

1997/06/30 - IV. ÚS 98/97: OBJECT OF CRIMINAL OFFENCE

HEADNOTE

In relation to criminal offenses against the Republic under Chapter One of the Special Part of the Criminal Code, No. 140/1961 Coll., the dissimulated interest of the ruling party oligarchy, employing all instruments of totalitarian power against the "rest of the inhabitants", was enshrined in the law as the object of such criminal deeds. The behavior of the complainant, which was qualified in the criminal proceeding as the criminal offence of High Treason and Espionage under § 105 of the Criminal code, was capable at the very most of calling into doubt the interests of that ruling oligarchy. During the incriminated period, however, the existence of a sovereign state was a mere fiction, for the Czechoslovak state, while in its internal relations presenting itself as a totalitarian system, was in actuality the mere vassal of the foreign power which was occupying its territory. Therefore, all this means that if, on the one hand, it is permissible under Article 7 of the convention³⁾ to convict and punish a person also for offenses, when the material elements of that offense are not at all, or not sufficiently, defined in the criminal code, it is hardly possible, on the other hand, to convict and punish persons whose conduct during the era of non-freedom exhibited some formal features of criminal offenses against the foundations and the safety of the Republic, albeit under conditions where, beyond any doubt, the actual object of the criminal offense was lacking.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

of the Constitutional Court of the Czech Republic (Panel IV) from 30 June 1997, sp. zn. IV ÚS 98/97, in the matter of the constitutional complaint of ing. F. V. against the ruling of the Supreme Court of the Czech Republic of 23 January 1997, file no. 1 Tzn 0011/96-34, rejecting on the merits a complaint of the violation of the law.

The ruling of the Supreme Court of the Czech Republic from 23 January 1997, file no. Tzn 0011/96-34, is annulled.

REASONING

This timely filed constitutional complaint is brought against the above-cited ruling of the Supreme Court of the Czech Republic, which rejected a complaint of the violation of law filed by the Minister of Justice in favor of the complainant, and against the resolution of the former Supreme Court of the CSSR of 15 March 1979 in the criminal case conducted at the former High Military Court in Přeborn. The complainant objects that, in the contested decision, the case was assessed only from the perspective of the pertinent statutory provisions, in particular those of the Code of Criminal Procedure, without giving any consideration at all to the significance of constitutionally guaranteed basic conditions for a fair procedure. It was and remains problematic the idea that the attributes of state sovereignty can be protected by means of law from injury by the complainant, and not only by him, in the case of a state whose sovereignty or defensive capacity, at the time at issue, remains a matter of serious doubt to say the least. The complainant therefore prays that the Constitutional Court grant his constitutional complaint for the violation of Arts. 37(2), 40(3), and 39 of the Charter of Fundamental Rights and Basic Freedoms and annul the contested decision.

In its statement of views, the Supreme Court of the Czech Republic continues to adhere to its position that the complainant violated the law that was applicable at the time, in addition that his conduct continues to be punishable even at the present time. The human point of view to which the complainant makes reference is not the crucial criteria for decision-making by a court; on the contrary, the fact that judges are bound by the law, as is laid down in Art. 95(1) of the Constitution of the Czech Republic,⁴⁾ is decisive. In no case can agreement with the legal outcome established as a result of the decisions in the original proceeding be considered as „conservation“ of the legal outcome by the dubious acts of the court in the original proceeding, rather as a confirmation that these courts' decisions were in full agreement with the criminal code in effect at the time and which, in

respect of the issue is dispute, still applies today. It is not the case, then, that the complainant's conduct was declared to be criminal by the law then in force in conflict with the principles of a democratic society. Therefore, for the above cited reasons this party proposes that the complainant's constitutional complaint be rejected as manifestly unfounded or, in the alternative, rejected on the merits.

