DISCUSSION

POSSIBILITIES OF INTRODUCTION OF SUBSIDIARY PROSECUTION IN CZECH CRIMINAL PROCEEDINGS

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Abstract: *This paper deals with subsidiary prosecution, which is an institute that is not known to the current Czech criminal trial, but its legislative embedment is considered in the future. Attention is paid in this context, among other things, to criminal-law relations, which are applied through criminal-trial relations, and to the right to efficient investigation which the aggrieved party (victim of the crime) has in relation to the state. The author admits, under certain conditions, the existence of subsidiary prosecution because it is a suitable form of how to check the principle of legality, as well as a suitable instrument against misuse of discretionary powers of the public prosecutor (in the systems built upon the principle of opportunity).*

Keywords: *subsidiary prosecution, aggrieved party, right to efficient investigation, accusatorial principle*

INTRODUCTION

At present it is possible to register the development which is not too favourable for criminal law, namely the so-called half restatement of criminal law, which causes that the Czech legislator is in such a situation that it will have to adopt, quite soon, new Rules of Criminal Procedure. While the core issue for criminal material law was the choice between material and formal perceptions of a crime, the issue of key importance in the field of criminal procedural law is whether the accusatorial policy of the state is to be built upon the principle of legality or opportunity.

In connection with (perhaps) ongoing restatement of Czech criminal procedural law, there appear considerations consisting in an extension of the accusatorial principle, i.e. renaissance of private prosecution, or subsidiary prosecution.[2] Both of these institutes[3] are unknown to the existing Czech legal order, it is true,[4] but in a number of European countries they are absolutely common, even though they are used only sporadically. From the viewpoint of basic principles of criminal proceedings, it means

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[2] Cf. Grounds and principles of the new Rules of Criminal Procedure of 2014, which are based on material intents from 2004 and 2008.

[3] RŮŽEK, A. *Obžalovací zásada v československém socialistickém trestním řízení*. Prague: ČSAV, 1964, pp. 65–70; GŘIVNA, T. *Soukromá žaloba v trestním řízení*. Prague: Karolinum, 2005.

[4] Cf. Section 46 and Section 47 of the Act no. 1873 of the Empire Collection of Acts, laying down the Rules of Criminal Procedure.

one of the most important interventions into the structure of the criminal trial.[5] The central actor at these institutes is the person of the aggrieved party (or victim of a criminal offence), i.e. one of the entities of the proceedings, which has, under certain circumstances, the position of a party.

During the last two decades it has been possible to register continuous debates about relations of retributive and restorative justice, whose central issue can be understood as the nature of a conflict arising in consequence of commitment of a criminal offence. At present it is not possible anymore to question the shift from the purely retributive concept of criminal law towards the restorative concept which grants also the autonomous position and importance to the person affected by the offence (the aggrieved party or victim of the criminal offence). This interaction is influenced also by other variables which are based on the growing level of protection of human rights and fundamental freedoms – through normative embedment, as well as through the decision making activity of the European Court of Human Rights,[6] Constitutional Court of the Czech Republic[7] and Court of Justice of the European Union.[8] In its consequence it therefore means considering and redefining criminal-law[9] and criminal-procedure relations.[10] German theoretician Eser speaks in this context about a change in the relation between the state exercising its criminal-law claim and the citizen, when the criminal proceedings are basically privatised and are focused on agreements between the offender and the victim. The rights of victims are highly strengthened, the institutes of private prosecution and subsidiary prosecution are regulated, so is the consent of the aggrieved party with criminal proceedings, settlement etc.[11] In a wider context it is possible to highlight the phenomenon of the intergrowth of

[5] Another one of important interventions is introduction of the so-called formal burden of proof on the prosecutor. MULÁK, J. Pojetí základních zásad trestního řízení v připravované rekodifikaci trestního práva procesního. In: Group of Authors. *Aktuální otázky civilního a trestního řízení se zaměřením na rekodifikaci občanského soudního řádu a trestního řádu ve světle principů demokratického a právního státu*. Prague: Všehrd, 2016, pp. 107–113

[6] REPÍK, B. *Evropská úmluva o lidských právech a trestní právo*. Prague: Orac, 2002.

[7] MOLEK, P. *Právo na spravedlivý proces*. Prague: Wolters Kluwer, 2011.

[8] FENYK, J. Listina základních práv Evropské unie a trestní řízení. *Státní zastupitelství*. 2015, No. 3.

[9] This matter concerns a relation arising through commitment of a criminal offence, between the offender and the state, represented by competent bodies, whose content consists of the right (and at the same time also the obligation) of the state to exercise (against the offender) the limitations resulting from criminal legislation, the obligation and the right of the state to proceed, in this process, in a legal way, which is at the same time also the right of the offender, who is obliged, in turn, to tolerate the measures imposed this way.

