



CENTRE FOR ADVANCED STUDY SOFIA

CAS WORKING PAPER SERIES

Issue 2

Sofia 2009

This publication presents part of the research outcome of a project carried out at the Centre for Advanced Study Sofia under the title

ROLES, IDENTITIES AND HYBRIDS

Multiple Institutional Cultures in Southeast Europe within the Context of European Unification

*Available in electronic form at
www.cas.bg*



CENTRE FOR ADVANCED STUDY SOFIA

CAS Working Paper Series No. 2/2009

Copyright © 2009 by the CAS contributors/CAS

Copyright remains with the individual authors/CAS. This publication may be distributed to other individuals for noncommercial use, provided that the text and this note remain intact. This publication may not be reprinted or redistributed for commercial use without prior written permission from the author and CAS. If you have any questions about permissions, please, write to cas@cas.bg.

Preferred Citation: Kanushev, Martin, *Expert Examination, Norm, and Truth in the Bulgarian Judiciary System*. CAS Working Paper Series No. 2/2009: Sofia 2009. *Roles, Identities and Hybrids*, a project of CAS supported by the Volkswagen Foundation, Germany.

MARTIN KANUSHEV

**EXPERT EXAMINATION, NORM, AND TRUTH
IN THE BULGARIAN JUDICIARY SYSTEM**

The Social Problem: Crime without Motive

A certain number of crimes happened in Bulgaria in the recent years, committed by parents against their own children. What did those crimes have in common? Do they have an analogical mechanism that makes them possible? Why exactly they attracted public interest?

First of all, that is because they were family crimes, perpetrated in family environment where parents have killed their own offspring. Unlike crimes against society and its rules, they are crimes against those laws that are conceived as inscribed directly in the human heart and that bond generations together. The second common feature is that those crimes are not insignificant violations of law: they are all murders, some of which accompanied by inexplicable cruelty and incredible cold-bloodedness. They were defined as monstrous crimes against human nature: out-of-bounds, inhuman, and unnatural acts. Thirdly, those crimes put under question the legal notion of responsibility. Of course, part of them were done by persons with serious disorders, but others come from a psychic condition that could be termed a zero degree of insanity. They are neither preceded, nor accompanied, or followed by any recognizable symptoms of mental illness. And finally, a great part of those crimes were committed without any reason, use or benefit, but without any emotion like affect, anger or fear either. With them, the motive that would build the innate rationality of the crime and at the same time is related to the punishment is not obvious. Consequently, the question about the rationality of the act, as an intelligible and coherent complex of motives and as a condition of possibility of the punishment, remains unanswered. And how would a judiciary system act if faced with a crime without a cause for its existence, perpetrated by a subject endowed with reason? How would the court institution function

if it were unable to reconstruct the motive of a crime, but at the same time it could not base its decision on a psychiatric diagnosis of insanity? It would pose a number of questions to medical knowledge that point to a single hypothesis: the pathological nature of the crime.

Here is one of those cases, which problematizes the social in-effectiveness of the Bulgarian court and psychiatric institutions. On March 16, 2001 in Sofia, around 8:37 a.m. a young woman called the police and reported that her three-year old son was kidnapped by unknown individuals. “They stole my child” were her first words. Then she explained that her child was snatched from her hands as she was taking him to the kindergarten. The mother said she was holding her child by the hand when a car stopped next to them. Two assailants grabbed the child and the car speeded away.

Two hours later, around 10:30 a.m., the child was found drowned in a pond. According to the police version, he was killed in an exceptionally cruel manner. The perpetrator of the murder of little Peter was his mother Daniela Terziyska. The incident took place around 6:50 a.m. at their home, when the woman strangled her son with a rope. After that, she put the corpse in a black plastic bag, transported it with the help of a taxi cab and threw it away in the pond. She returned home and informed her parents that the child was kidnapped. According to the police report, Terziyska made her first confession around 7:20 p.m. and she made a full confession late the same night. Immediately after that, a full search of her home, and an investigative experiment, were conducted. The woman pointed to a trash can where the investigators found the bag and the rope. Sofia City Court decided that the suspect would be remanded in custody. She was charged, with premeditated murder of her own son, in an especially painful and cruel manner, under article 116 of the Criminal Code which provides for a sentence of 15 to 20 years in prison or a life sentence.

