure now in force. Thus, the well-founded suspicion of a criminal act is declared as condition of the institution of proceedings among the fundamental provisions of the Code. At the same time, criminal proceedings may be instituted on report, on notice, or on the observation of the investigating authority, as it is laid down in paragraph 121 of the Code. There is not a complete harmony between the two provisions, as a report is not always sufficient for forming a well-founded suspicion, consequently for instituting criminal proceedings. Doubtless to say, priority is due to the rule of fundamental importance of the Code, laying down the factual condition of instituting proceedings, when the conflict between the two afore-mentioned provisions is regarded. This possible conflict is released, however, by the very text of the Code, allowing to complete a report. In this process various acts of proceedings may be then carried out, to confirm or dispel the suspicion. Taking into consideration, nevertheless, that the actual criminal proceedings were not instituted by that time as yet, the completion of the report cannot form part of the investigation either. For this reason, special provisions are to be considered for the procedural acts in question instead of the general rules of the procedure /see item 51. of the instructions No. 4/1980 BM of the Minister of Interior /.

a paradox situation that, the stricter conditions are laid down by the law for invoking criminal proceedings, with a view to reduce this way the possibility of the unjustified and unnecessary molestation of the citizens, the broader will be the extent of the deregulated field within the activity of the authorities, withheld from recognition and control.

The lack of interest in the selective activity of the authorities may be surely attributed to the circumstance that a systematic research work in latent criminality has been started only recently. True, the fact that part of the criminal acts and their perpetrators remained undetected was known also previously. In the absence of authoritative research findings, the "law of constant conditions" claiming that total criminality was represented by the known cases, could hold its stand firmly.[27] If the registered and the undetected criminality have, in fact, the same structure, and the detected and the unknown offenders have the same characteristics, then legality retains its validity, as a "norm of programme" at least. The dark field can be explained by imperfect prosecution so it is only a flaw that can be removed. Thus the full realisation of the command of legality requires not more than the increase of the quality of prosecution; even the increase of the staff may be sufficient. In terms of the "law of constant conditions" the delicts that become known get to the surface from the mass of the criminal acts by a selection at random. The actual structure of criminality is not distorted by the selective interference of the authorities; as a result, science can remain with the analysis of the data registered by criminal statistics. It has thus no sense to confront the thesis of legality with the authorities way of proceding as no regularities will be revealed.

[27]Cf. KORINEK, L.: A látens bünözés vizsgálatának módszertani kérdései. Dolgozatok a közgazdaságtudományok köréből /Methodological problems of the investigation of latent criminality/. Pécs, 1985. p. 3.; SACK, F.: Dunkefeld. In: Kaiser - - Kerner - Sack - Schellhos /ed./: Kleines Kriminologisches Wörterbuch. C.F. Müller, Heidelberg, 1985. p. 81.; SCHIMA, K.: Entwicklungstendenzen in der Kriminologie. In: Strafrechtliche Probleme der Gegenwart. 4. Bundesministerium für Justiz, Wien, 1976. p. 91.

Nevertheless, research findings questioning the "law of constant conditions" came to light in an increasing number from the 1960-ies onward. Recent investigations studying latent criminality which referred no more to "estimates based upon everyday professional experiences" but, instead, made use of the methods of empirical sociology[28] indicated an actual difference between the structures of the dark field and registered criminality. They refuted also the thesis which claimed the identity of the characteristics of registered offenders and those who remained undetected. In particular, the common conception was questioned which stated a close relationship between social status and criminality.[29]

The difference between latent criminality and that registered in criminal statistics led the suspicion, understandably, to the crime control agencies. The assumption that the difference in the structure of registered and complete criminality is due to the selective way of proceeding of the prosecuting organs, seemed to be reasonable. This suspicion was confirmed by investigations carried out with the method of sociological observation. They indicated, indeed, that, in the absence of appropriate checking, the prosecuting organs selected the reports of the population that led to the institution of criminal proceedings not exclusively on the basis of legal criteria. Thus they have had the liberty to take decisions at their discretion, without being checked, whether or not a conduct in a given situation is qualified as infringement of a penal norm. They have been, furthermore, in a position, by selecting the targets of their proactive activity to pre-determine to scope of criminal acts and the group of the offenders that will be then figur-

[28]For the two fundamental methods of research in latent criminality see: SACK: op. cit. p. 80.