The Minister of Justice of the Czech Republic stated in its submission that in the proceeding which preceded the issuance of the contested ruling, just as in the proceeding before the first instance court, the basic principles of the means for marshalling and assessing evidence in preliminary proceedings were not consistently respected. The court's conclusion that the complainant's conduct met all material elements of the criminal offense of espionage under § 105(1), (3)(b), (d) of the Criminal Code¹) and of high treason under § 91 of the Criminal Code²) has no foundation in the admitted evidence so that it cannot be considered as a correct conclusion. Even the substantive element of the criminal offense at issue was evaluated in a faulty manner. Since, the contested decision, the Czech Supreme Court rejected on the merits the Minister of Justice's complaint of the violation of the law, indicating that it found no violation in the sense complained of, then the filed constitutional complaint, to the extent indicated in the complaint of the violation of the law, must be considered as well-founded.

In his 12 May 1997 submission, the Supreme State Attorney of the Czech Republic stated that, even if the defendant's act remained criminal, it would hardly be possible to infer therefrom the same level of danger to society as the court deciding at the end of the 1970's found.

As it has already declared in a host of its decisions, the Constitutional Court is not a court that stands in a position of superiority to the ordinary courts, it is not the pinnacle of their system, for which reason alone it may not arrogate to itself the right of supervisory review over their decision-making, provided these courts proceed in accordance with the provisions of Chapter Five of the Charter. In this regard, the Constitutional Court has ascertained from the former Higher Military Court in Příbram that the complainant was found, by a judgment of that court, guilty of the criminal offense of espionage under § 105(1), (3)(b), (d) of the Criminal Code²) and, as a result of the same conduct, of the criminal offense of high treason under § 91 of the Criminal Code,¹) which he was alleged to have committed in that, from the end of 1969 until November of 1976, as a Czechoslovak citizen in the course of his service assignment at home and abroad, he misused his position with the intention of impairing the defensive capacity of the Republic by disclosing to a foreign intelligence service, partly in return for payment, facts described in more detail in the criminal file, bearing on the organization and manner of activity of one of the branches of the Czechoslovak armed services, specifically information concerning employees of the MNO [Ministry of National Defense] and the Czechoslovak Security Services, which have the character of state secrets of special importance; and, further, in co-operation with a foreign power, that for an extended period of time, he handicapped and even disabled the fulfillment of some assignments in areas of especially important interests to the Czechoslovak Republic, thereby causing a substantial measure of damage, in part of a material character, and further serious consequences, despite the fact that he was specially assigned to keep state secrets. For this conduct, he was convicted under §§ 105(3),¹ 35(1) and 29(1), (3) of the Criminal Code to a total punishment of 25 years

imprisonment with assignment to the third correctional-educational level of the NVU MS [Ed. Note: Correctional-Educational Institute of the Minister of Justice], and was further obliged to pay the Czechoslovak state compensation for damages in the amount of 293 901 Czechoslovak Crowns. It was also evident from the file that, in its 15 March 1979 ruling (action no. 1 Tov 1/79-137) the former Supreme Court of the CSSR rejected on the merits the appeals of both the complainant and the former High Military Procurator in Přebram.

Lastly, the Constitutional Court learned from the file of the Czech Supreme Court, that the Minister of Justice of the Czech Republic submitted a complaint of the violation of law. In the reasoning of the contested ruling, the Czech Supreme Court stated, among other things, that the task of courts does not consist in the assessment, on the basis of their own views, of the political and other circumstances and consequences of the occupation of Czechoslovakia by foreign troops after 21 August 1968. In this respect, courts cannot support their decisions on mere political and historical opinions on those events, especially in the light of the fact that Czechoslovakia remained an independent state, recognized as one by other governments. In addition to that, even after the changes brought about after 1989, the legal order precedes on the presumption of the factual and legal continuity with the previous regime, unless specified otherwise in a relevant statute (§ 2 of Act No 480/1991 Coll., on the Era of Non-Freedom⁵). The complainant's conduct does not qualify as a manifestation of resistance against the previous regime, as it did not exhibit any features other than those of a criminal offense. Such resistance should have been unambiguously manifested by some form of struggle against the regime or such other conduct as meant by § 3 of Act No 198/1993 Coll.⁶) [Ed. Note: the act is entitled, „on the Lawlessness of the Communist Regime and Resistance to It“]. Moreover, one cannot speak of resistance in the above sense in relation to a situation where, while the complainant did some harm to the bodies of the regime of that period, at the same time he enjoyed its considerable trust and profited both from that regime and from the co-operation with a foreign power.