The suggestion that Terziyska has murdered her child appeared during conversations with her relatives, and after the results of the autopsy came. According to the investigation, the woman invented the story with the abduction in front of the kindergarten with the purpose of covering her own crime. But the evidence pointed exactly to her as the perpetrator: her conduct was unusual for a mother whose child had been kidnapped; the dead body of the child had remained longer in the water; there were no witnesses of the “kidnapping” whatsoever; she called the police from her home phone; she never looked for help in the kindergarten; the autopsy proved that the death of the child occurred earlier. It was also determined that Terziyska suffers from a mental illness: “a mixed condition of schizophrenic and affective disorder”. She had been treated in a psychiatric hospital 6 years earlier. Moreover, she had made several suicide attempts and during the night before the incident had decided to jump from the 7th floor. Because of her condition, she had

been on a sick leave for 4 months, but a month earlier she had stopped taking the prescribed medicines.

During the interrogation, the woman was calm, cold and restrained; she did not even want to see her child's body. According to the psychologists, she just asked: "Is my child dead?" Initially it really seemed that her actions were logical and coherent, but in fact they were caused by her morbid condition. Although the investigation could not find the "triggering factor", the motivation for her act was defined as abnormal. The psychiatric expertise was expected to answer whether the murder had been planned, when the decision for its implementation had been taken, why it was perpetrated, and the most important question: what kind of person is able to commit such a monstrous crime? For this purpose, on March 19, 2001, Terziyska is placed in the Clinic for Judiciary Psychiatry for "a complete specialized examination needed for uncovering the objective truth".

Can the judges and the psychiatrists answer the question "Who are you?" if they can not discover the motives for the perpetration of the crime? Obviously not. Therefore, the most important question is neither for the circumstances under which the crime was committed, nor for the intention of the subject, but for the complex of motives that turned this person into a criminal. The rationality of the crime – as an intelligible coherent complex of motives – is the key to understanding such unlawful acts. There are two lines of requirements, and the first one is the rationality of the act. The law stipulates that every crime is punishable from the moment, at which the insanity of the subject has not been proven. But since the crime is sanctioned at the level of the grounds that caused it, since the aim of the punishment is directed to the motive inherent in the criminal, this legal norm is insufficient. On the contrary, the judge can pronounce a sentence only if the rationality of the act that is being punished is postulated. The second requirement is connected with the possibility for accumulation of the complex of motives as grounds for the act, and the reasonability of the subject who has done it. The causes for committing the crime that make it intelligible and the motive of the individual that makes him punishable must coincide. There is a necessity of coincidence between the motives that determine the rationality of the crime and the responsibility of the perpetrator who is to be punished.

Hence the need for a certain type of knowledge which could characterize the rationality of a given crime and separate the rational from the irrational act. But if today the arguments of psychiatric knowledge are preferred to the reference to the criminal law, this is due to the inconsistency between the reasonability of the subject doing the crime, and the rationality of the act that should be punished. The reasonability of the criminal is the prerequisite for applying the law: it is not applied if the subject is legally insane. But exercising of criminal law requires the rule: I can judge only if I understand why he

or she committed the act, i.e. if I can include the crime in a sphere that could be analyzed. In order for the judiciary system to function, the reality of the crime and the individual who is the defendant are not enough. The motive should be determined too, because it is the basic psychologically determined link between the act and the actor. That is why the psychiatrists are “specialists in motivation”, they have to evaluate not only the reasonability of the subject, whether he or she is responsible or insane, but also the rationality of the crime; the whole system of relations that connect the perpetrated action with the perpetrator. The big task of the legal psychiatrist is to entirely integrate the crime in the overall behavior of the subject. The more determined and motivated from a psychiatric point of view this integration is, the more undoubtedly punishable the defendant will be according to the legal principles. Conversely, the less obvious and provable this integration is, the more it will seem to the judges that the crime has erupted in the subject as a sudden and irresistible mechanism. And the less punishable he or she will be. In such a case the punitive justice will agree that it can not proceed with the case, because the person is legally insane, and will order that he or she be confined in a psychiatric hospital for compulsory treatment.

