ČLÁNKY

History and present state of the comparative legal science of the litigation law *

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The development of the legal order in the Czech Republic has taken complicated ways along with the changes of political systems and states forms depending on the intensity of enforcement of the Czech state law. The Austrian Monarchy imposed the Austrian legal order upon the Czech nation. This legal order became the basis of the legal system of the First Czechoslovak Republic in the period between the world wars. The Munich Dictation and the following German occupation interrupted the democratic development of the legal system. The post–war renewal of the state taking place in bipolar world already anticipated the formation of new political powers which began to enforce their ideologies even into the legal order which was supposed to assure the consolidation of the positions. The change of a democratic legal state into a totalitarian state in 1948 was thus reflected also in the liquidation of the foundations of the democratic legal order, which had been built for more than a hundred years. Forty years of the totalitarian regime subordinated to the Marxist philosophy fundamentally changed the principles of the Czech or Czechoslovak legal order respectively, which was then based on the rules of the classness of law, the superiority of the social ownership to the individual ownership, it underlined the repressive component of the criminal law etc. Only the political changes of 1989

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enabled interruption of the forty–years superiority of the law taken form the class point of view and returning to the democratic traditions. The makers of new acts could be again inspirated by democratic, mostly western legal systems.

The development of the Czech legal system has been, apart from the influence of changing political regimes, dependent on the forms of state part of which the Czech lands were at the particular time. The Habsburg Monarchy in he last century was a dualistic state with different legal developments in both parts of the Monarchy. In the non–Hungarian part the Austrian legal order was valid for the whole second half of the last century. It was developing under substantial influence coming from Germany. On the other hand, in the eastern part of the Monarchy to which also Slovakia belonged the Hungarian legal order was in use, which was very much based on habitual law and had a lot of features from the past centuries. This legal dualism was accepted by the pre–war Czechoslovak Republic. The so–called Reception Act from 28th October 1918 took over the Austrian legal order for the Czech lands (Bohemia, Moravia and Silesia) while in Slovakia the Hungarian order was still valid. The legal order in the Czechoslovak Republic was despite the great efforts of legislative bodies of the state never completely unified in the decisive legal branches.

The post–war development deepened the legal dualism even more. The creation of the Slovak law–giving bodies and taking over part of the legal order of the clero–fascist Slovak State made the unifying of the Czechoslovak legal order wholly impossible. Only the change of political system in 1948, which tented to immediately interrupt the hitherto legal development, meant the end of the legal dualism. Centralized socialist state, based on power hierarchical structures of the party bureaucracy, needed an unified legal order which would enable the power superiority of the Marxist political party. The forty–years' development of the so–called socialist law was thus creating the unified legal system.

The development after 1989, after fundamental economical and political changes, was though being challenged by different notions. Problems concerning national minorities appeared to be more powerful than civil problems and the state began to fall apart. The shared state life of the Czech and Slovak nations ended up on the last day of 1992. The Czechoslovak state disappeared from the map of Europe and two states replaced it – the Czech Republic and the Slovak Republic. Since then both the Czech and the Slovak legal order have been developing differently.

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This rather extensive historical introduction is essential for understanding further exposition, which deals with comparison of the idiosynkracies of the litigation law in the Czech Republic. As it is clear from the above text, the Czech legal order has always been developing under strong influence of foreign legal orders. Therefore the legal theory, but even more often the legal practise, has been in touch with

comparatistics. The litigation law was not an exception in this sense. The makers of the litigation legal norms as well as the litigators, who are interested in the theory of criminal or civil litigation have always had to deal with the problems of the foreign influence on the Czech legal order and interprete its meaning.

The comparison of the Czech litigation and foreign provosins of the civil litigation is not unknown to the Czech legal science as well as to the legal practise itself. It is however true that comparatistics has never developed into an unified independent scientific discipline. The Czech comparative legal science thus is neither, and never has been, an independent area of the legal system, nor any independent scientific discipline has developed from it. Despite this, the methods of the comparative legal science are used in the research of the litigation law. It has not though developed into any independent subject in universities or elsewhere. Within the exposition of the organization of the judicial administrative system in the Czech Republic and of the Czech litigation law at the faculties of law the students are told about the differences among the basic principles of the organization of the judicial systems as well as the principles of the litigations in the particular legal systems. From these the idiosynkracies of the Czech litigation law are concluded.

In further exposition about the idiosynkracies of the Czech comparative litigation law we have to look at the civil, criminal, administrative litigations independently. We will namely examine the competition law and the litigation before the Constitutional Court.