[10] Unlike this, the criminal-procedure relation is situated at the procedural level, it arises through the charging with commitment of a criminal offence and its participants are law enforcement authorities and the person charged with commitment of the criminal offence, when the content is also the right and obligation of these authorities to impose on the person charged the limitations implying from criminal legislation, in this case especially from the Rules of Criminal Procedure, the obligation of this person to tolerate these limitations, and a similar requirement for the legal procedure as in the case of a criminal-law relation. This applies only to the main criminal-procedure relation, because in criminal proceedings a number of criminal-procedure relations with other entities are implemented, not only on the basis of the fact against whom the proceedings are conducted.

[11] ESER, A. Funktionswandel strafrechtlicher Prozeßmaximen: Auf dem Weg zur "Reprivatisierung" des Strafverfahrens. In: *Heidelberg: Symposion der rechtswissenschaftlichen Fakultäten der Albert-Ludwigs-Universität Freiburg und der Städtischen Universität Osaka* [online]. 1993 [2017-09-12]. Available at: <http://www.freidok.unifreiburg.de/volltexte/3389/pdf/Eser_Funktionswandel_strafrechtlicher_Prozessmaximen.pdf>. p. 21 et seq.

inquisitional and adversarial criminal proceedings, i.e. penetration of certain elements of *common law* into the continental criminal trial.[12]

POSITION OF THE VICTIM

One of the questions which are often asked especially among the academicians is the question whether the procedural rights of the aggrieved party in criminal proceedings are sufficient, whether they should be further extended up to a level equal to the rights of the person charged. These questions were called out by the fact that the amendments of the Rules of Criminal Procedure, especially those which were adopted in the first years after 1989, rather extended, fostered and deepened the procedural rights of the person charged, but either at all or in a very small extent they were dealing with the rights of the aggrieved party.[13]

Due to the knowledge of victimology and under the intensifying pressure of the public opinion and organisations whose aim is to improve the position of victims in the world, also in our country the procedural regulations were subject to gradual reforms. One of important features characterising development of Czech criminal law in recent years and decades has been also significant fostering of the rights of the aggrieved party, or of criminal offence victims within the framework of criminal proceedings.[14]

This fostering can be monitored in four rather freely interconnected directions. On the one hand, the area of claims which can be exercised by the aggrieved party in adhesion proceedings has been extended.[15] Furthermore, procedural rights of the aggrieved party have been fostered significantly (e.g. the right to be informed about the filing of accusa-

[12] AMBOS, K. International criminal procedure – "adversarial", "inquisitorial" or mixed? *International Criminal Law Review*. 2003, No. 3, p. 4, [2017-09-06]. Available at: <http://papers.ssrn.com/sol3/papers. cfm?abstract_id=1972235>. From the Czech point of view e.g. TOMÁŠEK, M. Prorůstání adversárních a inkvizičních prvků při europeizaci trestního procesu. *Právník*. 2009, No. 5, p. 467 et seq.; TOMÁŠEK, M. Srovnání teoretických problémů harmonizace trestního procesu v USA a v EU; KRISTKOVÁ, A. Adverzární, inkviziční a smíšený trestní proces – koncepce a širší souvislosti. *Časopis pro právní vědu a praxi*. 2013, No. 3, p. 370.

[13] JELÍNEK, J. *Poškozený v českém trestním řízení*. Prague: Karolinum, 1998.

[14] Massive extension of the rights of the aggrieved party in criminal proceedings was brought by the Act no. 45/2013 Coll., on victims of crime, with separated effective terms from 1 April 2013, or from 1 August 2013, respectively. It is also possible to remind the amendment to the Rules of Criminal Procedure from 2011 (Act no. 181/2011 Coll., effective from 1 July 2011), which made it possible that the subject matter of the claim of the aggrieved party should not be just the damage compensation, but newly also the compensation of non-material detriment and unjustified enrichment. This way the position of the aggrieved party in criminal proceedings was actually made nearer to the position of the prosecutor in civil proceedings. They made it possible to use also a financial guarantee with the link to satisfaction of the claim of the aggrieved party. JELÍNEK, J. et al. *Zákon o obětech trestných činů. Komentář s judikaturou*. Prague: Leges, 2014; JELÍNEK, J., GŘIVNA, T. et al. *Poškozený a oběť trestného činu z trestněprávního a kriminologického pohledu*. Prague: Leges, 2012; BERANOVÁ, A. Úvahy nad právní úpravou adhezního řízení de lege ferenda. *Criminal-law revue*. 2016, No. 10, p. 221 et seq.; BERKOVÁ, I. Uspokojení nároku poškozeného v trestním řízení, a to zejména ve vztahu k zajištěnému a odčerpanému majetku. *Criminal-law revue*. 2017, No. 6, p. 139 et seq.

[15] Through the amendment to the Rules of Criminal Procedure carried out by the Act no. 181/2011 Coll. it was made possible for the aggrieved party to join, in adhesion proceedings with the claim for compensation of not only property damage and health injury, but also for compensation of other non-material injury or surrender of unjustified enrichment. JELÍNEK, J., GŘIVNA, T. et al. *Poškozený a oběť trestného činu z trestněprávního a kriminologického pohledu*. Prague: Leges, 2012

tion, the right to free-of-charge defence or defence for reduced remuneration, right for instruction on the part of law enforcement authorities, right to provide the consent with settlement, right to take part in plea bargaining, or if he is at the same time also a victim pursuant to the Act on victims of crime, then the right to make a declaration about impacts of criminal offences on his existing life). The aggrieved party has acquired, in some cases, a limited right of disposal concerning criminal proceedings (in the positive sense of the word he has right to efficient investigation, in the negative sense of the word he has right to grant the consent with criminal proceedings). Finally, the adoption of the Act on victims of crime has become reality.[16] It is possible to conclude that the Czech legal order[17] takes rather a compensation and therapeutical approach towards the victim.