The investigation of the above-mentioned murder, after determining the premeditation of the perpetrator and the circumstances of the crime, starts looking for the last necessary element: the motive for the act. “But nobody can say for sure what went on in this young woman’s mind at the moment when she tightened the rope around the neck of her son or what exactly in her psyche has unlocked the instinct to attempt the life of her own child”. This statement of a psychiatrist demonstrates the principal impossibility to find a motive for the crime and understand its rationality. In such a case, how could the act be punished if it lacks a reason for its existence? If an act is determined with a causal connection, can it be considered an act of free will? Does not it imply responsibility or we have a case of insanity? Is it necessary, in order to be able to judge someone, to be able to reconstruct the causal intelligibility of his or her crime? Therefore, the legal responsibility is constituted through the intelligibility, which the psychiatrist will construct through references of the unlawful act to the personality of the subject. The more psychologically determined a crime is, the more its perpetrator will be looked upon as legally responsible. If the act is more or less baseless, there will be a greater chance for the violator of the law to be acquitted. So, we have a paradox here: the freedom of a person could be proven by the fact that his or her act is seen as necessary and predetermined, the lack of responsibility could be proven by the fact that his or her act is seen as arbitrary and accidental. With this paradox, law and psychiatry introduce an endless game between legal responsibility and psychological determinism, which is the crossroad of juridical and medical thought.

The Judge and the Principle of Internal Conviction

According to Bulgarian law, crime does not exist if the individual is in the state of legal insanity at the moment of the act. An expert examination should make a distinction between illness and responsibility, between pathological causality and freedom of the subject, between therapy and punishment. Therefore it is impossible for one to be judged as simultaneously guilty and insane; if there is a psychiatric diagnosis of mental illness, justice should have no authority over the perpetrator of the act: this is the juridical principle of releasing the detained person.

The case of Terziyska though shows exactly the opposite movement of legal power in the Bulgarian judiciary system. The judges state that the subject is guilty, because she has committed a crime, and at the same time they order her to be detained in a psychiatric hospital, because she has a mental illness. On March 19, 2001 Sofia City Court issues an order “for obligatory accommodation of Terziyska in a psychiatric hospital, because there is a danger that she might commit another crime or destroy evidence for the murder”. This happens after an expert psychiatrist is called to perform a medical examination in the courtroom, and he “suspects” that the woman may be suffering from schizophrenic psychosis or she may be insane. Regardless of the Bulgarian law, according to which for insanity one can only get dropping of the case, the judges use this issue as an integral part of their judgment. They admit that a person could be guilty even when insane: guilty, but also one who must be detained and treated, instead of being punished, guilty and dangerous because of the obvious illness. On April 19, 2001, after a month of Terziyska’s stay in the hospital, experts still can not give their opinion about her psychic condition. They address the prosecutor with a request for the deadline to be extended by 30 days because of “the complexity and difficulty of the expert examination”. Sofia City Court agrees with the psychiatrists’ argument.

According to the legal rationality, the judiciary process discovers the truth about the crime, determines who is the perpetrator and applies the legal punishments. Knowledge about the violation, knowledge about the perpetrator, knowledge of the law: those are the three preconditions that make it possible for the objective truth about the crime and the internal conviction of the judge to entirely coincide in the sentence. The principle of internal conviction states that one can not issue a sentence without having complete confidence. The decision for the punishment, as light or probational as it may be, should be made only after the evidence for the guilt of the defendant has been clearly, comprehensively, and completely determined. Secondly, we can not give legitimacy only to evidence defined and qualified as such by the criminal law. If it is convincing enough – i.e. if its essence is such that every rational consciousness understanding truth would approve it – every kind of evidence can be accepted. It is not the legality of the evidence, not its meeting

the exact requirements of the law, that will make it a valid evidence, but its obviousness. And, thirdly, that criterion by which we could recognize that the evidence is valid is confidence: the confidence of an impartial and unbiased person. Being a thinking individual, such a person is able to recognize truth. Together with the principle of internal conviction, we have an anonymous social regime of truth according to a universal subject.

However, this regime of universal truth, to which Bulgarian law is subordinated, contains in itself two specific phenomena. They concern the real application of truth in judicial practice and create a disbalance in it regarding the exact formula of the principle of internal conviction. In the first place, regardless of the principle that we should never punish before we have complete evidence, certain proportionality exists in the judicial practice between the level of confidence and the severity of the punishment. When the judge is not entirely convinced in a crime, he or she has the tendency to express their uncertainty in an indirect way: through extenuation of the punishment. That means that regardless of the principle of internal conviction, strong presumptions never remain unpunished. In other words, we have a judicial practice, hidden behind the principle of internal conviction, which extenuates the punishment because of insufficiency of evidence. It shows the uncertainty of the judge about the guilt of the defendant.