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There is no doubt that the biggest attention to foreign influence on the Czech litigation law was concentrated on the area of the civic proceedings. This was caused mainly by the fact that the Czech civil litigation developed under a much stronger influence of foreign litigation regulations than the criminal proceedings. The civic proceedings from the reign of Joseph II were in force in the western part of the Habsburg monarchy for more than 100 years unchanged. In the second half of the last 19th century, the judicial system as well as the civil proceedings began to seem more problematic and not corresponding to the needs of the society. The Austrian legislature started to look for suitable models for the reform of the civic proceedings. There were two main inspiration sources: French civic code (Code de procedure civile) from 1806 and German judicial code from 1877. This fact was reflected also in the scientific explorations in the field of civic proceedings. We should mention Emil Ott, who gave a detail explanation of organization of Austrian judicial system and judicial code[1]. In his works, we can see the French influence on German

[1] **E. Ott**: *Geschichte und Grundlehre des österreichischen Rechts-führsorgverfahrens*, Vídeň; **E. Ott**: *Soustavný úvod ve studium nového řízení soudního*, I. a II. díl, Praha 1908; **R. Canstein**: *Lehrbuch der Geschichte und Theorie des österreichischen Civilprozessrechtes*, Berlín 1880;

and consequently Austrian law by means of legal praxis in Bavaria, Wurttemberk, Baden, Hannover and Rhine region. The Austrian civil proceedings were newly codified in 1895 – 1896[2].

After the foundation of Czechoslovakia, the legal adjustment from 1895 – 1896 was accepted as well as the judicial system. The republic also accepted adjustment of the Hungarian civil proceedings, codified by the paragraph I/1911 which replaced acts No.LIV/1868, LIX/1881 and XVIII/1893. The Hungarian civil judicial code was built on the basis of the German civil judicial code from 1877 with some exceptions[3].

By acceptance of Austrian and Hungarian civil procedure, a legal dualism existed in Czechoslovakia. Also the judicial system was different in various parts of the country. This state should have been changed by unification codes. The unification of civil procedure was prepared since 1922. Both commissions (in Prague and Bratislava) were looking for models for the new legal system. There were no substantial changes since 1877 in Germany and also other developed countries did not change their litigation law. This situation resulted in a time–consuming work of unification commissions and in the problematic result of their effort. This result was presented to the Parliament in 1937 but the National Assembly did not manage to discuss it before the World War II.

The leading litigation expert in the pre–war Czechoslovakia was prof. Václav Hora, who analyzed the civil litigation and used comparatistics as one of the most important methods. He compared a number of Czech civil litigation institutes with similar institutes in the Hungarian law[4] and with legal system in other countries. especially in Germany. He did not omit also the Roman litigation law[5].

Comparatistic studies in the period before the World War II were also produced by prof. J. Vážný, expert on the Roman law. His works concentrated on the influence of the Roman law on the then system of civil litigation[6].

The postwar development took other direction. After the February coup d'état in 1948 were unified the judicial system and civil litigation system by means of new litigation code from 1950[7]. The civil litigation, as well as the whole legal code, was under a strong influence of the Soviet law. Since then, the litigation comparatistics began to orientate in a different, biased, way. Besides the studies comparing socialist and capitalist law with in advance given result, there appeared

R. Schmidt: *Lehrbuch des deutschen Zivilprocessrechts*, Berlín 1929.

[2]Č. 110 a č. 111/1895 ř. z., č. 112 a č. 113/1895 ř. z., č. 78 a č. 79/1896 ř. z., č. 217/1896 ř. z., č. 218/1896 ř. z.

[3]**Plosz**: *Vorträge aus dem ungarischen Z. P. R., 1917*; **F. Schuster**: *Zivilprozessordnung für Königreich Ungarn*, Kroatien atd., Vídeň 1855.

[4]**V. Hora**: *Civilní řád soudní na Slovensku*, Praha 1922.

[5]**J. Vážný**: *K vymezení pojmu rozsudku*, Časopis pro právní a státní vědu, 24, 1941, s. 207–215.

[6]**J. Vážný**: *K vymezení pojmu rozsudku*, Časopis pro právní a státní vědu, 24, 1941, s. 207–215.

[7]Č. 319/1948 Sb. o zlidovění soudnictví a zákon č. 142/1950 Sb., občanský soudní řád.

comparative works concentrated on comparison of Czech or Czechoslovak litigation law with legal system in other so–called socialist countries. Main attention was paid to the influence of the Soviet litigation law on Czechoslovak civil litigation and of the Soviet judicial system on the Czechoslovak one. Similar comparisons appeared also in text books of that time[8].