Concerning the position of the aggrieved party and further extension of his procedural rights, it is, however, necessary to state that the extent of procedural rights of the aggrieved party in criminal proceedings should be derived also from the meaning of criminal proceedings. Provision of wide procedural authorisations of the aggrieved party up to the level comparable with the person charged leads basically to an increase in formal demands of the trial and to its deceleration, and this leads also to a paradoxical decrease of the aggrieved party's hopes relating to fast and efficient damage compensation, which he could obtain. The disproportional, rather ill-considered extension of procedural rights can be contra-productive for the aggrieved party.

The aim of the extension of the rights of the aggrieved party (through legislative means), has been so far, however, to foster his position within the framework of the prosecution already commenced. This means that the invariable aspect was always the approach taken in relation to the claim of the aggrieved party for provision of his protection through criminal-law means, i.e. the entitlement regarding the fact that the prosecution should be initiated at all. The aggrieved party has, of course (in the same way as any other person) the right to initiate, through its announcement, the commencement of the activities of the criminal proceedings (Section 158(1), (2) of the Rules of Criminal Procedure) and can also ask the prosecutor to remove any delays in the proceedings or any defects in the procedure of the Police authority (Section 157a of the Rules of Criminal Procedure). Nevertheless, if the aggrieved party failed to succeed at the Police authority or at the prosecutor with his initiative to launch the prosecution in a particular case, he could not achieve a remedy at the criminal court or at the Constitutional Court.[18] The fact is that this judicial authority ensuring protection of the constitutional rights (Art. 83 of the Constitution of the Czech Republic) has derived from the wording of Articles 39 and 40 of the Charter a conclusion stating that prosecution of a criminal offence and also appropriate punishment is a matter

[16] JELÍNEK, J., PELC, V.. Zákon o obětech trestných činů – jeho nedostatky a možnosti řešení. *Bulletin advokacie*. 2015, No. 11; JELÍNEK, J., PELC, V., HERANOVÁ, S., GALOVCOVÁ, I. *Current Issues Related to the Injured Party and Decision on Damages in the Czech Republic and Slovak Republic*. Waldkirchen: rw&w Science & New Media Passau-Berlin-Prague, 2017.

[17] Act no. 141/1961 Coll., on the Code of Criminal Procedure (Rules of Criminal Procedure), Act no. 45/2013 Coll. on victims of crime.

[18] Resolution of the Constitutional Court of the Czech Republic of 29 March 2007, file ref. no. III. ÚS 921/06, of 19 April 2007, file ref. no. II. ÚS 349/06, of 19 September 2011, file ref. no. IV. ÚS 2609/11

of the relation between the state and the offender of the offence,[19] which means that this relation does not include the victim, because there is not any basic right of the victim to "satisfaction", which could be brought to the victim by prosecution and eventual punishment of the offender. In other words, the aggrieved party does not have any procedural entitlement to initiation of criminal proceedings. The Constitutional Court has thus been satisfied just with the stating that a feature of a modern legal state is a monopoly of the state in the field of criminal law[20] and a corresponding monopoly of the public prosecutor's office for initiation and conducting of the prosecution,[21] on other occasions it referred to the basic principles of criminal proceedings (especially to the principle of legality and the accusatorial principle).[22]

The existence of the right of the aggrieved party to initiate prosecution against another person is denied (not only) on the part of the Constitutional Court even at present, nevertheless there has been an interesting shift in recent years in the issue of the rights of aggrieved parties within the framework of the phase of criminal proceedings which are underway before commencement of the prosecution.[23] The initiator of this shift was just the Constitutional Court, which, however, followed up to the case law of the European Court of Human Rights. The result was the granting of the right to the so-called efficient investigation to the person who became an aggrieved party in consequence of commitment of a criminal offence. It is already possible to consider this right as relatively embedded at present. The fact is that the relevant case law of the European Court of Human Rights is very rich[24] and partial attributes of this law and requirements for quality of investigation have already been analysed in it relatively at a detailed level.[25] The right of the aggrieved party to efficient investigation was derived from the obligation of the state to ensure effective protection of basic human rights and freedoms including the finding of offenders responsible for their breach and to bring the offenders to justice and punishment; the fact is that without this obligation the protection of basic rights and freedoms could not be efficient enough.