Secondly, another similar judicial practice leads to distortion of the legal foundation. It consists, in opposition to the principle of internal conviction that all kinds of evidence can be gathered and presented, but only the conscience of the judge must consider them: some evidence have more weight than the rest, regardless of their innate rational structure. But if the weight of evidence is not determined by its rational structure, it is determined by the institutional position of the subject who presents it. For example, the testimony of police in the Bulgarian justice has a privilege before any other testimony. The opinion of the psychiatrists, as opposed to any other element of judiciary proof, also has a considerable privilege. However, these are not legal evidence, but privileged statements in the court that contain status presumptions for the truth. These are statements with consequences of truthfulness and strength specific only for them: a position above the law of the expert statements in the production of judiciary truth.

Those specific phenomena could be seen in the case of Terziyska: how, on the basis of the complex of evidence, “the objective truth” has been reached and how the judges have come to their “internal conviction” in her guilt.

The Version of the Prosecution: Terziyska has strangled her child with the help of a rope, after which she carried the body in a plastic bag and dropped it in the pond. During the interrogation she made full confession, immediately after which an investigative experiment was made during which the woman showed the place, where she dumped the plastic bag and the rope. The inves-

tigators discover material evidence, and the expert examination shows that on the rope there are traces of “biological material” from the mother and the child, and in the bag they found a hair belonging to the child. A taxi driver testified that he drove the woman to the park and she was carrying a black bag. The Prosecution gives three basic pieces of evidence: Terziyska’s full confession, the hair found in the bag and the “biological material” that as a whole constitutes her guilt.

The Defense Position: The Confession. Here is the text of the first confession that Terziyska made in front of the police officer, the psychiatrist and the psychologist: “I got mad at the child, I took a little rope from the coat rack and strangled him. I took a big bag and put him inside. I walked out, took a taxi and went to the park. I took the child out of the bag and dropped him in the pond. I took the bus at the stop, got off at the open market, dumped the bag and went home by taxi”.

Here is also the text of the second confession, made this time in front of a judge, prosecutor and a lawyer: “My child woke up and woke me up. I was smoking and drinking coffee. My child got angry at me. I took a little rope, white, made of cotton, thinner than the cigarette. I tied it around his neck and fastened it. This was in the living room. I got a bag, a plastic bag, and placed him inside. I got out, took a taxi and asked him to take me to the park. I sat in the back and the bag with the child was next to me. I stopped the taxi at the funfair. I went to the pond and dropped him without the bag. I took the bus; I got off at the stop by the market and dumped the bag in the trashcan. I took a taxi and went home”. From both statements it is obvious that Terziyska does not mention anything about the most important evidence, the tool of the crime – the above mentioned little rope.

The Interrogation: Here are the main questions of the Defense: How is it possible to interrogate a woman with “serious psychic problems”, before it has been certified that she is fit for such investigative actions? Why the police officer, the psychiatrist and the psychologist interrogated Terziyska after the opening of the investigative case when a magistrate in the presence of a lawyer should have done the interrogation? And why, more than 5 hours she was the object of impermissible psychological pressure, including hints about her personal life and assurance that nothing can happen to her, because if she is insane, she can not be put on trial.

The Investigative Experiment: The court appointed lawyer of Terziyska’s was not present during the investigative experiment, which makes its legal value questionable. The woman claims that the trashcan in which she dumped the bag and the rope near the market is missing. The investigators quickly turned the experiment into inspection and found the two objects in one of the nearby trashcans. The market cleaning staff though definitively state that those

trashcans were twice cleaned after 8 a.m. on March 16, 2001, while the investigative experiment was conducted at 1:45 a.m. on March 17, 2001.

The Material Evidence: The rope and the bag that were found have not been listed by measures in the record of evidence from the inspection, nor have they been examined at the spot in the presence of witnesses. The child's hair and the traces from the mother and the child were found during an expert examination appointed later, and not in front of witnesses. But the "biological material" in question was found only at the ends of the rope and no traces from the child were found in the middle. There are no traces from the fingers or palm of the mother on the bag. The experts can not tell when exactly the findings on the rope date from. They also can not tell how long the corps of the child remained in the water. Only the time of death was approximately determined as between 7 and 9 a.m.

The Time: In the protocols from Terziyska's interrogation no times have been fixed: the time of exiting the house, taking the taxi and returning home. According to the taxi driver's witness testimony, the woman boarded the cab around 8 a.m., got off at the park at 8:07 a.m. and arrived at her parents' place around 8:20-8:25 a.m. No investigative experiment was made whether 20 minutes is enough time for the whole trip – to the park by taxi, then to the market by bus, again by taxi, and then walking home. And then there is addition time to include: walking to the pond, dumping the body, waiting for the bus, dumping the rope and the bag, finding a taxi to go back.