The situation did not change a lot even later. The civic judicial code No. 99/1993 Sb. did not change its character as well as the litigation literature. The comparative method is used in historical studies or theoretical works[9]. In that time, comparative chapters appear also in certain litigation law textbooks. In 1970'a and 1980's, books with comparative orientation by J. Macur were published. Especially the publication about the administration judiciary in European countries is worth mentioning[10].

The 1989 year meant a principal change in understanding of the law. The law is cleaned from the ideological burden. There were substantial changes in the organization of judiciary. There were established commercial courts, upper courts. The military courts were abolished. The principle of independence in decision making of the judges became the central principle of the judicial system. This principle is stated in the Constitution (Article 82) and developed in detail in the act of judges and courts (Act No. 335/1991 Sb.). The judges' independence is defined by the statement that the judges are limited only by the law and have duty to interprete the law to the best of their knowledge. They are required to judge objectively, impartially and only according to the facts discovered in harmony with the law. The judges are appointed by the President without any time limit.

The legislature introduced a number of substantial changes into the civil process by means of so–called big amendment to the civic judicial code (in force since January 1, 1991) – Act No. 519/1991 Sb.). For a number of taxatively mentioned proceedings, the regional courts became the appropriate courts of the first level. The commercial courts were established. The reduction of possibilities for state attorney to enter the proceedings is a change towards democracy in the judicial system. The state attorney is allowed to enter only three types of proceedings – qualification for legal transactions, proclamation of death and enlistment to a register of companies. The variety of correction means in civil litigation was also changed in a democratic way. The institution of extraordinary scrutiny in the form of complaint about breaking of the law was abolished and a new institution of reappeal was established. This institution does not require the presence of the state attorney. Also the execution procedure was changed – the institution of judicial auction in

[8]**Fr. Štajgr**: *Organizace československých soudů*, Praha 1953; **Fr. Štajgr – O. Plundr**: *Organizace justice a prokuratury*, Praha 1957; **Fr. Štajgr a kol.**: *Učebnice občanského procesního práva*, Praha 1955.

[9]**Fr. Štajgr**: *Některé teoretické otázky civilního práva procesního*, Acta Universitatis Carolinae, Praha 1969; **J. Fiala**: *Spory vznikající z podnětu výkonu rozhodnutí (exekuční spory)*, Acta Universitatis Carolinae, Praha 1972.

[10]**J. Macur**: *Správní soudnictví*, Brno 1986.

the case of execution of movable and immovable assets was introduced. In the field of financial execution, the variety of ways to establish judicial bail law on real estate was enlarged. The execution by means of liquidation of the property was abolished and reduced by a special bankruptcy act.

The civil procedure was also novelized by Act No. 171/1993 Sb. (in force since September 1, 1993). The democratic principles of the civil litigation were supported especially in the field of equality of participants in the litigation. The principle of material truth was changed. The new conception is based on the difference between the disputable and indisputable litigation and states that the disputable litigation must be governed by the hearing principle while the indisputable litigation by the investigation principle. Therefore, the participants in the disputable litigation have a duty to claim facts and propose proofs. The way the litigation is oriented must be determined by the participants and not by the court. In the field of indisputable litigation, the court has a right (not duty) to present also other proofs proposed by the participants when they are necessary for detection of the facts of the case. The new conception of the material truth connects unambiguous effects of the unfulfilled proof duty of the participant, because it enables the court to decide only on the basis of presented proofs without duty to find out the „real facts of the case". The participant who does not fulfill his proof duty can expect unfavourable decision of the court. This can not work in litigation requiring decisions made on the basis of complete knowledge of the facts of the case, according to basic difference between disputable and indisputable litigation. The investigation principle in the indisputable litigation means that the court has a duty to carry out all proofs needed for detection of the facts of the case.

Finally, the verdicts for recognition and missing were introduced to the civil litigation[11].

The professional literature is still looking for its new image. The litigation experts are acquainting themselves with foreign literature but a concrete result in form of comparative studies has not appeared yet. Apart from four works by J. Macur[12], there is no Czech comparative litigation science literature.

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[11] **I. Schelleová**: *K novelizaci občanského soudního řádu,* Časopis pro právní vědu a praxi, 1993, č. 1, s. 72–75; **I. Schelleová – K. Schelle**: *Kontumační rozsudky,* Právník, 133, 1994, č. 3, s. 226–236; **I. Schelleová**: *Soudy a soudní právo.* Zlín, Živa 1994; **I. Schelleová**: *Notářství.* Zlín, Živa 1994; **I. Schelleová**: *Advokacie.* Zlín. Živa 1994.