If we enabled the victim to enter into the criminal-law relationship, we would create a trilateral relation from it, and such a trilateral relation is missing the direct relevant link between the offender and the victim. The fact is that all the rights of the victim which were derived by the European Court of Human Rights in its decision making activities take place solely on the background of the state – victim relation, which means that the victim does not have any direct right against the offender. For this reason I believe that it is still possible to speak about the fact that the parties of the criminal-law relation are the offender and

[19] Resolution of the Constitutional Court of the Czech Republic of 26 February 1997, file ref. no. II. ÚS 361/96.
[20] Resolution of the Constitutional Court of the Czech Republic of 8 April 1998, file ref. no. I. ÚS 84/99.
[21] Resolution of the Constitutional Court of the Czech Republic of 19 February 2007, file ref. no. IV. ÚS 264/06.
[22] Resolution of the Constitutional Court of the Czech Republic of 27 September 2000, file ref. no. ÚS 249/2000.
[23] ŠČERBA, F. Právo na účinné vyšetřování ve světle judikatury Ústavního soudu. *Trestněprávní revue*. 2016, No. 7–8, pp. 157–163.
[24] KONŮPKA, P. Právo poškozeného na účinné a nezávislé vyšetření některých trestných činů jako základní lidské právo. *Státní zastupitelství*. 2010, No. 9, p. 8.
[25] KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech. Komentář*. Prague: C. H. Beck, 2012, pp. 370–374.

the state, nevertheless besides this relation there arises still another relation, namely the relation between the state and the victim, whose content is the victim's right to efficient investigation. This right would, however, have to be universal, i.e. independent of the nature of the intervention into the fundamental right or freedom of the victim and the type thereof.

BASIC PRINCIPLES OF CRIMINAL PROCEEDINGS

These principles represent various and historically conditioned leading regulative ideas,[26] on which the criminal proceedings (its organisation and activity of its bodies) are built and through which it is regulated.[27] This establishes also their importance because the entire criminal procedural law is built upon them, especially the systemic and structural criminal-procedure relations.

The fundamental principles are a more specific expression also of fundamental legal principles, and therefore also of fundamental general principles of the society in a certain level of historical development and corresponding culture, including legal culture, at both the national and supranational levels. The approach to the notion of "legal principle" is not understood in a uniform way in literature, it is, however, possible to trace several of its meanings which were summarised by Muniz. According to the author it is therefore possible to understand the principle as a highly general norm; a norm containing vague terms; a norm determining certain objectives; a norm expressing higher values of the legal order; a norm of extraordinary importance; a norm of a high status; a norm determining relevant norms during decisions or as a maxim helping to categorise the legal system. [28]

The meaning of basic principles of criminal proceedings (of generally procedural principles) continues to rise, which implies, according to Kühn, on the one hand from the "priority of procedural equity", i.e. "subsidiarity of the material-law review to the procedural-law review", which has been recently exercised in the constitutional justice, and on the other hand from the fact that according to case law of the Constitutional Court of the Czech Republic it is possible to consider as constitutionally conforming judicial proceedings only the proceedings in which a general court fully and absolutely respects the applicable principles of procedural law.[29]

Besides the above, the importance is further emphasised by the functions which are to be fulfilled by these principles. This specifically concerns such functions as cognitive (learning), interpretation, application, legislative, criminally politic, stabilisation (coher-

[26] Concerning the notion of "legal principle", e.g. HOLLÄNDER, P. *Filosofie práva.* Plzeň: Aleš Čeněk, 2012, pp. 200–202.

[27] JELÍNEK, J. (ed.). *Základní zásady trestního řízení - vůdčí ideje českého trestního procesu.* Prague: Leges, 2016 or ŠÁMAL, P. *Základní zásady trestního řízení v demokratickém systému.* Prague: Codex Bohemia, 1999.

[28] MUNIZ, J. R. T. Legal Principles and Legal Theory. *Ratio Juris.* 1997, Vol. 10, p. 269. (cited according to KŮHN, Z. *Aplikace práva ve složitých případech: K úloze právních principů v judikatuře.* Prague: Karolinum, 2002, p. 77 et seq.

[29] Findings of the Constitutional Court of the Czech Republic, file ref. no. III. ÚS 367/99, III. ÚS 205/97, III. ÚS 80/96.

ent) and correction (checking).[30] The Czech Republic builds its criminal proceedings upon the principles of officiality (Section 2(4) of the Rules of Criminal Procedure) and legality (Legalitätsprinzip, mandatory prosecution; Section 2(3) of the Rules of Criminal Procedure), which order the law enforcement authorities to prosecute all criminal offences about which they learn, unless the laws or an international treaty provide for otherwise. This therefore means an obligation to respond, in a qualified way, to every crime about which they learn, because the matter can be resolved at the end in an adequate way also otherwise (e.g. by means of any of the diversions).

