

## SUSTAINING AND FOSTERING LEGITIMACY OF CRIMINAL JUSTICE INSTITUTIONS IN THE THIRD DECADE AFTER THE VELVET REVOLUTION<sup>1</sup>

Igor N. Barilik\*

**Abstract:** *The third decade after the Velvet revolution in 1989, which restored political freedom and democracy in Czechoslovakia, has found its two successors – the Czech republic and Slovakia – in the midst of, what some authors describe as, a crisis of legitimacy of state institutions in Western countries. The perception of legitimacy and the trust in institutions of criminal justice play pivotal role in securing and maintaining social consensus and harmonious development of societies. Economic and political turbulences during the era of transformation to the free market economies especially in the 1990s have contributed, in author's view, to an unfortunate state of a very low trust of the Czech and Slovak citizenry in how their criminal justice institutions exercise entrusted powers and perform their duties. A question thus emerges, what should be done to sustain and foster legitimacy of criminal justice institutions in the context of contemporary development of these relatively young democracies? The article firstly turns to a discussion in the literature of English and American provenience with the aim to analyse the meaning and importance of democratic legitimacy of criminal justice institutions. A special focus is dedicated to the notion of 'procedural justice', i.e. perceived fairness of how these institutions exercise their authority, and supposed limitations of this concept for achieving higher perception of legitimacy and law-abidance among population. Further, some complementing aims, such as endeavours to reach 'materially' just outcomes, or focuses on professionalization and higher efficiency in exercising entrusted powers, are being discussed. The author finally submits that, in order to sustain and foster institutional legitimacy in evolving Czech and Slovak democracies, much more attention has to be paid to ensure that criminal justice institutions, i.e. the police, the public prosecution, the judiciary and the correctional service, exercise their duties in a procedurally just, fair and respectful manner, in consistency with the principle of proportionality, and in an effective and proficient pursuit of security.*

**Keywords:** *legitimacy, criminal justice institutions, procedural justice, proportionality, efficiency*

### 1. CRISIS OF LEGITIMACY IN THE CONTEMPORARY EUROPE AND ITS IMPLICATIONS FOR CRIME CONTROL

In recent times we have been witnessing on numerous occasions thousands rallying in the streets to express deep dissatisfaction with how those in power have been responding to important issues that affect and worry whole societies. For instance, the Occupy movement for fairer economy structures and more democratic governance has reached global proportions, being particularly visible in major cities such as New York or London. Across the pond in Europe, for instance, the Spanish are protesting against the lack of representativeness and democracy in country's politics, high rates of unemployment and welfare cuts, the Greeks are furious about the way their government and European institutions treat them on the brink of national bankruptcy, and the list continues.

These events signalize that larger and larger groups of citizens living in Western democracies do not trust their elected governments to address their problems and grievances properly. It appears they feel that their legitimate expectations of decent living standards

---

<sup>1</sup> The essay received the Second award Ius et Societas in 2012.

\* Mgr. Bc. Igor N. Barilik, MSc., Faculty of Law, Charles University, Prague

and fair and effective governance of public affairs are not met, and that the state and public institutions are not exercising entrusted power in the expected manner. This distrust, in their view, excuses protests, civil disobedience, and even breaches of law. Such a situation indicates that we might well be facing a similar, if not worse, crisis of *legitimacy* (or legitimation) of authorities in Western democracies as the one that occurred throughout the 1970s.<sup>2</sup>

The atmosphere in the Czech Republic and Slovakia apparently coincides with these trends. A number of Slovak cities have witnessed gatherings of protesters against large-scale political corruption, which were instigated by a revelation of evidence depicting the influence of post-socialist tycoons on decision-making practices on the highest levels of the nation's government. In a similar fashion, the Czech public is distressed by scandals of top politicians and influential lobbyists, undermining, to a large extent, the legitimacy of the currently ruling coalition.

Such perceptions have significant impact on various fields of state's functions and undertakings, such as regulating the economy, providing welfare etc. One of the fundamental roles of states is securing peace and order among their citizenry. There is a legitimate expectation the state would provide security to its citizens and businesses by preventing and fighting crime. This expectation justifies the use of coercive force and provides legitimation to crime control institutions of the state, such as the police, criminal courts or prisons. In controlling crime, legitimacy is thus an important issue. And how to best foster and sustain it is an important question.<sup>3</sup> In democratic societies, however, the people legitimately expect the state to provide certain public goods other than just the protection from crime. Some of these goods, such as preventing the government from intruding on citizens' privacy, may not only be concurring but also competing in nature. Fulfilling legitimate expectations in accordance with the values of society is considered vital for the functioning of state.

Why is it important to understand and assess the efforts to enhance legitimacy in relation with promotion of democracy in society? If we agree that democracy, in the Lincolnian ellipsis the governance 'of the people, by the people, for the people', is an ideal worth following, we need to perceive legitimacy as 'democratic legitimacy', i.e. the legitimacy of a democratic government<sup>4</sup>. Considering democracy as a core value in society, we have to study how its institutions can best foster *democratic legitimacy*.