[12] **J. Macur**: *Povinnost a odpovědnost v občanském právu procesním,* Brno 1991, **J. Macur**: *Správní soudnictví a jeho uplatnění v současné době,* Brno 1992; **J. Macur**: *Právo procesní a právo hmotné,* Brno 1993; **J. Macur**: *Problémy vzájemného vztahu práva procesního a hmotného,* Brno 1993.

In Czech litigation science the open competition procedure is very topical nowadays, which after forty years' absence again became a part of the Czech legal order in 1991[13]. The preparation of the open competition act and its further amending were connected with study of these problems in countries with tradition and a lot of experience in this area. The foundations of the preparation of this act were not only the open competition act from 1931 but also legal arrangements from other countries, namely the Austrian, German, Italian, Swiss, English arrangements as well as the arrangement in the U.S.A.[14] Particulary the knowledge ensuing from contemporary modern arrangement of the open competition and composition procedures carried out in England by a statutary norm „Insolvency Act 1986[15]" appeared to be very valuable. It was also possible to consider preparation of multilateral international contracts attempting to establish unified collision criteria of the competition and composition procedures with an extraneous element. At that time moreover the discussions on these problems were going on within the European Community[16] as well as within the Council of Europe. The conclusions of these talks were expressed in the proposal of a multilateral international contract „Draft European Convention on certain international aspects of bankruptcy (CDCJ–89–66)" from 15th December 1989[17]. The results of interactions conferences connected with the problems of open competition and composition were also inspirating if their importance extended beyond the borders of particular countries. The main stimulation in this respect was brought by for example the results of XIIIth International Congress of Comparative Law, held on the theme „L'insoivabilité transfrontiére[18]".

The open competition and the composition are legal institutes connected with market economy. They were therefore re-established in the Czech legal order by the Open Competition and Composition Act no. 328/1991 valid since 1st October 1991. They must be taken as a part of the legislative complex which in the legal area enabled the establishment of market economy in the Czech Republic. Open competition and composition have their places in modern legal orders even though they react to a boundary situation, i.e. to the bankruptcy of the debtor and to the disorders in the contracting covenants connected with the bankruptcy. There

[13]Č. 328/1991 Sb. platný ve znění zákona č. 122/1993 Sb.

[14]**V. Steiner**: *K novému zákonu o konkursu a vyrovnání*, Arbitrážní praxe, 1991, č. 10, s. 257.

[15]*Butterworths Insolvency Law Handbook*, London 1990, dále též *„Statutory Instruments: The Insolvency Rules 1986"*, Londýn 1986 vydané k výkladu uvedeného zákona prostřednictvím *„Her Majesty's Stationery Office"*, London 1986 – uvádí **V. Steiner**: *K chystané nové právní úpravě řízení konkursního a vyrovnávacího*, Právo a zákonnost, 1991, č. 8, s. 434.

[16]*„Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens"* zpracované autorskou dvojicí **G. Kegel a J. Thieme**, Tübingen 1988 – uvádí **V. Steiner**: *K chystané nové právní úpravě řízení konkursního a vyrovnávacího*, Právo a zákonnost, 1991, č. 8, s. 434.

[17]**V. Steiner**: *K chystané nové právní úpravě řízení konkursního a vyrovnávacího*, Právo a zákonnost, 1991, č. 8, s. 434.

[18]**V. Steiner**: *K chystané nové právní úpravě řízení konkursního a vyrovnávacího*, Právo a zákonnost, 1991, č. 8, s. 434.

would be a gap if these situations were not regulated because they happen and will be happening. The efforts for solving a bankruptcy of an economical subject is according to the contemporary Czech legal arrangement of the open competition and composition aimed at the fact that the economical losses could be equally and fairly divided between the creditors so that none of them could profit from the bankruptcy. The basic principle of the open competition according to the Czech legal arrangement is therefore not the saving of the bankrupter but the parity of the creditors affected by the bankruptcy.

The legal essence of the open competition as well as of the composition under the condition of the Czech legal arrangement is that in both cases the property arrangement is dealt with. The basic presumption of the open competition or composition is the existence of the bankruptcy of the debtor. Then it must always be the property arrangement that is negotiated, and which takes place because there are more creditors. There are thus always more principally bilateral obligatory relations which are dealt with multilaterally and contemporarily. The arrangements takes place among subjects with inconsistent interests (not only the debtor's interests on contrast to the interests of the creditors, but also among the creditors themselves) and therefore it is carried out according to strictly established rules.

