

English abstract

Legal and Criminological Aspects of Intentional Homicide

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The study explores selected problems on the subject of intentional homicide that has key importance in terms of differentiation of these delicts through the introduction of privileged and qualified factums of crime. Until recently, all cases of intentional homicide except of infanticide were considered “murder” under article No. 219 of the former Czechoslovak criminal code of 1961. The new Czech penal code passed in 2009 replaces this uniformed conception by a terminological bipartition of “murder” and a less grave crime of “manslaughter”, defined as committed in an excusable state of sudden strong mental agitation or as motivated by previous damnable actions of the victim. Furthermore, the new penal code returns to the traditional distinction between “simple murder” and “murder committed with aforethought or after premeditation”. The study endeavors to present a comprehensive commentary on the elements of this new system of homicide law. Therefore it examines the cases of intentional killings committed in a state of a strong non- pathological affect (agitation), further it deals with the issue of provocation of the offender by the victim and eventually it concentrates on the qualifying criteria of premeditation. The Author draws mainly from foreign, predominantly Germanic, literature and jurisprudence and combines it with extensive case reports from the practice of the Czech law courts. The work is the first Czech – language monograph on differentiating aspects of intentional homicide.

Affect in this study is defined as strong, boisterous, yet short and a temporary emotional state, guided usually by autonomic (somatic) reaction and mimic displays. The study gives general explanation on the influence of strong emotions on human behavior from philosophical and psychological perspective. When a person is acting under affect, an impulse concentrates all focus of the subject on a sole motive (aim) and overshadows all other motivations. In persons exposed to strong distress

the ability of purposeful rational behavior is preserved longer than the orientation in ethical norms. In cases of cumulating affect the subject needs an increasing amount of mental energy to keep the negative emotions under control. The discharge of cumulated affect does not occur until a certain critical limit is crossed, often due to a seemingly trivial immediate impulse. The study endeavors to define the concept of *affectdelict* (affective delict, a term from German legal discourse). In the broadest sense it is understood as a violent criminal offence, motivated by stepped up emotional state of the offender. In a narrower sense it serves as a term for the sector of affective delicts that may be judged more leniently under special mitigatory provisions of penal laws. The term may also denote the said provisions of penal laws themselves.

The works of criminology and forensic psychology provide a distinct picture of affective homicide as a special category, characterized by usual motives, scenarios and offender- types. The situational character determined by interpersonal conflicts with close persons is very clear. A substantial criminogenic factor is the immediate availability of a lethal weapon. The most common types of affective homicide can be described as “matrimonial” (between intimate partners) and “confrontational” that occur between two men under the influence of alcohol.

The study analyzes the significance of the offender's affect from the perspective of criminal liability. The key difference is between the very rare pathic (pathological) affect that has the characteristics of a temporary psychosis and a strong stepped up non-pathological affect. The latter can but diminish the responsibility of the offender and more frequently lacks any forensic significance. It can however qualify as “excusable mental agitation” under the privileged factums of homicide (i.e. manslaughter). The terms of “affectdelict” and diminished responsibility must not be confused. Strong affective state is much rather to change the offender’s priorities than to lead to temporary insanity.

Separately from the matter of insanity the relationship between affect and criminal fault has to be examined. Affect may influence the degree of criminal fault only as much as it influences the accuracy of the offender’s notion of the seriousness and extent of harm caused by his offence. Within continental legal theory and jurisprudence there is a prevalent opinion that affect has no influence over the form of criminal fault in terms of intention

or negligence. According to some views, however, a typical affective homicide offender acts so precipitously that there is no room left for him to form *mens rea* required for an intentional crime in terms of the continental doctrine. Offender's motivation is focused entirely on the removal of the source of danger, without a more detailed idea of destructing another person's life. Offences committed in a state of intense agitation fall into a gray area between the forms of criminal fault recognized in continental law as negligence can be disqualified in the same way as intention. This view can be argued against by pointing out that intense emotional agitation only affects the choice of objectives but not their conscious pursuit. The perpetrator of an affective delict is very well aware of what he wants to do or possibly of what he thinks he should do. At the same time he sees nothing else than the objective and the means it can be achieved with. The offender always pursues his aim deliberately, no matter how precipitously or irrationally the choice of the aim was made.