The Witnesses: Only one witness statement was taken. The witness claims that around 8 a.m. he took in his taxi Terziyska and drove her to the park. The woman was carrying a black plastic bag; she opened and closed the door of the cab herself. But nobody looked for another potential witness, the woman who Terziyska claims she met at 8:15 a.m. at the traffic light near the kindergarten. Not a single witness was found who saw Terziyska throw away the body in the pond, or who rode with her on the bus or saw her dump the bag and the rope in the trashcan. Nobody tried to find the second taxi driver, who left the woman nearby her parents' home either.

In spite of those obvious inconsistencies in the investigation, Sofia City Court made the following conclusions regarding the entire evidence material.

Regarding the Investigative Experiment: "In spite of the fact that the protocol for the experiment is unfit and should not be valued as evidence, the circumstances that it describes, and more precisely the finding of the rope and the plastic bag, are determined by the protocol from the inspection of the place and by the testimony of eyewitnesses. There is no doubt for the court in the honesty of their testimony, and so it considers them truthful".

Regarding the Expert Examination: "The differences between the soil sample from the bank of the pond in the park and those taken from the sole of the

snickers taken from the home of the defendant, as well as the impossibility to determine by testing whether the child was with dry or wet hair on the picture after the body was taken out of the pond do not change the legal conclusions related to the mechanism of the criminal act and its authorship”.

Regarding the Evidence Material: “The Prosecution, in its decree did not elaborate on all evidence collected in the course of the investigation and having significance for its correct conclusion, and the evidence they based themselves upon are analyzed separately and not evaluated in the complex of the entire evidence, but in spite of that the legal conclusions that the Prosecution came to are correct and basically are founded on a truthful interpretation of the evidence”.

Sofia City Court made the last conclusion above on March 5, 2002 as first judiciary instance. The Chair of the penal body dropped the case with a verdict, but also declared: “I have accepted that Terziyska is the perpetrator of the crime, I have considered the expert examination and I have rejected her confession”. In essence, the Court confirmed the statement of the Prosecution that the mother is guilty, but she can not bear legal responsibility. And she rejected the appeal of her lawyers against ending the legal proceedings because of insanity. The Defense wanted the court to acquit Terziyska, because she has not committed the crime and the indictment has not been proven. The lawyers announced that they would appeal at a second judiciary instance.

On June 10, 2002 Sofia Appeals Court enacted their decision. They confirmed the suspension of the trial because of insanity, and not because of lack of evidence. And at the same time they confirmed the statement of the Prosecution and the decision of the First instance court, according to which Terziyska is guilty, because she committed the crime. The Appeals Court rejected all arguments of the Defense, including the claim that the woman has made a confession under psychological pressure. The lawyers stressed that the case has not clarified the facts and should be returned for further investigation: the evidence is absolutely insufficient, and part of it was collected against the law. The Prosecutor asked that the decision of the First judiciary instance stand, because there is enough evidence that the mother has killed her child. Terziyska herself stated: “I have not confessed that I have killed my child and I have not shown material evidence in my testimony”.

On January 31, 2003, The Supreme Court of Cassation reverses totally the decision of Sofia City Court and Sofia Appeals Court on this case, as well as the verdict of the Prosecution with which the legal proceedings were stopped. “The case is taken back to the stage of preliminary investigation for a new hearing so that the considerable breach of procedural rules be cleared. The Court believes that the law enforcement authorities and especially the Investigation and the Prosecution have allowed considerable breaches of procedural rules during the investigation that have led to insufficiency of evidence and

ill-grounded conclusions. The Law is seriously broken because the pre-legal authorities have aimed their efforts at the psychic condition of Terziyska removing their main obligation: to determine beyond reasonable doubt the main fact concerning the case, whether a crime has been committed with Terziyska's participation in it. The Court agrees that the violations of procedural rules should be eliminated because in the aggregate they have predetermined the lack of clarity about facts and circumstances of crucial significance for finding the objective truth».