The application of the principle of legality is a reflection of the fact that the state has assumed a monopoly for prosecution of all crimes. Individual persons have waived the right to enforce justice separately and have assigned this authorisation to the state, which in turn has created a specialised body of public prosecution and in legislation it has made this body obliged to prosecute all criminal offences, whereby it has demonstrated that the monopoly for prosecution of crimes means for the state not only an exclusive right to prosecute but also an obligation to do so. The right to punish becomes an attribute of state power; it is a demonstration of the internal sovereignty of the state.[31] According to Provazník, the recent criminal-procedure relation implies from the classical theory of a social treaty because he believes that criminal law needs to be perceived as an instrument for prevention of a war of all against all, referring to Miřička's bon mot: *"If we remove criminal law, we will have club law, we will return back to self-help and revenge."*[32] In the sphere of criminal law this does not mean only that the state will be able to punish, in the case of an act aimed against the society, also an offender who is stronger than the victim, but without any doubt also the fact that it will make it in a more appropriate and objective way, and the state monopoly for *ius puniendi* is more advantageous for all the involved parties.[33]

The opposite to the principle of legality is the principle of opportunity (*Oportunitätsprinzip, discretionary prosecution*), which means that the public prosecution body is authorised (not obliged) to prosecute the crimes about which it learns. It does not commence the prosecution or it refrains from it if it does not find any public interest in the prosecution or if the prosecution is purposeless for another reason. The introduction of the elements of opportunity generally serves to an increase in effectiveness of criminal proceedings, to assurance of the standard of human rights and to the building up of a framework for application of an alternative solution of criminal matters (where an emphasis is placed at the same time on the so-called solution of the conflict between the person charged and the aggrieved party, and in general the rights of aggrieved persons are fostered within the framework of this trend).[34] This principle is traditionally (but not ex-

[30] JELÍNEK, J., SOVÁK, Z., ŘÍHA, J. *Rozhodnutí ve věcech trestních*. Prague: Leges, 2015, p. 17.

[31] JELÍNEK, J., GŘIVNA, T., HERCZEG, J., NAVRÁTILOVÁ, J., SYKOVÁ, A. et al. *Trestní právo Evropské unie*. Prague: Leges, 2014.

[32] MIŘIČKA, A. *Trestní právo hmotné: část obecná i zvláštní*. Prague: Všehrd, 1934, p. 12.

[33] PROVAZNÍK, J. Trestněprávní poměr a trestněprocesní vztah ve světle ochrany základních práv – posun paradigmatu? *Právník*. 2015, No. 3, p. 229 et seq.

[34] It is possible to differentiate between the use of this principle in cases when the public interest is missing there (e.g. Section 172(2)(c) of the Rules of Criminal Procedure) or when it is only weakened but did not cease to exist (e.g. in case of diversions) or pragmatic reasons for the use of opportunity (crown witness, cooperating person charged).

clusively) connected with the Anglo-American type of criminal proceedings (common law), which is given especially by the consequence of a different social, historical and cultural development of these states with an adversarial model of criminal proceedings in comparison with the "continental" inquisitorial type of criminal proceedings. In the areas where it is applied it provides the law enforcement authorities with "certain creativity which can replace unsuitable or insufficient regulations of criminal material law, and thus to actually modify it or complement it in a material way", i.e. it can operate as a procedural corrective tool for the extent of criminal lawlessness (especially in the systems with formal concepts of criminal offences), or open wide possibilities for out-of-court settlement of criminal matters, conclusion of agreements about the guilt and sentence (known as *plea bargaining*). Legal orders of individual states declare particular principles as the rules, from which they know exceptions in favour of another principle. A pure form of legality or opportunity basically does not appear.[35]

Proceedings before court are governed, in the field of criminal proceedings, by the accusatorial principle[36] expressed in Section 2(8) of the Rules of Criminal Procedure, according to which judicial proceedings can only be initiated on the basis of an act of accusation of a body different from the court. This act may be an accusation, criminal complaint or draft agreement on the guilt and sentence. The person who submits these acts is exclusively the prosecutor, who at the same time represents public prosecution in the proceedings before court.

The accusatorial principle is an expression of the principle stating that "there is no judge without a party" (*nemo iudex sine actore*), and therefore it is not demonstrated in the preparatory proceedings. Until the filing of the accusation, the lord of the lawsuit (dominus litis) is the prosecutor. The proceedings in the stage before submission of the accusation are within the exclusive competence of the prosecutor. When the accusation is submitted, the case passes to the court which decides separately about all issues associated with further proceedings (Section 181(2) of the Rules of Criminal Procedure). The prosecutor can, however, take the accusation back until the court of first instance holds final consultations. Nevertheless, after the starting of the trial he can only do so with the consent of the accused person. If the accusation is taken back, the case returns to its preparatory proceedings (Section 182 of the Rules of Criminal Procedure). After submission of the accusation, the court decides separately about all issues connected with further proceedings, but it can only decide about the fact which is stated in the claim statement (Section 220(1) of the Rules of Criminal Procedure). Another declaration is the fact that participation of the prosecutor during the trial is mandatory (Section 202(1) of the Rules of Criminal Procedure).

This means that the Czech Rules of Criminal Procedure do not recognise an institute which would enable the aggrieved party to "make" the prosecutor submit an accusation

[35] Cf. MULÁK, J. Zásada legality a oportunity v českém trestním řízení. In: Jiří Jelínek et al. *Základní zásady trestního řízení - vůdčí ideje českého trestního procesu*. Prague: Leges, 2016, pp. 44–59.