I think this is a crucial point for countries in transformation to democratic rule and for young developing democracies. Living in the third decade after the Velvet Revolution, the Slovaks and the Czechs are in the process of developing democratic institutions and structures, whose foundations were laid down in the beginning of 1990s. Commencing of the

---

<sup>2</sup> Cf HABERMAS, J. *Legitimation Crisis*. London: Heinemann, 1976; FRIEDRICHS, D. The Legitimacy Crisis in the United States: A Conceptual Analysis. *Social Problems*. 1980, Vol. 27, No. 5, pp. 540–555.

<sup>3</sup> Cf REINER, R. We must acknowledge the limits of policing and punishment in the absence of social justice. In: *British Politics and Policy at LSE Blog* [online]. 30.1.2012. [2012-03-15]. Available from: <<http://blogs.lse.ac.uk/politicsandpolicy/2012/01/30/fire-brigade-policing-social-justice/>>.

<sup>4</sup> It might be argued that the Saudi regime is 'legitimized' by the consent of the majority of population that acknowledges its 'divine' source of power, and then indeed reinforcing of the *mutaween* (Saudi religious police) might well support this 'legitimacy', but it is not a form of democratic legitimacy we are looking at.

process of democratization was arguably possible because the anti-communist movement achieved widespread acclamation of the Czechoslovak citizenry, which had, at the same time, lost its confidence in the communist government and its structures.<sup>5</sup>

Naturally, this transformation of the form of government has had a profound impact on the crime control institutions in the newly created independent Czech and Slovak republics. Not only were their actors regulated by provisions of new constitutions and criminal laws, but the whole structures were rebuilt and a lot of functionaries were replaced. I assume every institution has faced distinct, newly emerged, problems and challenges ever since.

The system of criminal courts has suffered greatly, in my view, from the inability to undertake a ‘generational replacement’ of judges, who had exercised judicial power of the previous communist government, with new skilful judges without links to the older garniture. Instead, the old cadres apparently replace themselves systematically by their offspring and other acquaintances, which is clearly a pathological state of affairs in a democratic judiciary. The police have struggled with a dramatic increase of crime rates in general, and with political obstacles to investigate corruption and other serious crimes in particular. The service of public prosecutions has also undergone structural changes, eventually transforming into the Public Prosecutor’s Office in the Czech Republic based on the ‘State’s Attorney’ model.

I perceive, however, the activity of prosecution service, or rather its dysfunction, as a key driving force behind the above-discussed crisis of legitimacy of state governments. Consider the infamous situation at the highest instances of both, Czech and Slovak public prosecution offices, at the moment. The former has been damaged by a struggle over the future direction of the institution between a controversial high-ranked state attorney in charge of the Prague office<sup>6</sup> and the minister of justice, who eventually lost his chair allegedly due to his efforts in this struggle. The latter has been for a long time paralysed by a controversial obstruction on the side of the president of the republic to name the General Prosecutor<sup>7</sup> elect, which, in my view, renders the current ‘leadership’ of the General Prosecutor’s Office illegitimate.

I would, nevertheless, draw an introductory assumption, albeit vulnerable to criticism, that on the brink of the third decade after the fall of communism in 1989, democratic mechanisms of Czech and Slovak republics are put in place and they are stabilized enough to be subjected to a scrutiny of crime control institutions operating within *a democratic society*. Saying that, I acknowledge in one breath that, in practice, these institutions might often operate in a fashion different from what is expected in liberal democracy, specifically in politically sensitive cases. In this context, it is useful to turn our attention to the contemporary discussion about legitimacy of crime control institutions among the academia

---

<sup>5</sup> Cf BEETHAM, D. *The Legitimation of Power*. London: Palgrave Macmillan, 1991.

<sup>6</sup> The High Public Prosecutor in Prague is a senior state’s attorney in charge of the second highest office of public prosecutions in the Czech Republic, overlooking district and county offices in Prague and other Czech counties.

<sup>7</sup> The General Prosecutor is the highest-ranking figure in charge of the Slovak service of public prosecutions. The strictly monocratic structure of this institution that allows for concentration of almost absolute power in final decision-making on (not) prosecuting and (not) charging whatever suspects in the hands of the General Prosecutor is a highly criticised residuum of the former communist dictatorship in the country.

of advanced Western democracies, the United States and the United Kingdom in particular, as theorizing and research of this topic is underdeveloped in our scholarship.

In what follows, I firstly outline the underlying perspectives on the notion of democratic legitimacy of crime control institutions. Then I proceed to describe the research of Tom Tyler, Mike Hough and other authors on the concept of ‘procedural justice’, and offer my criticism based on the limitations of the concept. In conclusion, I advocate for a multidimensional approach based on three pillars – (1) procedural justice, (2) the principle of proportionality, and (3) effectiveness in delivering security – as the most viable way for sustaining legitimacy in democratic counties, including the Czech Republic and Slovakia.