The open competition and the composition are of a general character from the point of view of the Czech legal arrangement which means that they are relevant for every legal subject without considering the fact whether it is a legal or a physical person or whether it is a selfemployed subject in the commercial-legal sense or not. Everyone can also take part in them as a creditor. It is thus not decisive whether the conditions under which the open competition procedure can be proclaimed or the composition can be allowed arose within business activities.

The basic property-legal condition of the proclamation of the open competition or the permission of the composition is bankruptcy. The notion of bankruptcy is by the Czech legal arrangement defined in two ways: either as insolvency or as overdebtment. Each term has different content. There can be insolvency without overdebtment and vice versa. From the point of view of the debtor insolvency is of general character, i.e. it is connected with all the debtors, while overdebtment is connected only with legal persons and the selfemployed as for the physical persons. Insolvency consists in the fact that the debtor has not got enough financial means. Overdebtment is not defined in the law amd therefore we have to start from the general meaning of this term. We understand is as a state when the debits of the debtor are higher than their assets. The debits are the total value of the debtor's obligations and the assets are the total value of their property. The difference then is that we consider every property values that belong to the debtor (things, claims, other financially appreciable rights etc.) when passing judgements on overdebtment while when considering insolvency we just take the debtor's financial means into account.

The Czech conception of the open competition and composition thus consists

in the multilateral character of the relations among the participants of the open competition and composition compared to for example bilateral nature of the relation between the entitled and compulsory subjects in the Czech conception of the executive procedure.

To Czech legal arrangement of the open competition and the composition we should finally add that this arrangement has already been amended by the act no.122/1992 Col. valid since 16th April 1993. According to this amendment the substantial change lies in the introduction of the institute of the so-called protective time in the period between submitting the proposal of the open competition and its proclamation. During this time the selfemployed subject has got the last possibility of consolidating their financial conditions and of getting over the state of bankruptcy. At the same time space is created for the founder of the debtor to take respective actions towards them. The protective time does not start automatically but on the proposal of the debtor. The protective time lasts for three months and can be only exeptionally prolonged by another three months under conditions stated in the law. The relation between the open competition and the privatization process in the Czech Republic is further arranged by the amendment as well. A special regime making differences between particular stages of privatization is introduced for the state-owned enterprises, other state-owned organizations and legal persons with the property participation of the state. Compared to the previous arrangements the possibilities of the leading staff in the managing positions of the bankruptor are limited. These persons during the open competition and the composition namely must not gain ownership of the things which were owned by the debtor before the start of the procedure not even in the case of the public sale of these things. They can not gain ownership of these thing within the period of three years since the end of the open competition or composition. Legal acts carried out at variance with this rule are not valid.

The legal arrangement of the open competition and composition in the conditions of the Czech legal order enabled the start of the process of the open competition and composition procedures which will make it possible to resist the losses brought by bankruptcies with economical means[19].

[19] **I. Schelleová**: *Podstata konkursu a vyrovnání.* Právnické sešity, č. 45, Brno, Masarykova univerzita 1993; **I. Schelleová**: *Novela bankrotového zákona přijata,* Časopis pro právní vědu , 1, 1993, č. 1, s. 143 – 145; **I. Schelleová**: *Vymezení pojmu konkursní právo,* Obchodní , 1993, č. 8, s. 20 – 21; **I. Schelleová**: *Vývoj konkursního práva,* I. část, Obchodní právo, , č. 9, s. 21 – 26; **I. Schelleová**: *Vývoj konkursního práva,* II. část, Obchodní právo, 2, 1993, . 18 – 24; **I. Schelleová**: *K charakteru konkursního řízení,* Časopis pro právní vědu a praxi, 2, 1994, č. 1, s. 113 – 122; **I. Schelleová**: *Cesta k současné právní úpravě konkursního řízení,* Všehrd, 26, 1994, č. 3, s. 8 – 13; **I. Schelleová**: *K současnému stavu výzkumu konkursního práva,* Právník, 133, 1994, č. 4, s. 367 – 370; **I. Schelleová**: *Konkursní soud,* Časopis pro právní vědu , 2. 1994, č. 3, s. 78 – 86; **I. Schelleová**: *Předmět konkursního řízení a jeho správa,* Časopis ávní vědu a praxi, 2, 1994, č. 5, s. 52 – 81; **I. Schelleová**: *Postavení věřitelů v konkursním í,* Časopis pro právní vědu a praxi, 2, 1994, č. 6, s. 15 – 47.