The Ambiguous Role of the Psychiatrist

Here is the legal basis for psychiatric involvement in the Bulgarian judicial practice: "expert examination is mandatory when there is a doubt regarding the sanity and the psychic condition of the defendant". The regulations for court-psychiatric examination say that such a doubt could arise due to various circumstances as: "unclear motives for the commitment of the crime, unusual behavior, illogical testimony, existing record for a mental illness in the past or if the person has already been treated in a psychiatric hospital". In other words, there is a discrepancy between the legally regulated role of the psychiatrist and his real function in the judicial practice. At the level of the Law he is designed to be a scientific expert who should impartially aid the judge to build his internal conviction and pass a fair sentence. His main task is "to help the court in understanding correctly those facts that serve as evidence in the case in order to reach the objective truth". In the judicial practice though, legitimized sufficiently by the legal notions of "liberty" and "responsibility", the psychiatrist solves other problems too. Here are the questions to which he has to give an answer in his expert examination: 1. Is the defendant in a dangerous condition? What is the decree of danger that the defendant poses to his or her self? What is the level of public danger of the defendant by the moment of doing the crime and by the moment of hearing of the case in the court? 2. Is he or she liable for correctional punishment or they need compulsory medical measures? What are the most appropriate medical measures with view of the specificity of given personality? Is his or her illness temporary and what healing procedures does the defendant need? Or is it a chronic mental disorder, which requires a prolonged and strict medical control? 3. Could the defendant be treated or readapted? Could the person, who has committed the crime but by the time the sentence has acquired a disturbance of consciousness, be cured and then be punished? In six months the court decides about termination or continuing of the compulsory medical treatment, in view of the results of the last psychiatric examination.

But actually those are not questions about insanity; consequently they are not the questions about legal responsibility and free will that have been intentionally misused. On the contrary, they are about the imposing of punishment, its necessity, severity, practical use, possible efficacy; they make it possible, through a hybrid medico-juridical discourse, to specify: is the hospital preferable to prison; should a lengthier or a shorter prison sentence be passed; whether a medical treatment or security measures are needed; what in each specific case would be most appropriate: compulsory hospitalization or a short-term treatment, temporary psychiatric observation or a permanent medical supervision. In short, a whole series of various questions about truth is inscribed in the judiciary system. As a result of this intermingling of punishment and treatment, a hybrid truth substitutes for the legal truth about the crime. Here are the basic dimensions of this medico-juridical truth. The question is not anymore only whether a certain fact has been established and whether it is a criminal fact, but also what kind of fact this is; what does this rape or murder mean, and consequently, at what level and into what sphere of reality we can inscribe it. Part of the answers could be: fanaticism, psychotic reaction, temporary insanity, disorder of consciousness, or perversion. The second key question is not anymore only who is the perpetrator of this crime, but how can we determine the factors that caused it, and consequently, where in the perpetrator of the crime is hidden its cause. The most probable answers are: instincts, attitudes, unconscious mind, environment, heredity. And finally, the third important question is not only which law sanctions this crime, but also what most appropriate security measure should we take, how can we predict the further development of the subject, do we have to medically treat him or her. A whole complex of normative, diagnostic and prognostic judgments concerning the totality of the life of the patho-criminal subject, functions in the judicial practice through the psychiatric knowledge. A scientific truth is embodied in the truth required in criminal law: a truth that turns the recognition of guilt into a hybrid juridico-medical discourse.

Today, Bulgarian psychiatrists have to give the answer to the question: was the defendant in a condition of insanity when he or she committed the crime? But first of all they have to determine whether the subject is dangerous; whether the subject is liable for punitive sanction; whether the subject yields to treatment or re-adaptation. There is an evolution at the level of Bulgarian law, not only at the cognitive level of psychiatry: we have crossed from the juridical problem of defining of responsibility to another problem. Consequently, punishment does not refer to a legal subject, responsible for his or her actions, but to a correlative element of a mechanism consisting of removing dangerous individuals from society, their treatment and re-adaptation. At the same time the control over the patho-criminal subject is taken by the unified medico-juridical discourse and its hybrid truth. That is why the Law requires from the Court to specify the punishment within the boundaries of the crime pepe-

trated by first taking into consideration “the level of public danger that the act and the perpetrator pose”. At the level of the judiciary system the crime tends to be nothing more than an event signaling the existence of a more or less dangerous individual in society. The legal notion of responsibility, which defines the level of freedom of the subject, is already quite problematic. Because this notion requires that an analytical intelligibility should be reached, which is constituted only through a reference of the crime to the personality of the individual. And consequently, the more psychologically predetermined and motivated a criminal act is according the scientific opinion of the expert, the more the perpetrator should be seen as legally responsible. On the contrary, if the act is found to be more or less causeless and not predetermined from a psychological perspective, the greater the inclination of the judge would be to acquit the perpetrator. In short, the juridical charge with guilt for a crime is accompanied by the psychological notion of danger. The level or decree of danger, the potential risk of criminality that the subject in question poses counts in the construction of any punitive sentence. This means that the defendant, who the Law recognizes as legally irresponsible because of insanity: a victim of uncontrollable impulses and disturbed instincts in fact poses the most serious and immediate danger. So, those individuals detained for observation and treatment in a psychiatric hospital – whether they have committed a crime or they just pose a threat to themselves or the others -are in any case the subjects of mortal dangers.