## 2. THE MEANINGS OF AND PERSPECTIVES ON LEGITIMACY

Before engaging in the discussion how crime control institutions should foster and sustain *legitimacy*, it is important to outline what is meant by this term in the literature. Coicaud<sup>8</sup> argues legitimacy is ‘the recognition of the right to govern’, which simultaneously justifies the power of the governors and the obedience of the governed. This justification of the right to govern depends upon three necessary conditions: the consent of the governed individuals with the authority to be obeyed, their mutual agreement with those in command about the values that should substantiate the rights and duties to be protected and promoted as legal norms, and the correspondence of the law to the values of the society, ‘stand[ing] above both the governors and the governed’.<sup>9</sup>

Barker<sup>10</sup> further distinguishes the normative approach to legitimacy as ‘a property or characteristic of regimes which satisfy criteria ... most usually identified as the transfer of consent by subjects to rulers, often in some form of regularly renewed democratic contract’ from the empirical approach that focuses on ‘the study of popular attitudes towards and support for rulers as a basis for analysing and predicting regime stability, both at national and transnational level. ... Legitimacy is used as a term to describe a regime which is supported by its subjects, and democracy is the most reliable manner in which that support can be expressed and studied.’ David Beetham<sup>11</sup> bridges these approaches in his seminal work *The Legitimation of Power*, arguing from the social-scientific perspective that legitimacy is ‘multi-dimensional in character’ and consists of three elements:

“i) [legitimate power] conforms to established rules, ii) the rules can be justified by reference to beliefs shared by both dominant and subordinate, and iii) there is evidence of consent by the subordinate to the particular power relation. The first level is that of rules; the second that of justifications grounded on beliefs; the third that of actions. The three levels are not alternatives, since all contribute to legitimacy; all provide the subordinate with moral grounds for compliance or cooperation with the powerful.”<sup>12</sup>

<sup>8</sup> COICAUD, J. M. *Legitimacy and Politics*. Cambridge: Cambridge University Press, 2002, p. 10.

<sup>9</sup> COICAUD, J. M. *Legitimacy and Politics*. Cambridge: Cambridge University Press, 2002, p. 25.

<sup>10</sup> BARKER, R. *Legitimizing identities*. Cambridge: Cambridge University Press, 2001, pp. 8–10.

<sup>11</sup> BEETHAM, D. *The Legitimation of Power*. London: Palgrave Macmillian, 1991, p. 15.

<sup>12</sup> BEETHAM, D. *The Legitimation of Power*. London: Palgrave Macmillian, 1991, p. 16.

There are a number of pertinent issues in the current debate related to the reforms of criminal justice systems and their impact on the perceived legitimacy of its institutions. For instance, a controversial issue of pitfalls and promises of involvement of private companies in crime control, such as through private policing or private prisons, seems to be in the centre of heated discussion among scholars, practitioners and the general public in Western democracies.<sup>13</sup> To give another example from the United Kingdom: a reform of the police service in England and Wales has recently been undertaken, which introduced an entirely new aspect to the way policing has been done in the country – general and direct elections of the highest ranking police officials (Police and Crime Commissioners) that have taken the charge of the whole police force (except for London) since the autumn of 2012<sup>14</sup> – a step generating serious implications for the question of legitimacy of police in democratic society.

Yet these issues deal with normative, or structural, aspects of legitimacy of crime control institutions. By these I mean the question whether certain legal reforms enhance or weaken the perceived legitimacy of a particular institution as a whole. Assessment of an institution's legitimacy from this viewpoint is principal in the debate. At this point, I would however like to draw attention on a different perspective. Legitimacy is not just a quality that can be attributed to a particular institution but, as I would propose, also to the actions its agents take and the decisions it delivers. Crime control institutions, most importantly the police and (lower) courts, as well as prisons, probation officers etc. perform their duties by the way of applying legal norms in particular cases, i.e. by taking and enforcing individualized decisions.

A distinction can be drawn here between the justification of *rules*, which are normative in essence, and *acts*, which are individualized on a case-by-case basis. Legitimacy of the exercise of power in particular cases is derived from the legitimacy of rules the individual decisions and actions are taken upon. This raises a question whether there is such a thing as legitimacy of a particular decision or action; different from mere legality (being in accordance with legal rules), but also containing the element of accordance with the values of society and consequential justification of power. Furthermore, can there be illegitimate decisions and acts of a legitimate institution? Can a certain amount or proportion of illegitimate acts render the institution illegitimate?

Literature usually captures the 'big picture' of legitimacy of institutions or, rather, governments or regimes as a whole, but appears to provide limited consideration of the 'little pieces of the puzzle'. It can be argued that it is the justification of particular decisions and actions that, if considered in aggregate, influences the legitimacy of the institution that undertakes them. This line of argument prompts a discussion about the prospects for the enhancement of legitimacy, as viewed through the undertakings of crime control authorities.

---

<sup>13</sup> Cf LOADER, I. Thinking Normatively About Private Security. *Journal of Law and Society*. 1997, Vol. 24, No. 3, pp. 377–394; SKLANSKY, D. Private Police and Democracy. *The American Criminal Law Review*. 2008, Vol. 43, pp. 89–105; SPARKS, R. Can Prisons Be Legitimate? *British Journal of Criminology*. 1994, Vol. 34, pp. 14–28; WHITE, A. *The Politics of Private Security: Regulation, Reform and Re-Legitimation*. Basingstoke: Palgrave Macmillan, 2010.