In the proceeding on the complaint of the violation of the law, submitted in the case under consideration by the Minister of Justice pursuant to § 266 of the Criminal Procedure Code,⁷) the Supreme Court's duty was, first of all, to assess the issue whether the material elements of a criminal offense were present, therefore also the issue whether the object of the criminal offense existed. For the object is an element of each and every criminal offense, so that an act directed against something which is not capable of being the object of a criminal offense, cannot give rise to criminal liability. In the opinion of the Constitutional Court, the matter under consideration is just such a case where the object of the criminal offense is lacking. The provisions contained in the First Chapter of the Special Part of the Penal Code, No. 40/1961 Coll., as amended by later acts, protect the foundations of a sovereign state, that is, its constitutional establishment, security, and defensive capacity. Then, with regard to the criminal offense of high treason under § 91,¹) the object of the criminal offense is the constitutional foundation of the Republic, its territorial integrity, sovereignty or defensive capacity, whereas with regard to the criminal offense of espionage under § 105²) the group object of the criminal offense is the interest in the protection of the Republic's external security. During the incriminated period, however, the existence of a sovereign state was a mere fiction, for the Czechoslovak state, while in its internal relations presenting itself as a totalitarian system, was in actuality the mere vassal of the foreign power which was occupying its territory. It is well

known that each fiction results from the process of the destruction of an order of values, therefore it evokes even in the area of law those excesses, which are a quite typical phenomena in a totalitarian system, especially in the field of politics. The function that such a legal fiction normally played in totalitarian orders was precisely to veil and shroud a condition of the utmost injustice, a condition the distinguishing feature of which was omnipotence on the one side and the absolute lack of legal protections on the other. This applies in full as well to the totalitarian constitutions which, in comparison with social reality and the cruelty of their conditions for the „rest of the inhabitants“ represented a mere world of appearances, sharply contrasting with the factual lack of constitutional guarantees.

In connection with the argument made by the Supreme Court of the Czech Republic, asserting that courts may not base their decision-making upon mere political and historical opinions on the „August Events“, the Constitutional Court considers it to be of the utmost necessity to make reference to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms³⁾ (‐Convention‐), to which authorities active in the criminal process have up till now evidently not given any thought, for it has never even been applied in adjudging the criminality of conduct engaged in during the period of „non-freedom“. In particular, paragraph 1 of this Article³⁾ provides that no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed; paragraph 2³⁾, however, states that this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations. The fact that the binding nature of these principles is embodied in the Convention indicates the Convention’s quite evident bent towards tying the interpretation of what is or can be law and, on the contrary, what is not and can not be law, to the existence of a certain value order founded on the principle of consensus. Norms cannot regulate, prescribe, or order "out of thin air", rather they build upon an already-existing hinterland of values. Norms share a common base with values to the extent that, together with them, they form the normative and value order of a given society, serving as its constitutive, establishing, and organizing principle. Therefore, all this means that if, on the one hand, it is permissible under Article 7 of the convention³⁾ to convict and punish a person also for offenses, when the material elements of that offense are not at all, or not sufficiently, defined in the criminal code, it is hardly possible, on the other hand, to convict and punish persons whose conduct during the era of non-freedom exhibited some formal features of criminal offenses against the foundations and the safety of the Republic, albeit under conditions where, beyond any doubt, the actual object of the criminal offense was lacking.

In relation to criminal offenses against the Republic under Chapter One of the Special Part of the Criminal Code, No. 140/1961 Coll., the dissimulated interest of the ruling party oligarchy, employing all instruments of totalitarian power against the "rest of the inhabitants", was enshrined in the law as the object of such criminal deeds. The behavior of the complainant, irrespective of the reasons motivating it, was capable at the very most of calling into doubt the interests of that ruling oligarchy. The Czech Supreme Court made the argument to the effect that the complainant’s conduct did not exhibit the characteristics of resistance as meant by Act No 198/1993 Coll., on the Lawlessness of the