The definition of a less reprehensible form of intentional homicide through the mitigatory criterion of intense affect is quite usual within the systems of homicide law in penal codes of various European states. It is a phenomenon that builds on a long history since the reception of Roman law in the late middle ages. The legislator cannot privilege all affective criminal behavior, but can do so only in specific cases. The substance of the theory of affectdelict is the question about the conditions on which the influence of mental agitation can be considered a mitigating circumstance that justifies a more lenient sanction. The affect can mitigate the socioethical condemnation of the criminal act only if the offender cannot be blamed for the initial situation that caused him to get into the state of agitation. At the same time the situation has to be exceptional in a way that an average reasonable person of moral integrity could emotionally react in a similar way the offender did.

For reasons of legal certainty an introduction of a privileged factum of crime into the special part of penal code is a more preferable solution than reliance upon general provisions on sentencing whose application depends on the judge's discretion. A comparison of homicide laws in German speaking countries shows systematic differences in the relation of the factum of affective homicide towards other types of criminal homicide. In each jurisdiction there are differences as to the stress particular provisions put on the spontaneity of the offender's reaction, differences in

the emphasis on particular types of emotions (anger, fear, etc.) that may cause a temporal loss of control of the defendant. Last but not least there are differences as to whether the offender's affect is explicitly placed into causal relationship with a provocation by the victim. Another important question is the differing relationship between the provision on affective delict and the extenuating or decriminalizing provisions of the general part of the penal code.

The second part of the study deals with those cases of homicide whose offenders were motivated predominantly by serious wrong doing that was inflicted on them by the victim. The author examines the image of provoked intentional killings in the scholarly works of criminology and forensic psychology. The term of provocation in this context is used to denote intentional conduct of the victim that was previous to the crime and can be considered as extenuating circumstance and eventually result in application of mitigatory provisions of penal laws. Provocation expresses the idea of a share of moral guilt the victim had for the escalation of the interpersonal conflict into a serious violent crime. The relationship between the conduct of the victim and the crime has to be such as to make it possible to judge the offender's reaction more leniently from the perspective of criminal law.

In the study two different types of criminogenic situations are recognized. The first essentially rests in a reversion of the offender and the victim's roles. A serious aggression or abuse originally comes from the future homicide victim and befalls the future killer. The initial power relationship is extremely asymmetric and detrimental to the offender, who usually depends on the victim in some way. The homicidal act is preceded by a systematic physical mistreatment, bullying, extortion or intimidation from the part of the victim. In the final conflict the oppressed person manages to put up resistance that becomes fatal for the oppressor. Most frequently these are the cases of "domestic tyrants" killed by their battered wives or girlfriends. The second type of situation shows a relative balance of power in the initial conflict between the victim and the offender. The victim, however, acts towards the offender in a way that to some extent makes his extreme anger or agitation excusable. The substance of provocation in these cases does not primarily rest in a long term abuse or exploitation but is much rather to be found in a particular serious wrong, insult or act of violence, that caused the offender to suddenly lose his self-

control. Some of the so-called confrontational homicides or fatal alcohol driven “pub- brawl stabbings” fall within this category, as do many intimate homicides that resulted from a series of severe conflicts in the partnership. The taxonomy is cemented by case reports from the practice of the Czech law courts.

The penal laws in European jurisdictions usually take into account the cases of deliberate severe provocation by the homicide victim in various ways. From the Czech Republic’s neighboring countries, however, only German penal code includes an explicit regulation of article 213 on the so called provoked manslaughter („provozierte Tötung“), whose perpetrator was moved to the crime by a serious acts of violence or insults on the part of the aggrieved. The author draws attention to the key issues relating to this delict, which are frequently answered by the German judicature and criminal science in a rather inconsistent way. The key problems, which are mentioned in detail, include the question of causal relations between provocation and a criminal act, or the question of error on the part of the offender. Numerous case reports from the German legal practice are included.