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The Czech comparative legal science also focused on the area of the administrative process. It achieved remarkable results particularly in the period between the first and the second world war when it was examining the procedure of revision of the lawfulness of the administrative decisions by the court. It understood the revision procedure as the procedure of correction the subject of which are administrative decisions. The revision procedure was not admitted to be of the character of the civil litigation. It was taken as a „continuation of the administrative process with different means", when the procedure of revision takes place before an independent administrative court and many features are used which are characteristic for the litigation before general courts, but nevertheless it does not gain the character of the civil litigation. The administrative court was not a part of the system of the general court. Judges of this court in some cases were even giving lectures on the administrative law at the faculties of law. The knowledge of the procedure of revision were thus delivered to the students within the study of the administrative law and not the civil litigation.

Many stimulating studies and papers on the administrative justice come from the period between the two world wars. They compare the arrangement of this institute in Great Britain, France, Germany and Austria. These studies, since they were high-levelled, also reached international appreciation. They were exclusively published in administrative-legal volumes („The Volume of the Public Law"). Authors of these studies pointed out the distinction of the procedure of revision both from the ordinary procedure in administrative matters and the civil litigation.

After the revolution in 1989 the administrative justice was renewed but its procedure forms a part of the civil litigation and takes place before the general courts. This solution can not be however taken as the definitive one. Intensive discussions are going on about a change of mentioned conception, about taking the administrative justice out of the area of the civil justice and about its independent arrangement. The knowledge of the comparative legal science plays an important role within these discussions.

The Czech comparative legal science has been much more examining the administrative litigation. This was due to the traditional views that the administrative law is limited to the area of the material law and certain procedural problems are just a part of the realization of the administrative material law. There was no general arrangement of the administrative litigation and each important material-legal institute had its own respective procedural rules. That is also why the general comparison of the administrative litigation with other litigations namely civil and criminal ones, did not take place.

Only the governmental order no.91 from 1960 – not by a statutary norm yet – generally arranged the administrative litigation. This arrangement was used only

subsidiary where the special procedural rules were missing, which would consider the particular material administrative-legal institutes. As late as in 1967 act on the administrative litigation no.71 Col. (The Administrative Order) was issued which enabled the general conception of the administrative litigation. Some are however still convinced that the administrative law is just one legal branch within which the administrative litigation has the character of a subsystem. The administrative litigation in its narrow sense is pointed out including only such norms of the administrative law which arrange the applicative litigations in the administration carried out in the form of the so-called administrative procedure. Due to this fact not even considerations on the relation between the administrative litigation and other types of litigation are not being dealt with.

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The comparatistics in the area of the litigation criminal law begins to develop only recently. The legal arangement of the criminal procedure was dealt with similarly to the legal arrangement of the civil procedure. The old procedural criminal law valid in the Czech lands was based on the principles of the inquisitive litigation defined by he Josephian Criminal Order in 1788 and the Code on Crimes and Major Police Offenses in 1803. This aarangement was at substantial variance with the requests for the criminal litigation after 1848. The most important demand was the principle of the publicity, orality, the principle of indictment, the civic control over the performance of justice and the establishment of the courts with jury. A new criminal litigation order was issued in 1850 but it was not valid for a long time – in 1853 it was replace with another criminal order which returned to the principles of the inquisition litigation from the time before the revolution in 1848. The decisive year in the development of the criminal litigation was the year of 1873, when the definitive criminal order was issued which took over the litigation principles of the criminal litigation code from 1850.

The Austrian criminal litigation order was then with minor changes valid also in pre-war Czechoslovakia and was replaced by a new criminal order in 1950.

Together with the development of the legal arrangement of the criminal procedure also the legal science of this branch began to develop. The Austrian and later the Czechoslovak criminal procedure are being compared with the arrangement of the criminal procedure in the western countries. One of the authors who were interested in the comparison namely of the Austrian criminal litigation mostly with the arrangement of the criminal procedure in France was F. Storchen[20]. Comparative passages can be found also in the work of another criminal proceduralist A. Miřička[21]. But the comparative method was in the greatest extend doubtlessly

[20] **F. Storch**: *Řízení trestní rakouské,* Praha 1887.
[21] **F. Storch**: *Řízení trestní rakouské,* Praha 1887.

used by Jaroslav Kallab. His inclination towards legal philosophy and international criminal law requested that in fact. Out of his vast scientific production we mention namely the publication „The foundations of the theory of capability of being a party and of appurtenance of the courts in the Austrian criminal procedure[22]" in which he examined namely the relation between the material and the formal law and the difference between the material civil and criminal law. He was also interested in the criminal justice over the youth where he applied a lot of features from the arrangements of other countries. He was also studying international protection of currency.