Communist Regime and Resistance to It. In the opinion of the Constitutional Court, however, such an argument misses the heart of the matter, since its quintessence does not consist in the assessment of whether the complainant, by his conduct, offered resistance to the totalitarian regime, but whether his conduct can be qualified as a criminal act. It is the opinion of the Constitutional Court that, in the light of the above considerations, the complainant's conduct cannot be qualified as such, and therefore it is also irrelevant which group of inhabitants the complainant belonged to and whether he may have profited from his membership in such group. If there are general principles of law recognized by civilized nations (Art. 7(2) of the Convention) 3) and if they are legally binding, principles which reflect in essence the value order of the nations in question, then the legal orders of the individual states, as well as the application of law within them, must correspond to these principles. In this case, therefore, it is not merely a matter of basing judgments on political and historical opinions, but also on assessments and interpretations that no court can avoid if it is to fulfill its duty enshrined in Article 908) and Article 95 para. 14) of the Constitution of the Czech Republic.

The fact that the Supreme Court of the Czech Republic rejected on the merits the complaint of the violation of the law submitted by the Minister of Justice, while failing in its obligation to examine the violation of the law in the light of the above-stated criteria, resulted in the violation of Article 908) and Article 95 para. 14) of the Constitution, as well as of Article 36 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.9) For the above-stated reasons, the Constitutional Court has, pursuant to § 82 para. 2, lit. a) of Act No. 182/1993 Coll., on the Constitutional Court, granted the constitutional complaint and, pursuant to § 82 para. 3, lit. a) of the cited act, annulled the contested judgment.

IV. ÚS 98/97

Overview of the most important legal regulations

1. § 91 of Act no. 140/1961 Coll., the Criminal Code, governs treachery as one of the crimes against the foundations of the state, and provides that a citizen of the CR who, in connection with a foreign power or with a foreign agent commits the crime of subversion of the republic, terrorism, diversionist activities or sabotage, shall receive a prison sentence of twelve to fifteen years or an exceptional punishment
2. § 105 of Act no. 140/1961 Coll., the Criminal Code, governs espionage as one of the crimes against the security of the republic and provides that anyone who spies out a fact kept secret under a special law, the misuse of which may seriously endanger or damage the constitutionality, sovereignty, territorial integrity, defense and security of the state, will receive a prison sentence of two years to eight years. Par. 3 provides cases where a perpetrator will receive a prison sentence of eight to fifteen years: b) if he commits such a crime although he was especially charged with protection of the secret information, d) if the crime concerns secret information which is classified under a special act at the level of "strictly secret".
3. Art. 7 par. 1 of the Convention on the Protection of Fundamental Rights and Human Freedoms provides that no one may be sentenced for an action or failure to act which, at the time it was committed, was not a crime under domestic or international law and also

may not be given a stricter sentence than could have been imposed at the time the crime was committed. Par. 2 provides that this Article does not prevent trying and punishing a person for an action or failure to act which, at the time it was committed, was criminal under general legal principles recognized by civilized nations.

4. Art. 95 par. 1 of Act no. 1/1993 Coll., the Constitution of the CR, provides that in making their decisions, judges are bound by statutes; they are authorized to judge whether enactments other than statutes are in conformity with statutes.

5. § 2 of Act no. 480/1991 Coll., on the Time of Lack of Freedom, provides that legal acts adopted in the period specified in § 1 (from 1948 to 1989) are annulled only if special acts so provide.

6. § 3 of Act no. 198/1993 Coll., on the Illegality of the Communist Regime and Resistance Against It, provides that the resistance of citizens against the communist regime, which they expressed on the basis of political, religious or moral democratic conviction was legitimate, just, morally justifiable and worthy of respect.

7. § 266 of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Procedure Code) provides that the Minister of Justice may file a complaint with the Supreme Court for violation of the law against a legally effective decision of a court, state prosecutor or investigator which violated the law or which was made on the basis of defective steps in proceedings.

8. Art. 90 of Act no. 1/1993 Coll., the Constitution CR, provides that courts are called upon above all to provide protection of rights in the legally prescribed manner. Only a court may decide upon guilt and determine the punishment for a criminal offense.

9. Art. 36 par. 1 of the Charter provides that everyone may assert, through the legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body.