[36] JELÍNEK, J. Obžalovací zásada - minulost a budoucnost. In: Jiří Jelínek et al. *Trestní právo procesní - minulost a budoucnost*. Prague: Leges, 2016, pp. 36–44; ŠRAMEL, B. Obžalovacia zásada: minulost, súčasnosť a budúcnosť. *Trestní právo*. 2013, No. 1, pp. 19–29.

(initiate prosecution) and verify the results of the pre-judicial stage of criminal proceedings vis-á-vis the public to a certain extent through the public hearing of the case in the proceedings before court. For this reason, there is offered a possibility of introduction of the institute of the so-called subsidiary prosecution, if the prosecutor issued an order on suspension of the case or discontinuation of the prosecution. Such subsidiary prosecution could be initiated by the aggrieved party in a certain time period from the issuing of the order on suspension of the case or discontinuation of the prosecution. The fact is that according to the current Czech legal order the prosecutor can suspend the case before commencement of prosecution (Section 159a(4) of the Rules of Criminal Procedure) or discontinue prosecution after commencement of prosecution [Section 172(2)(c) of the Rules of Criminal Procedure] for the reason of purposelessness of the prosecution. Another principle is the principle of assurance of rights of the aggrieved party (Section 2(15) of the Rules of Criminal Procedure), according to which the law enforcement authorities are obliged, in each period of the proceedings, to enable the aggrieved party to achieve full exercise of his rights, about which it is necessary to instruct him pursuant to the laws in a suitable and comprehensible way so that he can achieve satisfaction of his claims; they must conduct the proceedings with necessary considerateness towards the aggrieved party and while saving his personality. The purpose of this principle is protection of the victim from the deepening of the primary harm through secondary and recurrent victimisation.

The Rules of Criminal Procedure therefore do not count on any possibility of the so-called private or subsidiary prosecution, when a person other than the public prosecutor would play the role of the indictor, typically the aggrieved party. According to the existing legal regulations, the aggrieved party can file a complaint against such decisions, about which the supervisory prosecutor's office is to decide, and in the case of a decision about discontinuation of prosecution he can further submit an initiative to the supreme public prosecutor for its cancellation due to illegality.

Subsidiary prosecution (like private prosecution) belongs among the institutes which extend the scale of the existing rights of the aggrieved party. This institute is then one of the examples of privatisation of criminal proceedings.[37]

SUBSIDIARY PROSECUTION

The term "subsidiary" prosecution generally means *"the right of the aggrieved party to assume the place of the public prosecutor where the latter refuses to commence prosecution of a public-prosecution offence or to continue in the commenced prosecution*".[38] Thus the

[37] Other manifestations are e.g. private-prosecution offences, offences prosecuted upon request, enabling offences, consent of the aggrieved party with prosecution or the so-called diversions. For more detailed information on this topic see e.g. JELÍNEK, J. Jak dál s trestním stíháním se souhlasem poškozeného. *Kriminalistika*. 2017, No. 1, pp. 3–11; PIPEK, J. Oficiální nebo dalekosáhle privatizované trestní řízení. *Právník*. 2000, No. 12, pp. 1144–1181; ŠRAMEL, B. Privatizácia trestného konania: cui bono? *Bulletin slovenskej advokacie*. 2013, No. 6, pp. 31–37.

[38] Moreover, it is possible to meet the notions "incidental prosecution" and "ancillary prosecution" – these are, however, not synonyms to subsidiary prosecution. GŘIVNA, T. Soukromá žaloba v trestním řízení (nástin problematiky). *Trestněprávní revue*. 2005, No. 12, p. 317.

aggrieved party performs certain control[39] over the execution of the right (and obligation) of the public prosecutor to prosecute all criminal offences (in the systems based on the principle of legality), or fulfils the task of a securing element against misuse of discretionary authorisations of the public prosecutor (in the case of authorisations implying from the principle of opportunity),[40] which means that the aggrieved party comes on a subsidiary basis (the public prosecution has therefore a preferential right).

The admission of subsidiary prosecution in all matters when the public prosecutor refused to initiate prosecution or to continue in the proceedings commenced is theoretically possible, it is true, but it is not too practical. For this reason the legal orders which recognise subsidiary prosecution[41] in turn bind its application to fulfilment of qualified conditions which should eliminate the danger of filing the so-called vexatious actions.[42] The limitation of the possibility of initiating subsidiary prosecution can then be achieved in various ways, e.g. through the type outlining of decisions of the prosecutor,[43] list of crimes, specification of the group of aggrieved parties actively legitimated to initiate subsidiary prosecution,[44] obligation to be represented by an attorney, or obligation to settle the costs of the proceedings if the prosecution was discontinued or if the accused person was acquitted, in the extent in which they were incurred after the entry of such a party into the proceedings within the framework of the subsidiary prosecution. A certain filtration function could be performed in this context also through preliminary hearing with regard to the prosecution (analogously useable also for subsidiary prosecution). Another usual limitation is deposition of a financial advancement for the costs of the prosecution carried out because in the case of private prosecutions it is not guaranteed that the means spent on the proceedings from public means will be spent purposefully. In some countries (e.g. France) it is even possible, in the case of an exonerating judgement issued in cases initiated by private prosecution, to impose a fine on the initiator. These mechanisms, however, absolutely do not exclude the public prosecutor from representing the prosecuting party because he is authorised to assume his role again at any time.