<sup>14</sup> Cf NEWBURN, T. Police and Crime Commissioners: The Americanization of policing or a very British reform? *International Journal of Law, Crime and Justice*. 2012, Vol. 40, No. 1, pp. 31–46.

### 3. POLICE LEGITIMACY IN A DEMOCRATIC CONTEXT: THE PROSPECTS OF PROCEDURAL JUSTICE

As indicated above, the aim of this paper is to deal with the question what best fosters legitimacy in the context of a democratic society. As with legitimacy, it is impossible to come up with a clear and undisputable explanation of what ‘democracy’ is, or indeed enumerate which are the democratic and the non-democratic societies in the contemporary world. Making a case for the development of a democratic character of Slovak and Czech societies, I will aim to assess the prospects for legitimacy within the framework of democratic values and answer the question what best promotes democratic values relevant to criminal justice, i.e. what corresponds with the popular will and expectations, hence sustains the legitimacy of crime control institutions,<sup>15</sup> in order to offer some solutions in the context of the mentioned societies. In doing so, I will focus on the undertakings of the police for the following reason:

“The police are the most visible agent of social control and the most high-profile institution in a justice system that is empowered to define right and wrong behaviour. If the police abuse their powers and wield their authority in unfair ways, this cannot only damage people’s sense of obligation to obey their directives (their authority in the normal sense of the word); it can also damage public perceptions of their moral authority and therefore the moral right of the law to dictate appropriate behaviour.”<sup>16</sup>

The research of Hough and colleagues builds up on a notable work of American psychologist Tom Tyler on the notion of ‘procedural justice’, which I would like to present and analyse in this essay. In his article *Enhancing Police Legitimacy*, Tyler presents a case for procedural fairness in an argument that contains three points:

“First, the police need public support and cooperation to be effective in their order-maintenance role... Second, ... [a] central reason people [voluntarily] cooperate with the police is that they view them as legitimate legal authorities, entitled to be obeyed. Third, a key antecedent of public judgments about the legitimacy of the police and of policing activities involves public assessments of the manner in which the police exercise their authority. Such procedural-justice judgments are central to public evaluations of the police and influence such evaluations separately from assessments of police effectiveness in fighting crime.”<sup>17</sup>

In regard to the Tyler’s first point, it is taken for granted that effective crime control depends on the compliance of the vast majority of the public. Hough and colleagues argue there are two ways how to secure compliance.

“The instrumental route ... is where people comply with the law because the police present a powerful risk of sanction and punishment. By contrast, the normative route

---

<sup>15</sup> SWIFT, A. *Political Philosophy*. Cambridge: Polity Press, 2006, pp. 182–183.

<sup>16</sup> HOUGH, M., JACKSON, J., BRADFORD, B., MYHILL, A., QUINTON, P. Procedural Justice, Trust, and Institutional Legitimacy. *Policing*. 2010, Vol. 4, No. 3, p. 205.

<sup>17</sup> TYLER, T. Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*. 2004, Vol. 593, No. 1, p. 84.

is where people comply with the law not out of fear of punishment but because they feel they ought to.”<sup>18</sup>

The former, it can be argued, depicts the totalitarian political approach the Slovaks and the Czechs experienced under communist rule. In democratic states, however, using the police to enforce compliance ‘is expensive, and can’t be sustained for long without serious moral costs also’.<sup>19</sup> It is crucial for the police to achieve not only passive obedience, but also active cooperation and support from the public, without which ‘policing in developed democracies would become essentially unworkable’.<sup>20</sup>

In the second step, Tyler<sup>21</sup> established a link between voluntary law-abidance and cooperation with the police and police legitimacy. He argues that neither the maintenance of deterrent effect (creating the risk of getting caught) nor professionalization and higher quality and efficiency in police performance are sufficient for gaining support from the public. ‘People are more willing to cooperate with legal authorities when they believe that those authorities are legitimate’.<sup>22</sup> This means they believe the police are entitled to be obeyed, because they have the confidence that the police act in accordance with values embedded in the society. ‘A legitimacy-based strategy of policing increases cooperation with the law by drawing on people’s feelings of responsibility and obligation’.<sup>23</sup>

The third point is a conclusive one and has significant implications for criminal justice practice. Tyler<sup>24</sup> draws a distinction between judgments of the public about the ‘effectiveness, valence, or fairness of the outcomes of [policing] activities’ and judgements about ‘public views about the appropriateness of the manner in which the police exercise their authority’, i.e. between the fairness of procedure and the fairness of outcomes. Based on the findings of empirical studies, he observes that ‘[w]hen people are dealing with authorities or institutions, their evaluations of legitimacy are primarily linked to assessments of the fairness of the authority’s or the institution’s procedures’.<sup>25</sup> He therefore concludes that although people ‘consider both performance in controlling crime and procedural fairness when evaluating the police and the courts’, it is procedural justice judgements that ‘play a central role in shaping people’s views about the legitimacy of [these institutions]’.<sup>26</sup>

For a procedure to be just, Tyler<sup>27</sup> argues, it needs to fulfil four criteria. It must allow the citizen a meaningful *participation* in the process ‘by explaining their situations and communicating their views about situations to authorities’. Secondly, a procedure must be

<sup>18</sup> HOUGH, M., JACKSON, J., BRADFORD, B., MYHILL, A., QUINTON, P. Procedural Justice, Trust, and Institutional Legitimacy. *Policing*. 2010, Vol. 4, No. 3, p. 206.