The development of the criminal procedure after 1948 was deliberately affected by the Marxist ideas of the class role of the criminal law. It was in the branch of the criminal law where the influence of the Soviet conceptions and the repressive role of the criminal law became first decisive. This was also expressed in the criminal litigation code from 1950. The possibilities of using the comparative methods in the science of the criminal law were limited to the minimum. A couple of comparative studies are published but they are directly focused on expressing the differences in the legal arrangements of the so–called socialist countries.

In the second half of the 80s a comparative research took place in the faculty of law in Brno, focused on the mutual relation of the civil and criminal litigation. Certain political relieve enabled critical evaluation of the conception of the so–called judicial law which was created in the former Soviet Union and included also some progressive ideas. Czech research was also linked to the research done by some noticeable western proceduralists, namely J.Goldschmidt. The results of the research refused the conception of too narrow bounds between the civil and criminal litigation which would disturb the independence and individuality of both of them. The results also characterized the connection of the criminal and civil litigation as special, loose structural body at the level of the so–called complex branch. This conception of the criminal and civil law overcomes the unwanted effects of the total differentiation between the two litigations which does not take their shared features into account. The complex approach made it possible to unify the solving of the shared procedural problems where the differences between the criminal and civil litigations do not ensue from special features of one or the other. This accounts for desired simplification of the legislative arrangement and for lucidity of litigation–legal rules.

From the viewpoint of the complex conception the problems of the mutual relationship among important litigation institutes, e.g. civil lawsuit and criminal acussation, the positions of the parties in the civil and criminal procedures, the subject of the criminal procedure and the subject of the civil procedure etc. The shared constitutional principles of the criminal and civil justice were also examined as well as the basic rules connected both litigations.

[22]**J. Kallab**: *Základy nauky o způsobilosti býti stranou a o příslušnosti soudů v trestním řízení rakouském*

The de-ideologization of the criminal procedure and some important changes could take place only after 1989. Apart from de-ideologization the reform in the area of the criminal law was focused factually on de-criminalization, de-penalization and differentiation of the criminal responsibility. In the Czech Republic the criminal litigation has been during the past four years changed by six direct amendments and by two undirect amendments. The phases of the reform are following these aims: 1. Strengthening the protective function of the criminal litigation law. 2. Deepening the regulative function of this legal branch. 3. Modification of the educational function of the criminal litigation law. 4. Despite the existing division of the functions of litigation, weakening the outlasting inquisitive, namely the judicial phase of the litigation, so that the contradictory principle takes over. 5. With regards to the strengthening of the contradictorness of the litigation, the modification of the principle of the objective truth, officiality, legality, the finding principle and the principle of the presumption of innocence. 6. Applying other litigation principles into the particular stages and litigation institutes. 7. Simplification of the litigation through new arrangement of the criminal-litigation institutes which will assure that the bodies will be dealing only with their relevant matters, which will account for the speed of the litigation[23].

In connection with the reform work on the litigation code, the comparatistics began to develop intensively. Interesting and inspiring comparative studies began to be published which were examining the up-to-date problems of the litigation law in the Czech Republic as well as in the western democracies. V. Kratochvíl must be stated first out of the authors who published studies on this topic. Kratochvíl was interested namely in compason of the Czech and the Austrian criminal law[24]. We will also mention P. Šámal[25]. Several seminars on the problems of the criminal procedure took place where the general problems of the criminal procedure from the European point of view were also considered[26]. Similarily to the branch of the civil procedure, comparatistics as a scientific method in the area of the criminal

[23] **V. Kratochvíl**: *České trestní právo v pohybu,* Časopis pro právní vědu a praxi, 1994, č. 2, s. 17 - 18. K tomu dále zejména *Novelizace trestního zákona a trestního řádu,* Justičná revue, 1990, č. 1, s. 30 a násl.; **J. Teryngel**: *K novelizace trestněprávních předpisů,* Prokuratura, 1990, č. 1 - 2, s. 6 - 14; **J. Musil**: *Die Bestrebung zu einer demokratischen Strafrechtsreform in der Tschechoslowakei,* Zeitschrift für die gesamte Strafrechtswissenschaft, 1991, č. 4, s. 1021 - 1033; **V. Mandák**: *Novela trestního řádu 1990,* Bulletin advokacie, 1990, č. 4, s. 17 - 27; **A. Nett**: Koncepce přípravného řízení trestního, Justičná revue, 1990, č. 6, s. 18 a násl.; **J. Jelínek**: *O novele trestního řádu 1991,* Bulletin advokacie, 192, č. 3, s. 7 - 22; **J. Teryngel**: *Novela trestního řádu vyvolána Listinou základních práv a svobod,* Právo a zákonnost, 1992, č. 1, s. 29 - 39 a řada dalších.