Since the takeover of the prosecution of all crimes appears to be impractical, it is possible to look for a solution in the mechanism of determination of the list of specific criminal offences which relate, in a prevailing extent, to the person of the aggrieved party or intervening in his private (individual) interests in a prevailing extent.

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[39] In principle, there are three models of control - subsidiary prosecution, review by the court upon a motion of an authorised entity or previous consent of the court.

[40] KRISTKOVÁ, A. K legalitě a oportunitě v českém trestním řízení. *Trestní právo*. 2014, No. 4, pp. 4–13.

[41] E.g. Sweden, Norway, Belgium, Poland, Austria, Slovenia, Croatia.

[42] ŠRAMEL, B. Subsidiárná žaloba a možnosti jej využitia v slovenskom trestnom konaní. *Justičná revue*. 2013, No. 6-7, pp. 893–907.

[43] It would be possible to consider the current wording of Section 172(2)(c) of the Rules of Criminal Procedure, embedding the so-called procedural corrective instruments of criminal lawlessness. Concerning Austria, there is an institute of subsidiary prosecution, enabling the victim to assume the role of prosecution in the case that the public prosecutor takes the accusation back (Section 72 of the Rules of Criminal Procedure).

[44] The limitation can concern only those aggrieved parties who have exercised the claim for damages, non-property detriment or for surrender of unjustified enrichment, i.e. those aggrieved parties which are the parties of adhesion proceedings. A problematic matter may be active legitimacy at the so-called *victimless crime* (criminal offences without any immediate aggrieved party – e.g. criminal offences against the environment, bribery crimes), where subsidiary prosecution could be initiated e.g. by the public defender of rights (ombudsman).

As far as the groups of crimes are concerned, there should be excluded criminal offences during which there is no specific (immediate) aggrieved party (the so-called *victimless crime*), i.e. the cases when the aggrieved party is the entire society.[45] In these cases the public prosecutor should exclusively decide about the prosecution. Alternatively it is possible to consider inclusion of the public defender of rights as a subsidiary prosecutor.[46] In the issue of the group of criminal offences, a very important aspect is also consideration relating to the principle of subsidiarity of criminal repression in the legislative field, i.e. the extent of criminalisation.[47]

It is, however, not possible to state that on the active entry of the aggrieved party in the place of the public prosecutor and on the takeover of the prosecution the public interest ceases to be fostered in the criminal proceedings and is replaced by the fostering of a private interest. The fact is that from the nature of criminal proceedings it unambiguously implies that the aggrieved party can never foster a private interest through prosecution,[48] but can foster the public interest only.[49] For this reason the essence of the subsidiary prosecution continues to consist in the fostering of the public interest, but not through the public prosecutor, but through the party initiating subsidiary prosecution (the aggrieved party). In this meaning the subsidiary prosecution operates as a certain corrective tool and complement to the accusatorial monopoly of the public prosecution.[50]

As far as the prepared restatement of the Rules of Criminal Procedure is concerned, introduction of subsidiary prosecution (private prosecution) was originally proposed. Instead of this approach, there was chosen a variant when the aggrieved party can, with regard to the prosecutor's resolution on suspension of the case or discontinuation of the prosecution for opportunity reasons[51], after utilisation of the complaint procedure, ask the supreme prosecutor for cancellation of such a decision due to illegality or lack of rea-

[45] These are e.g. criminal offences associated with drugs, bribery crimes and criminal offences against the environment.

[46] It is possible to look for inspiration in provisions of Section 66(3) of the Act no. 150/2002 Coll., Rules of Administrative Procedure, which enables the public defender of rights (besides the supreme prosecutor - Section 66(2) of the Rules of Administrative Procedure) to initiate prosecution for defence of public interest, if there is a serious public interest in the filing thereof. It is worth mentioning that the supreme prosecutor can initiate prosecution if it just "finds" a serious public interest.

[47] MUSIL, J. Trestní odpovědnost jako prostředek ultima ratio. *Kriminalistika*. 2012, No. 3, p. 161 et seq.; FENYK, J. O subsidiární úloze trestní represe a trestním právu jako prostředku „ultima ratio". In: J. Hořák –M. Vanduchová (eds.). *Na křižovatkách práva. Pocta Janu Musilovi k sedmdesátým narozeninám*. Prague: C. H. Beck, 2011, p. 105; PŮRY, F. Poznámky k pojetí trestního práva jako „ultima ratio". In: *Pocta Otovi Novotnému k 80. narozeninám*. Prague: ASPI, 2008, p. 255.

[48] He can enforce the means of private law.

[49] KANDOVÁ, K. Nad veřejným zájmem v českém trestním právu hmotném a procesním. *Státní zastupitelství*. 2017, No. 3.