[29]Cf. SACK: op. cit. p. 83.; PFEIFFER, D.K. – SCHEERER, S.: Kriminalsoziologie. Kohlhammer, Stuttgart, 1979. p. 23.; CHRISTIE, N.: Scandinavian Criminology Facing the 1970's. Scandinavian Studies in Criminology. Oslo - Borgen - Tromsø, 1971. Vol. 3. p. 126.

ing in criminal statistics.[30]

Depending on the personal approach of those applying the law, the idea of selection resulted either in that they took offence at it,refused or they felt remorse. Those, however, who suffered from a bad conscience found support in their naive optimism. As they argued, the recognition of the fact of a distorting selection meant already the first step toward its elimination. With this in view, it was only the question of good intentions and honour that those administering justice apply the statutory rules not in a selective but in a "compensating" way, thus eliminating discrimination doing injustice to the lower social groups concerned.[31]

The reply given to the research findings on latent criminality by sociologists was, however, not so naive. Being objective and unimpassioned, they declared that selection and the disproportionately high representation of the handicapped social groups within the registered offenders was a necessary implication of the administration of justice in hierarchically structured societies. This view was summed up most strikingly by H. Popitz in his work "The preventive effect of non-knowledge".[32]

According to the initial thesis of Popitz, a society in which all violations of law are detected is not only unbearable but it destroys even its own norms. In fact, the criminal law, the administration of justice, and penalties may namely fulfil their useful functions, i.e. the increase of solidarity within the group, the maintenance of the intensity of collective feelings, etc. only as long as the infringement of norms appears as an exceptional phenomenon, without becoming known all over the society.

[30] See: SCHIMA: op. cit. p. 94.; FEEST, J.: Die Situation des Verdachts. In: Feest, J. - Lautmann, R.: Die Polizei. Soziologische Studien und Forschungsberichte. Westdeutscher Verlag, Opladen, 1971. pp. 71-92.

[31] For this view cf.: SCHÜNEMANN, H.W.: Selektion durch Strafverfahren? Die Bedeutung des labeling approach für unser Strafverfahren, Deutsche Richterzeitung, September 1974.

[32] POPITZ, H.: Über die Präventivwirkung des Nichtwissens, Recht und Staat, J.C.B. Mohr, Tübingen, 1968. p. 350.

Latent criminality, i.e. non-knowledge is thus in the theory of Popitz not only a necessary phenomenon; on the contrary, it is to be welcome. The tension between the necessary rigidity of the norms and the flexibility expected from the administration of justice is then released by non-knowledge; overlooking the breaches of the norms that became obsolete, their life can be prorogated. Thus, there will be no obligation to revoke the dying rules, reducing the way the respect of the entire norm system. Non-knowledge will also help to the formation of a favourable image on the validity of the norms in the society. On the contrary, the frequent ventilation of the breaches of norms, i.e. drawing public attention to these affairs would reveal that the rules are much more sensitive to injuries than it is desirable.

In the view of Popitz, sanctioning is evidently a matter of social status. Indeed, the respect of the norms is not at all independent from the prestige of those who breached the norms and were put on the pillory. With the punishment of offenders in a high social stand the reputation of the penal system may be improved but the respect of the violated norm will suffer from it without doubt.

Summing up the preceding, it is clear that, as soon as the frequency of the application of sanctions passes a given limit, it becomes incapable to comply with its useful functions. The social efficiency of sanctions can be preserved only as long as they appear to be exceptional, i.e. as long as the majority does not get what it would deserve. Thus, the preventive power of sanctions subsists only as long as the preventive effect of non-knowledge is upheld.

6. Lessons

Empirical research on hidden criminality was started in Hungary only recently[33], an the selection by the authorities

[33]Cf. also for the history of investigations in latent criminality: KORINEK, L.: Rejtett bünözés /Hidden criminality/. Közgazdasági és Jogi Könyvkiadó. Budapest, 1988.

was qualified a taboo for a long time. True, it happened almost 15 years ago that L. Viski formulated his integrated theory of criminality and, within this context, the analysis of the selection by the authorities and the procedure of definiton in the process of becoming a criminal.[34] His concepts had a productive effect upon the theory of criminology; nevertheless, Hungarian criminology hardly started to analyze the problems of legal policy and constitutional law as well as the consequences for criminal policy originating from the selection. The following remarks are limited to consider the dilemma affecting the relationship between legislation and the application of the law.

It was mentioned in the preceding that the principle of legality pronounces the rule of law and the primacy of the legislator. Accordingly, the organs applying the law are subjected to the legislative organs, they are bound to comply with the volition of the legislator, and are not entitled to consider at discretion the enforcement of the law. It was also dealt with that, as compared to the said principle, the idea of opportunity constitutes a release for those applying the law from their strict submission. Nevertheless, the legislator retains his predominant role even if he makes concessions to considerations of opportunity. Anyway, he reserves the right for himself to delimitate the frames of discretion even if this is made frequently using diffuse concepts, such as references to the circumstances of the given case, etc.