<sup>19</sup> SWIFT, A. *Political Philosophy*. 2<sup>nd</sup>. Cambridge: Policy Press, 2006, p. 220.

<sup>20</sup> HOUGH, M., JACKSON, J., BRADFORD, B., MYHILL, A., QUINTON, P. Procedural Justice, Trust, and Institutional Legitimacy. *Policing*. 2010, Vol. 4, No. 3, p. 207.

<sup>21</sup> Cf TYLER, T. Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*. 2004, Vol. 593, No. 1, p. 84.

<sup>22</sup> TYLER, T. Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*. 2004, Vol. 593, No. 1, p. 89.

<sup>23</sup> *Ibid.*, p. 88.

<sup>24</sup> *Ibid.*, p. 91.

<sup>25</sup> *Ibid.*, p. 91.

<sup>26</sup> *Ibid.*, p. 93.

<sup>27</sup> *Ibid.*, pp. 94–95.

*neutral and unbiased*, where the authorities ‘make their decisions using objective indicators, not personal views’. Furthermore, they must treat the citizen with *dignity and respect*. Lastly, people must ‘*trust* the motives of decision makers’ to be oriented towards people’s well-being and concerns. Public trust in authorities is enhanced by proper reasoning of their decisions and accountability for their conduct.

The presented arguments were validated in further empirical studies. For instance, Tyler and Fagan<sup>28</sup> observed that viewing the police as legitimate authorities increased the support from the residents of New York and that such legitimacy judgements were shaped by the procedural fairness of the police. Similar outcomes were observed from the data of a survey on public trust and police legitimacy among the population of England and Wales.<sup>29</sup> It is also interesting to see similar findings in older research of perceptions of legitimacy within the environment of English prisons.<sup>30</sup>

Tyler builds a strong, evidence-based and well-argued case for more appreciation and focus on fairness, neutrality and professionalism in decision-making and actions of agents of criminal justice institutions. Yet this argument can be, in my view misleadingly, reduced to a contradiction between a focus on process and outcomes. There is nothing wrong with the plea for better procedure in the quest for more legitimacy. I would however be more careful about providing the procedure itself almost exclusive credit for enhancing legitimacy of crime control institutions. In this paper, I do not aim to deny Tyler’s useful argument that fairer procedures enhance the perceived legitimacy. I however raise doubts whether such an account captures the whole picture. In the ensuing text, I aim to demonstrate an alternative line of reasoning that complements the argument that procedural fairness fosters the legitimacy of crime control institutions, albeit it applies mainly to more advanced democracies. Furthermore, there are other factors of similar importance that need to be considered as well.

#### 4. LIMITS OF THE CONCEPT OF PROCEDURAL JUSTICE

Three supposed limitations of positive effects of the focus on procedural justice need to be outlined in order to advance the argument. The first point deals with the importance, which perceived legitimacy itself has on law abidance. The second limitation is based on a claim that the concept of procedural justice can significantly enhance legitimacy only in a limited type of societies. The last claim stripes this concept of its key role in enhancing legitimacy of criminal justice, arguing there are other factors, which are as or even more important than fairness of procedure.

Proponents of procedural justice seem to attribute to legitimacy of criminal justice institutions a key role in fostering law abidance. Sunshine and Tyler<sup>31</sup> found in their New

---

<sup>28</sup> TYLER, T., FAGAN, J. Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities? *Ohio State Journal of Criminal Law*. 2008, Vol. 6, No. 1, pp. 231–275.

<sup>29</sup> Cf. HOUGH, M., JACKSON, J., BRADFORD, B., MYHILL, A., QUINTON, P. Procedural Justice, Trust, and Institutional Legitimacy. *Policing*. 2010, Vol. 4, No. 3.

<sup>30</sup> Cf. SPARKS, R. Can Prisons Be Legitimate? *British Journal of Criminology*. 1994, Vol. 34, pp. 14–28; SPARKS, R., BOTTOMS, A. Legitimacy and Order in Prisons. *British Journal of Sociology*. 1995, Vol. 46, No. 1, pp. 45–62.

<sup>31</sup> SUNSHINE, J., TYLER, T. The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. *Law & Society Review*. 2003, Vol. 37, No. 3, pp. 513–548.



York study that ‘legitimacy of the police significantly influenced compliance with the law’.<sup>32</sup> It might appear that Tyler’s explanation presupposes a link between policing (be it procedural fairness or efficiency in outcomes) and causes of criminal behaviour in certain extent. The more justification the police receive, the more people would obey the law, and hence the fewer people would commit fewer crimes. One should however keep in mind that it is widely acknowledged that policing has inherently limited possibilities in controlling crime.<sup>33</sup>