[24] **V. Kratochvíl**: *České trestní právo v pohybu,* Casopis pro právní vědu a praxi, 1994, č. 2, s. 9 a násl.; **V. Kratochvíl, J. Kuchta**: *Tendencje i charakter zmian w Czecho-Slowackim prawie karnym.* In: Tendencje zmian prawa karnego i prawa o wykroczeniach v Polsce i Czecho-Slowacji. Wroclaw, WuW 1992.

[25] **P. Šámal**: *Základní zásady trestního řízení v demokratickém systému,* Praha 1992.

[26] **J. Herrmann**: *Reforma trestního řízení ve východní Evropě.* Srovnávací studie o řízení před soudem, Seminář k reformě trestního práva procesního ČSFR, říjen 1992, Liblice.

procedure is only looking for its firm position.

In 1992 the Constitutional Court was established in the Czech and Slovak Federative Republic as a body of the protection of constitutionality. Together with the extinction of the federation at the end of 1992 the Court ceased to exist as well.

The Constitution of the Czech Republic (act no.1/1993 Col.) in its fourth catch dealing with the judicial power arranges the position of this Court. The organization of the Constitutional Court and the problems of procedure before it is included in the act no.182/1993 Col., valid since 1st July 1993. The factual origin of the Constitutional Court was though connected with appointing the judges of this Court. This happened on 15th July 1993. The seat of the Constitutional Court is Brno. The Constitutional Court as a specialized court is without any doubt one of the most important guarantees of the protection of democracy and lawfulness. The totalitarian regime had also anchored this body in the constitutional Federative Act since 1968, but it in fact never existed. In pre–war Czechoslovakia the Constitutional Court was created but its factual functioning was very problematic. The Constitutional Court created in 1992 worked for too short time to profile properly, show its rightfulness and to start to carry out its function. The Constitutional Court of the Czech Republic created in 1993 is much in the same position. Only the further development will indicate whether the Constitutional Court as the protector of the Czech constitutionality has its place in the Czech constitutional system.

The procedure before the Constitutional Court first became a subject of many theoretical considerations. Their author could not have made them up without the comparative methods – namely K.Klíma produced very creditable work in which he is analyzing the position of constitutional justice in particular types of constitutional systems.

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If we try to summarize the above presented knowledge of history and presence of the Czech proceduralist comparatistics, we will draw following conclusions:

1. In the Czech Republic, the comparative litigationa law is taken as a method in the research of the litigation law. It is neither an independent scientific discipline nor an independent branch of the legal system. The comparatics litigation law is at the faculties of law taught just within the teaching of the Czech litigation law.
2. In connection with the intensive reform process in the area of litigation law the knowledge of the comparative litigation law are of great importance. The

knowledge is a significant basis for the legislative organs which are creating a new arrangement of the litigation codes.

3. The comparative litigation law is in the Czech Republic a subject of the scientific research as legal comparation of norms and institutes of the litigation law as well as legal comparation of branches of the litigation law.
4. The litigation comparatistics in the Czech Republic uses the theoretical knowledge namely of the theory of law, philosophy of law but also of statistics and politology.
5. In the Czech comparatistics of the litigation law the analytic and evaluating methods are prevailing.
6. The progress of the comparatistics of the litigation law in the Czech Republic brings also modernization and de-ideologization of the law, creation or renewal of some legal institutes or whole legal branches respectively (the business law).
7. The comparatistics is in its more intensive development obstructed by the lack of experience, the language barriers, the lack of specialized literature etc. Contacts of the Czech scientists and pedagogues with their colleagues in western Europe and the U.S.A. consequently help to get rid of these obstructions.

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SUMMARY

Historie a současný stav české srovnávací právní vědy procesního práva

Podkladem článku je národní referát, který autorka na návrh organizačního výboru sepsala pro X. Světový kongres procesního práva, jež se bude konat ve dnech 17. – 23. září 1995 v Taormině. Obsahem článku je zpracování historie a současnosného stavu české srovnávací právní vědy procesního práva a to v oblasti občanskoprávního, trestního i správního procesního práva.