On the other hand, it is a self-containment of the legislator if, although the command of legality is prescribed, but it is clear that the organs applying the law are unable to comply with it. By declaring legality, the legislator disclaims to delimitate the actually existing and, the more, unavoidable, discretion. Under these circumstances the prosecuting organs are compelled to define, on their own, the kinds of criminal conduct that should be prosecuted, and the offences to which they can turn a blind eye. It would be unjust to blame them for this,

[34] VISKI, L.: Integrált bünözéselmélet és közlekedési kriminológia /Integrated theory of criminality and the criminology of traffic offences/. Jogtudományi Közlöny, 9/1973.

as the legislator charged then here with an impracticable task diverting, at the same time, his responsibility for specifying the relevant priorities.

All this should not say, however, by no means as if the conditions outlined above were desirable or even acceptable. First, professional reservations would disfavour to allow the prosecuting authorities to decide on their own, without being checked, to concentrate their resources to the prosecution of this or that kind of criminal conduct. True, their professional competence cannot be doubted, i.e. they must have the widest knowledge of the entirety of criminality. Nevertheless, organizational interests, performance-mindedness, the promise of a quick and easy success or the expectations of the public may frequently induce them to become incapable to assess, in an objective way, the forms of behaviour that are particularly dangerous to the society,[35] and it may be hardly possible to correct and erroneous decision subsequently. In fact, once the prosecuting authoriy took the decision to proceed to action, it will furnish the evidence confirming the correctness of its decision by itself, and the rule of the "self-fulfilling prophecy" will work, i.e. with the increase of the intensity of detection, the proportion of the criminal acts selected for prosecution will grow within registered criminality, confirming thus, apparently, the correctness of the selection.

Beyond professional reservations, a further argument against the uncontrollable selection of the prosecuting organs reads that the achievements attained in the field of the increase of the professional level of legislation and the administration of justice and their democratization will have thus only a relative value. Large-scale professional and social discussions preceding codification will be of no use it he selection of the norms, actually being enforced, will be withdrawn from the checking of those entitled to legislation and of the general public.

[35] See: FEEST: op. cit. p. 71.

The consequences of the foregoing expoundings make it imperative to face openly the limits of legality, to make public and thus controllable the process of decision in the course of which the "piths of prosecution" are formed, and to lay down the results in a public norm.

Evidently, this is a very delicate and difficult task as fixed reflections have a paralysing effect. Anyway, we think that the norms of criminal law have a concrete effect by their very existence, even without making them actually operated and we are afraid that, by an open declaration of the selective prosecution of criminal behaviour the supposed general preventive effect of the norms would be reduced.

Nevertheless, a solution has to be found. Continuing to delude ourselves and refusing to face the fact openly that the demand of legality is impracticable, we would agree with the views of Popitz unavoidably, i.e. accepting his thesis that the order of society can be maintained only by deception and misleading the general public. Also, we would accept thus the idea of a certain complicity of those engaged in legislation and the application of the law: the legislator would declare, indeed, the demand of legality knowing, at the same time, the impossibility of prosecuting all injuries to the law, as well as its undesirability. On the other hand, the prosecuting organs would take care for the continued "fragmental" application of criminal law, so that the breach of a norm remain an exceptional case and the majority should not get what it would deserve.

ЛЕГАЛЬНОСТЬ И УГОЛОВНОЕ ПРЕДСЛЕДОВАНИЕ

К. Бард

Автор попытается выяснить понятие легальности. В ходе этого он указывает на различия между легальностью и производством экс оффицио и разделяет тезис легальности на элементы. Из этих последних подробно изучаются проблемы, связанные с обязанностью раскрыть преступление. Автор обращает внимание на конституционно-правовые дилеммы, вытекающие из селективного уголовного преследования, а также на проблему разделения властей между законодателем и правоприменителем. В связи с этим ставится вопрос об обоснованности жесткого придерживания тези-

са безусловного уголовного розыска при условии, что это ставит перед органами уголовного розыска неразрешимую задачу.

LEGALITAT UND STRAFVERFOLGUNG

K. Bárd

Der Author versucht die Klärung des Begriffes der Legalität, und beweist im Laufe deren die Abweichung von Legalität und Offizialität /Verfahren amtswegen/, schliesslich erörtert die einzelnen Elemente der Legalität. Darunter erörtert die Studie am eingehendsten die Probleme, die Aufklärungspflicht der Straftaten betrifft. Es wird aud die verfassungsrechtlichen Dilemmas hingewiesen, die sich auf der selektiven Strafverfolgung ergeben, sowie auf das Problem, welches sich daraus ergibt, dass eine gewisse Verschiebung der Macht zwischen der Gesetzgebung und der Rechtsanwendung feststellbar ist. In Zusammenhang damit wird die Frage gestellt: ist begründet auf die These der bedingungslosen Strafverfolgung bestehen, wenn die Erfüllung dieser These für die strafverfolgenden Behörden eine unlösbare Aufgabe bedeutet.