On the one hand, increase in perceived legitimacy might not necessarily lead to crime reduction<sup>34</sup>, as those who commit crimes make their decisions upon a number of factors and circumstances (and can still as citizens justify the criminal justice institutions). On the other hand, as Beetham<sup>35</sup> argues, ‘[l]egitimacy is not the only factor contributing to the order, stability and effectiveness of a system of power; organisational capacities and resources are obviously crucial as well’. It is also true that even in the most disadvantaged societies that chronically suffer from the highest crime rates and display deep distrust of government’s institutions, most of the population still do not commit crimes. What are the causes of criminal behaviour and of law abidance is a very complex issue, one of which the legitimacy of crime control institutions forms only a part (although a significant one). Furthermore, legitimacy of the police as an institution that serves broader societal needs depends in a large part on the legitimacy of the government as a whole. As Reiner has argued, ‘trust in the modern police is something that has been hard won not only through the pattern and practice of policing but also through associated political strategies, and through wider social changes’.<sup>36</sup>

In this context, Tyler<sup>37</sup> outlines an ideal of law-abiding society (as opposed to crime control and punishment performance-oriented culture), in which ‘citizens have the internal values that lead to voluntary deference to the law and to the decisions of legal authorities such as the police’. A long path towards such ideal is, in his opinion, paved with such exercise of authority that is perceived by the citizens as following fair procedures.

---

<sup>32</sup> TYLER, T. Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*. 2004, Vol. 593, No. 1, p. 89.

<sup>33</sup> Cf. REINER, R. We must acknowledge the limits of policing and punishment in the absence of social justice. In: *British Politics and Policy at LSE Blog* [online]. 30. 1. 2012. [2012-03-15]. Available from: <http://blogs.lse.ac.uk/politicsandpolicy/2012/01/30/fire-brigade-policing-social-justice/>

<sup>34</sup> Beetham (in *The Legitimation of Power*) has shown how the prior erosion of legitimacy of communist rule in the Eastern Bloc led to the collapse of communist regimes and their replacement with democratically elected governments, enjoying (at least on the beginning) widespread public confidence. What he might not anticipated was the wave of dramatic increase in crime rates (especially property crime and organized crime) that swept Central and Eastern European countries throughout the 1990s. This trend may perhaps be explained by the (unmanaged) liberalization of society and economic changes, especially the privatization of the majority of the previously state-run business.

<sup>35</sup> BEETHAM, D. *The Legitimation of Power*. London: Palgrave Macmillan, 1991, p. 33.

<sup>36</sup> Cited in SMITH, D. The Foundations of Legitimacy. In: Tom Tyler (ed.). *Legitimacy and Criminal Justice*. New York: Sage, 2007, p. 34.

<sup>37</sup> TYLER, T. Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*. 2004, Vol. 593, No. 1, p. 96.

## 5. DOES PROCEDURAL JUSTICE 'WORK' ONLY IN DEMOCRACIES?

This leads us to the second point of a possible 'geographical' limitation of the concept. Can it be claimed that the notion that procedural fairness leads to the ideal of 'law-abiding society' applies to every regime or political culture in the world, or is it rather a concept that 'works' only in certain societies? It might be possible that procedural fairness is the most viable way to enhance legitimacy in the Anglo-American (common law) legal cultures, whereas different approaches might suit better other legal traditions. Or is the threshold for the promising 'workability' of procedural justice a democratic political culture? Hence, is the procedural justice viable solution for fostering legitimacy of crime control institutions in the Czech Republic and Slovakia?

The extent to which the procedural fairness paradigm appears to 'work' is a pertinent question that employs procedural justice researchers. Jackson and colleagues<sup>38</sup> have recently carried out a comparative research of data elicited from the European Social Survey, in which European citizens were inquired across 20 European jurisdictions<sup>39</sup> about their trust in justice. The first results show that police services in the United Kingdom and the Nordic countries enjoy high levels of public trust, whereas the Central and Eastern European countries from the former communist bloc tend to score below the European average.

The Czech Republic, which was included in the research, did not achieve promising results. Czech respondents expressed the fourth least positive views on the procedural fairness of the Czech police, i.e. fair and impartial treating of people by the police.<sup>40</sup> They also did not think criminal courts in their country had produced fair and impartial judgements based on evidence available to them,<sup>41</sup> but rather had often tended to let guilty people go free.<sup>42</sup> The respondents also did not believe the Czech police shared with them the same moral values, i.e. the same sense of what is right and wrong,<sup>43</sup> but their expression of the consent to the police authority coincided with the European average. The most alarming results reflected the perception of police and judicial corruption. They indicated that the Czechs had the third highest perception of how often policemen *and* judges do take bribes from among the surveyed nations; only a little lower than the Bulgarians and Russians.

In general, these findings confirm the assumption that societies with a tradition of self-governance, rule of law and accountability to public are more sensible to how the law enforcement and criminal justice institutions treat their citizens, and therefore offer better prospects for procedural justice.

---

<sup>38</sup> JACKSON, J., HOUGH, M., BRADFORD, B., POOLER, T., HOHL, K., KUHA, J. Trust in Justice: Topline Results from Round 5 of the European Social Survey. [online]. December 2012. [2012-03-15]. Available from: <[http://www.europeansocialsurvey.org/docs/findings/ESS5\\_toplines\\_issue\\_1\\_trust\\_in\\_justice.pdf](http://www.europeansocialsurvey.org/docs/findings/ESS5_toplines_issue_1_trust_in_justice.pdf)>.