Is not this a kind of rejection of the legal notion of responsibility and placing, as a fundamental problem, not the question of the level of freedom of the individual, but of the level of danger he or she poses to society? Respectively, is it not necessary for that which is called “punishment” to be not just punishment but rather a total mechanism for defense of society? For this reason, the relevant distinction should not be between legally responsible subjects who could be considered guilty and legally irresponsible subjects who should be released. The relevant distinction should be between absolutely and undoubtedly dangerous individuals and those who may stop being dangerous after they have passed a certain course of correctional treatment. In this case the goal of the punitive sanction should be to reduce the risk of criminality – either through a de facto elimination, or through constant exclusion, or various temporary restrictions, or a series of therapeutic measures. The strategic goal of the psychiatrist will be control of the dangers hidden in human behavior; in his expert examination he should determine the index of danger that the subject in question poses. This process of psychiatrization of the criminal danger is characterized by a constant transition from the crime to the criminal; from the criminal act that has been committed to the danger potentially present in the individual; from the modulated punishment of guilty participation to total defense of the society. And since today crime is being more and more pathologized, as the judge and the expert hybridize their roles, all those

forms of control related to the medico-juridical truth for a certain subject is being constantly reactivated.

The “Objective Truth” or Being an Insane Subject

Let us look again at the case of Terziyska: how is it possible, as it is according to the prosecution and the experts, for a mother to kill her three-year-old child? How the judge and the expert, playing and exchanging their roles, will come to “the objective truth” about the crime? How, through the cooperated activity of the juridical and the medical discourse, the identity of the insane person will be construed?

First question: What is the rationality of the crime from the perspective of juridical logics? The investigation will try to construct retrospectively not so much the motive, but the concrete occasion for the murder. In the morning, before the commitment of the crime, the child “enraged” his mother. And the night before Terziyska herself made an unsuccessful suicide attempt. Behind this concrete occasion, the prosecution manages to construct an absolute fact: the mother killed her child because she wanted to „get back her husband’s love“. Although without any preparation, without conscious premeditation, she already had a reason and respectively could possibly commit the crime. Although the murder looks like an entirely „spontaneous and irresistible act“, there is a general reason for it: „the woman’s desire to start a new life with her husband“. There is no motive that would allow for understanding and juridical rationalization of this crime. Here the Prosecution quotes Terziyska’s „confession“, but she admits what she did and how, without being able to answer the question: why she murdered her child. „I do not know why I did it. I suddenly did it, I do not know why“. The Investigation states: yes, we are indeed faced with a crime without a motive, which means that it was committed without reason. But if we carefully look at the defendant’s entire life, what do we see? We see a certain abnormal condition, a deviated behavior, a certain mode of pathological existence. Consequently, if it is indeed true that her action has no motive, she is at least totally dissolved in her unlawful act: her crime is entirely innate in a dispersed condition throughout her long years of pathological existence. In the final account, the defendant’s entire previous pathological way of life serves as a preliminary condition, discursive analogue to what will happen, to her murdering her child. In this way the Prosecution substitutes for the problem of the rationality of the crime something that is of an entirely different essence: the close resemblance between the offence and the perpetrator. If the subject resembles so much her act, it indeed belongs to her. Consequently, the judges will be right if they punish Terziyska, when one day they have to judge her crime.