The third part of the work focuses on the qualifying element of premeditation (derived from Latin *praemeditatio*) that used to be a traditional criterion between murder and manslaughter in the penal codes of 19th century Europe. The same criterion is now used in article 140 section 2 of the new Czech penal code (2009) that makes distinction between a “simple” murder (intentional homicide) and “premeditated murder or murder committed with aforethought”. The term of premeditation relates primarily to the decision- taking part of voluntary human activity, characterized by a process of choice between contradictory motives or stimuli that influence human psyche as well as the direction and intensity of the subject’s behavior. In terms of criminal law premeditation can be defined as mental activity of the offender that rests in evaluating of contradictory driving motives and precedes and determines the decision to commit a crime or commit a crime in a certain way. To make it relevant in terms of criminal law, however, there has to be a higher degree of premeditation rather than a simple reflection that can be found in any willful act. *Dolus praemeditatus* is a traditional legal term that must not be confused with the forms of criminal fault recognized in modern legal

theory. Premeditation is a circumstance that characterizes the offender's decision-taking in which the criminal intention has its source.

Premeditation and aforethought in Czech penal Code characterize cases in which the killer had a relatively higher degree of rational control over the criminal act. In such cases offender's psychical relation to the intended harm is tighter than in cases of spontaneous aggressive reaction. Such offender had a chance to take into account the motives dissuading him from the crime and yet despite all he persevered in his maleficent intention. The evil act of such a wrongdoer is considered more dangerous because his decision to commit the crime stemmed from a mature rational deliberation and therefore is likely to reflect a real and lasting negative attitude towards the protected interest and show callousness and indifference towards human life.

Parts of the work devoted to the criterion of premeditation are based predominantly on the 19th and early 20th century French and German legal sources. It is important to perceive the difference between the French concept of premeditation as a deliberation antecedent of the crime and the concept typical of 19th century German laws that emphasize reflected "acting with aforethought". The study gradually analyzes various theoretical pitfalls of criminal liability for a premeditated offence, such as complicity, attempt and *error in persona*. It further focuses on the criticism of the concept of premeditation from both doctrinal and practical perspective including the difficulties in proving the existence of the offender's premeditation. The third part of the study is concluded by a historical overview of the Austrian and Czechoslovak homicide law with regard to the phenomenon of premeditation as a formal aggravating circumstance.

The fourth part of the study presents a reflection on the interpretation and application pitfalls of the article 140 and 141 of the new Czech penal code. It uses the knowledge gained in the previous three parts of the work and also takes the latest development of Slovak criminal law into account. The author considers the definition of the "aforethought" or "reflection" ("rozmysl" in Czech) of Art. 140 section 2 to be the most difficult task. This "reflection" cannot mean the very basic rational reflection that has to be present with any sane offender as a prerequisite of criminal intention. The "reflection" in sense of Art. 140 section. 2 has to

be qualified in some way. If the offender acted with aforethought it means that he had considered the essential pros and cons and roughly realized the possible consequences. In contrast, if the perpetrator acts “without aforethought” he focuses only on the destruction of the object of his aggression, without thinking of any further consequences. An offender that acts “with aforethought”, on the other hand, considers the killing to be a purposeful solution, at least at the time it is being committed. The “aforethought” means that the initiative is on the part of the offender whose conduct is much rather an action pursuing at least a somewhat rational purpose –rather than a mere aggressive reaction to an escalating conflict. The forms of premeditation have to be studied in the context of fundamental problems of the general part of substantive criminal law.

Finally the work examines the crime of manslaughter (Art. 141, cp. Art. 146a) that constitutes the new privileged factum in the system of Czech homicide law. Using the perspective of criminology the author discusses the ambiguity of article 141 that includes the criterion of “excusable intense mental agitation” as well as “previous condemnable conduct of the aggrieved”. The author argues for an alternative of interpretation that accepts provocation as an independent extenuating circumstance that has to be determined separately from the loss of self-control due to intense agitation. The crime of manslaughter under the Czech penal code is not a pure *affectdelict* as in German or Austrian law but includes two mutually combinable yet separate extenuating circumstances: the affect and the provocation. The degree of seriousness and the negative character of the precipitating conduct of the victim have to correspond with the extraordinary gravity of the protected interest in cases of homicide: human life. That is the reason why the author pleads for a rather restrictive interpretation of the article 141. It is also worth considering if the new provision could be applied in cases of extended homicide or in cases of mercy- killing. At the very conclusion, the author reflects upon the connection between a new system of subjective elements in homicide law and the positivist definition of criminal offence the new Czech penal code adheres to in its general part.