<sup>39</sup> Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Israel, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

<sup>40</sup> The lowest three were Russia, Israel, and Bulgaria. On the opposite, the best results were achieved in Denmark, Spain, and Finland.

<sup>41</sup> The fifth worst result after Slovenia, Russia, Portugal, and Bulgaria.

<sup>42</sup> The third worst result after Slovenia and Bulgaria. In both measures, Nordic countries and Switzerland scored the best.

<sup>43</sup> The fourth worst result after Israel, Hungary, and Russia.

In a similar way, Tyler and colleagues<sup>44</sup> have presented the experiences with police legitimacy in international context and argued that, while for societies in transition controlling order through the means of coercion and effective performance would be of high importance, legitimacy played more important role in more stable societies such as Western democracies. This point reminded me of a quote from a Russian colleague of mine, who once said that ‘you could either have democracy or order in Russia, but never both’. It can be deducted from this rather pessimistic observation that to control crime effectively, it is not viable to build policing strategies upon values that have not yet been embedded in the social, political and legal culture of the majority of population. Societies that experience social changes and develop the democratic character and traditions in society, including the Czech and Slovak republics, need time for their institutions to prove they deserve people’s trust and legitimation.

## 6. PROCEDURAL JUSTICE AS A DIMENSION OF LEGITIMACY: THE IMPORTANCE OF PROCEDURES AND OUTCOMES IN POLICING AND CRIMINAL JUSTICE

The third point deals with the question of justification of the claim that procedural justice plays a key role in shaping legitimacy of criminal justice institutions in advanced democracies. If this question is to be discussed from the viewpoint of Beetham’s elements of legitimacy, it needs to be shown whether fair procedures enhance institutional adherence to established rules, promote values and beliefs shared in society, and support popular consensus and obedience. This line of argument leads to another question: What is the value of procedure in the context of democratic culture?

Decision-making in the sphere of policing, and crime control in general, is not ‘democratic’ undertaking in a sense of forming particular decisions upon collective deliberation and majority votes. The structures of the criminal justice system are hierarchical and the undertakings of its agents are bound by superiors’ commands or subjected to their review. Nevertheless, a democratic criminal justice system operates within the realm of democratically adopted legal norms and is accountable to the public. I argue it could therefore be useful to discuss what the values of democratic procedures are and draw analogic inferences for the value of procedural justice in controlling crime. Swift’s account of a democratic decision-making paradox may provide an insightful starting point:

“It is possible to value procedures – and to regard them as producing legitimate decisions – on grounds that have nothing to do with the quality of decisions they produce. ... An outcome of a procedure can be legitimate – one can have moral reason to endorse and abide by that outcome – simply in virtue of its having been the outcome of a legitimate (or, we might say, legitimizing) procedure. And it can be legitimate in that sense without being correct by any procedure-independent standards of correctness.”<sup>45</sup>

<sup>44</sup> TYLER, T., BRAGA, A., FAGAN, J., MEARES, T., SAMPSON, R., WINSHIP, Ch. Legitimacy and Criminal Justice: International Perspectives. In: Tom Tyler (ed.). *Legitimacy and Criminal Justice*. New York: Sage, 2007, pp. 9–29.

<sup>45</sup> SWIFT, A. *Political Philosophy*. 2<sup>nd</sup> Cambridge: Policy Press, 2006, p. 194, pp. 198–199.

According to Swift, the value of a democratic process is twofold. Not only it serves as a means to certain beneficial outcomes – thus having an instrumental value – but, in democracy, it is also an end to itself; it possesses intrinsic values. Criminal justice procedures also have an important value in society. In advanced liberal democracies, however, citizens are sensitive to interferences with civil rights and personal liberties, which the government need to justify in order to sustain a legitimate power. Processes of crime control involve use of coercive force and infliction of punishments. Such decisions and actions, I argue, are not perceived in a liberal society as beneficial *per se*, but rather as ‘necessary evil’. Therefore, law abidance (non-offending) and cooperation with police are instrumental values of criminal justice procedures. Their ends are order and harmony in society, which enable citizens to enjoy their liberties and pursue their happiness in a safe and crime-free environment.

Consider a common law example of a jury that finds a factually innocent person guilty. Swift<sup>46</sup> argues that, given that the procedural rules have been properly followed, such decision can still be judged as legitimate. In his view, this is because the perceived tendency of criminal justice processes (such as a jury trial) ‘to produce better rather than worse decisions [forms] an important part of the view we judge the legitimacy of decision-making procedures in these areas’.<sup>47</sup> This might be an empirical observation, but I would disagree with its axiological implications. A legally correct but factually unjust decision may still be perceived legitimate to some extent, if reached in a procedurally fair manner. However, the fact that a procedurally fair system is more likely to produce justified outcomes does not render all its (procedurally fair) actions wholly justifiable. Such simplified inference could have dangerous consequences, notably for the efforts in restoring justice for the victims of its miscarriage. There is neither intrinsic nor instrumental value in a wrongful conviction. I argue that a fair procedure is only valuable when it can deliver a fair outcome. Bornstein and Dietrich argued along similar lines in favour of attributing equal importance to the considerations of distributive justice, which is built upon the principle of proportionality:

“Without denying the benefits to be gained from improving procedural justice, one could even argue that concerns about distributive justice should be paramount. Questions about process are, in a sense, contingent on questions about outcome. ... Thus, we should not lose sight of what courts can do to enhance perceptions of distributive fairness, in addition to enhancing perceptions of procedural fairness.”<sup>48</sup>

It may be pointed that the main weakness of the focus on outcomes of policing and criminal justice procedures lies in the fact that all parties to the processes have their own subjective perceptions of what is ‘fair’ and ‘just’. If the outcome does not conform to someone’s expectations, yet he or she views the processes as basically respectful and fair, a claim can be put forward that such perception of procedure only mitigates the feeling of ‘injustice’ the person may still have assumingly suffered. Nevertheless, personal feelings of the

---

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., p. 199.

<sup>48</sup> BORNSTEIN, B., DIETRICH, H. Fair Outcomes Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes. *Court Review*. 2007, Vol. 44, No. 1/2, p. 73.

participants are an insufficient basis for drawing resolute conclusions about perceived legitimacy of institutions entrusted with coercive power,<sup>49</sup> procedural fairness in criminal justice, as well as of fairness in its outcomes. Axiological qualities of criminal justice outcomes can also be assessed upon their accordance with shared values embedded in society, independently of mere individual feelings.

## 7. CONCLUDING REMARKS: THE NEED FOR A MULTIDIMENSIONAL APPROACH

To summarize, for enhancing legitimacy of a democratic government, fair processes and effective and proportionate results work like ‘communicating vessels’. A procedure without an outcome is moot. Outcomes, on the other hand, cannot be reached without adequate procedures.

“[L]egitimacy [of a democratic decision] depends not simply on its emerging from a fair procedure... What makes it legitimate is the fact that the procedure by which it was made is more likely to get it right than is any alternative procedure.”<sup>50</sup>

In a similar way, I present the case for procedural justice on the basis of a premise that fair procedures of the institutions of crime control are more likely to produce better rather than worse results. Such procedures may well serve as the safest, and arguably often the only viable, way towards right and good decisions. As has already been shown, this is especially true in democratic societies, where procedural justice values of participation, impartiality, respect, and credibility correspond with the values embedded in their respective cultures. Yet, the concept of procedural justice forms only one dimension of legitimacy of criminal justice. As Fagan has observed,

“[t]he modern crisis of legitimacy in American criminal justice spans three dimensions of the functions of justice that produce legitimacy: concerns about procedural fairness and respectful treatment that recognizes citizen rights and treats people with dignity, problems in the perception of distributive justice and the proportionality and consistency of legal responses to condemnable behaviors, and doubts about the capacity and the criminal law and criminal legal institutions to detect wrongdoing and protect citizens.”<sup>51</sup>

Various authors place their emphasis on different aspects within this spectrum of legitimacy dimensions. In this paper, I have mainly discussed the prospects of procedural justice in the work of Tom Tyler, Mike Hough and others, and also touched upon the issue of distributive justice.<sup>52</sup> To provide a complete picture, there are also authors such as Professor Mark Moore, who prioritize “technical proficiency (security, proportionality) while

<sup>49</sup> Cf. BEETHAM, D. *The Legitimation of Power*. London: Palgrave Macmillian, 1991.

<sup>50</sup> SWIFT, A. *Political Philosophy*. 2<sup>nd</sup>. Cambridge: Policy Press, 2006, p. 217.

<sup>51</sup> FAGAN, J. Legitimacy and Criminal Justice, *Legitimacy and Criminal Justice*. *Ohio State Journal of Criminal Law*. 2008, Vol. 6, No. 1, pp. 124–125.

<sup>52</sup> Cf. BORNSTEIN, B., DIETRICH, H. Fair Outcomes Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes. *Court Review*. 2007, Vol. 44, No. ½, pp. 72–77.

remaining ‘aligned with important legal virtues, such as [procedural] fairness and restraint’.”<sup>53</sup>

I conclude the discussion with a proposition that, in democracies, considering the contemporary Czech and Slovak republics in particular, crime control institutions sustain and foster legitimacy when, bound by democratically adopted legal norms and effective public accountability structure, they exercise the entrusted power (1) in a *procedurally just, fair and respectful* manner that corresponds with democratic and liberal values and beliefs embedded in their respective societies, (2) in consistency with the principle of *proportionality*, and (3) in an effective pursuit of *security*, and hence contribute to sustaining and fostering public order and crime free environment, in which the citizens can best enjoy their rights and liberties.<sup>54</sup> Police legitimacy, in particular, can be enhanced by ‘actively cultivating the values and ethic of policing as a profession’.<sup>55</sup> Enhancing professional standards and good practice is nevertheless beneficial across the whole criminal justice system.

---

<sup>53</sup> Cited in FAGAN, J. Legitimacy and Criminal Justice. *Ohio State Journal of Criminal Law*. 2008, Vol. 6, No. 1, p. 135.

<sup>54</sup> *Ibid.*

<sup>55</sup> SMITH, D. The Foundations of Legitimacy. In: Tom Tyler (ed.). *Legitimacy and Criminal Justice*. New York: Sage, 2007, p. 56.