[50] KRONBERGER, F. *K reformě trestního řízení přípravného*. Praha: Knihovna věd právních a státních, 1928, no. 3, pp. 70–71.

[51] The prosecutor should newly have a possibility of discontinuing the prosecution (as well as suspending the criminal case), if the evidence collected is not a sufficient ground for successful representation of the public prosecution in proceedings before court, in order that persons shall not be uselessly called before the court when it is obvious that they will be exonerated from prosecution. Another reason for discontinuation of the prosecution (as well as suspension of the criminal case) will be the fact that there is no public interest in further prosecution.

sonability, and if the supreme prosecutor does not satisfy this request, he can contact the judge for preparatory proceedings with the same request. This means that subsidiary prosecution is not directly introduced, but there is a possibility for the aggrieved party to initiate a judicial review by way of a remedy means.

CONCLUSION AND SUMMARY

Although subsidiary prosecution is an unknown institute to the current system of Czech criminal trials, it represents an extraordinarily interesting subject matter of investigation. The current absence of the aggrieved party's possibility of initiating prosecution as private or subsidiary prosecution was mentioned in several decisions of the Constitutional Court as one of the arguments why the state is obliged to conduct efficient investigation in certain types of cases.[52] That is why it is clear that if these institutes were really included into Czech criminal law, i.e. if there appeared certain privatisation of criminal proceedings, the perception of the extent of the aggrieved party's right to execution of efficient investigation on the part of the Czech Constitutional Court would probably change quite a lot.

Nevertheless, I do not think that the process of privatisation of criminal proceedings needs to be completely refused, because the strict and consistent application of the core principles of continental criminal law is not sustainable from a long-term point of view. In my opinion, subsidiary prosecution can be substantiated because unlike private prosecution it is not a demonstration of the principle of opportunity, but it is its limitation in favour of the principle of legality and can be an important guarantee of legality as well. I am convinced that the authority competent to check the prosecutor's decision on discontinuation of the prosecution should be the court,[53] because it fulfils the attributes of impartiality and independence. In this context it is desirable to consider Article 80 of the Constitution of the Czech Republic, even though I do not think that the wording of that article would a priori exclude introduction of subsidiary prosecution, because I believe that it is a competence norm in the case in question. This means that I do not consider any possible introduction of subsidiary prosecution within the framework of the restatement to be against the Constitution. It is, however, necessary to urge on the legislator, and ask the subsidiary prosecution to be exactly outlined at the level of legal regulations, it should be easy to work with and its place in the system of prosecution of crimes should be clearly outlined.

Furthermore I would like to emphasise that extensive, not properly prepared or too wide privatisation of criminal proceedings can cause significant problems under the conditions of the continental legal system. In this context it will be inevitable to take into consideration also the circumstances[54] and specifics of the Czech legal order and to introduce

[52] Resolution of the Constitutional Court of the Czech Republic of 29 October 2013, file ref. no. I. ÚS 2886/13, of 26 March 2014, file ref. no. I. ÚS 4019/13.

[53] Recommendation of the Council of Europe Rec (2000)19 on the role of public prosecution in the criminal justice system, which was adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, point 34.

[54] Appropriate attention should be paid especially to the fact that initiation of criminal proceedings is often continuation of or an accompanying act to civil proceedings (e.g. during litigations between former partners or spouses) for the purpose of obtaining a more advantageous position in the lawsuit.

mechanisms, which would prevent this institute from being misused. It seems quite appropriate to determine both subjective and objective admissibility, i.e. to determine the exact list of criminal offences, group of aggrieved parties, type specification of decisions of the public prosecutor. A very strong argument for its introduction is the fact that the existence of subsidiary prosecution forces the public prosecutor towards more conscientious work. On the other hand, a negative argument is its low application usability, as indicated by foreign statistical data.

Particular legal regulation is the matter of further discussion, of course, nevertheless I believe that such an institute would contribute to inspections of public prosecutors, especially in the situation when the criteria of purposelessness of prosecution, for which the public prosecutor can suspend or discontinue the prosecution, are extremely indefinite. As far as private prosecution is concerned, rather negative aspects will prevail there (this mainly concerns fostering of the elements of opportunity; a significant shift towards privatisation of criminal proceedings missing philosophical justification; this can virtually be taken into consideration for several crimes only – typically defamation, false accusation), and therefore I do not consider it to be useful.[55]

The restatement work which is currently underway on the new Rules of Criminal Procedure could be a good occasion in the issue of the reopening of some issues of criminal material law, because criminal material law is implemented just through criminal procedural law. In particular, I bear in mind the extent of criminalisation (application of the principle of subsidiarity of criminal repression at the legislative level), solution of the relationship between material-law (Section 12(2) of the Criminal Code) and procedural correctives of the extent of criminal lawlessness [Section 172(2)(c) of the Rules of Criminal Procedure], structuring of procedural regulations in relation to the modified categorisation of criminal offences.

[55] MULÁK, J. Human dignity and criminal defamation in Czech law - constitutional-law and criminal-law aspects. In: *Challenges of today politics and society*. 2015, pp. 216–239.