Second question: Who is the subject of this act, according to the psychiatric expertise done by seven doctors? The expert examination reconstructs the defendant's entire life in the light of a teleology pointing to the conditions for possibility that have brought to the commitment of the crime. For that purpose, the experts draw a linear continuity of her individual development looking for the possible deviations from the norms of functioning and the rules of behavior. The expert examination focuses on a detailed survey of the biography of the defendant, and consequently she is characterized not so much through her crime, but rather through her pathological life up until this moment. However, the goal is not to discover the intent of the perpetrator and the circumstances of the perpetration, but to discover the general reason for her act. The expert report pathologizes Terziyska's crime to the utmost degree: it is entirely and completely dissolved in the phenomena of her illness. Its history is the history of a mental disorder that progresses through consecutive, more and more complicated phases of a continual pathological process. The beginning of the illness had been discovered 8 years before the commitment of the crime itself. Up until that moment the defendant had been "earnest, hard-working, sociable, without any family predisposition and with a normal biological development". Then the mental disorder unlocks under a situation of heavy stress, as a result of violence exerted upon her and the separation with a close friend. Only two months later, she "changed her behavior: started claiming that she is to blame for everything and she does not deserve to live". During that traumatic period, Terziyska suddenly started to show unhealthy experience and behavioral deviations. The expert report introduces a fundamental difference between the healthy and the sick personality of the defendant, between her life before, and her life after the springing up of the illness. After this moment there is a gradual and accelerating development of a pathological process presented as a series of psychotic conditions. First the medical diagnosis is affective psychosis, later it changes to schizoaffective psychosis, and a couple of months before, during, and after the commitment of the crime it is already a paranoid schizophrenia. There is a stronger and stronger drug treatment in correlation with the complications of the disease, which brings to periods of remission, but never to complete recovery. So, a determined psychiatric causality transforms the initial "comparatively mild" psychic disorder into an extremely serious mental illness. Could the paranoid schizophrenia not lead to the commitment of the crime? This mental illness is characterized by fundamental deviations in thinking and perception and with a strong, inadequate to the situation affect. Consequently, the medical diagnosis is constituted through a series of deviations from the norm as rules of behavior, and deviations from the norm as effective functional shape. The defendant shows "psycho-pathological disorders in the thinking process and para-logical consciousness, eccentricities and pseudo-hallucinations, but also deviations in attention, memory, intellect, emotions and behavior: impulsive reactions and automatism of desires". Her psychic condition shows unequivocal

cal pathology, because the mental illness has already affected the subject totally and irreversibly. In spite of the medical treatment in a psychiatric hospital, long after the commitment of the crime Terziyska “still shows herself through thought disorders, emotional inadequacies, ambiguity”. The sphere of instincts appears here enormously inflated and with a weakened conscious control over it. The instincts of that subject represent the core of the disease process and of the behavioral deviations that are the manifestation of the pathological essence of her personality. In short, Terziyska’s crime without a motive is not committed on the basis of that emptiness, which shows the lack of reason for existence: actually it is full of the pathological dynamics of the instincts.

Third question: What is it that this psychiatric analysis offers the judges who have to make their decision about the crime and its perpetrator? The central topic of the analysis is the functioning and the behavior of the subject in the light of possible anomalies and deviations. The eruption of the illness in the continuity of normal development is the most important instrument of medicalization and the principal instance is the notion of a condition that totally disrupts the psychic structures of the individual. So the analysis manages to constitute a total pathological mechanism which, according to the experts, is the real reason for the crime. “The motivation of the crime develops on complex pathological grounds and its subjective content is para-logical. The very act of homicide has a parabolic-impulsive character”. The absence of a motive is explained by the psychiatrists through an unhealthy instinct, through an impulsive action, which is the carrier of anomaly and which is unsusceptible of conscious control. Consequently, during the commitment of the crime and during the examination itself, the judges are faced with a juridically disqualified subject. When she killed her child, Terziyska was in a difficult psychic condition, which represents a “continued disorder of her consciousness”: this is a crime of an insane individual. The emerging of the illness, which pushed the subject to committing the act, is the result of a traumatic event in her life that “unlocked” the mental disorder. But in parallel with constituting of the disease process, the desire for crime has appeared long before the murder itself. This person poses an immediate danger to the surrounding people, because the future development of her mental illness, and of her behavior, is completely unpredictable. The index of danger the defendant bears in herself is extremely high because paranoid schizophrenia is characterized by “a mania for persecution, control, and coercion, transferring of thoughts and voice hallucinations, because of which the diseased subject is not the author of his own actions”.

Let us sum up. The biographical medical survey has gradually outlined the mentally ill person, and hence a psychiatric causality has become the substitute for the juridical definition of guilt. Every reason that determines her from a psychological perspective, and which could only diminish or even

eliminate any legal responsibility, brands the pathological subject as more and more dangerous and requiring special measures. The additional psychiatric expertise done two months after the crime again confirms “the inability of the defendant to participate in legal procedures”. She still suffers from paranoid schizophrenia, and the psychiatrists cannot prognosticate when she will recover so that she can stand trial. They categorically state that “due to the individual progress of each illness and the unpredictability of the effect of any treatment, at the present moment we can only limit ourselves to the hypothesis that a change in the ability of the defendant to participate in legal procedure could be expected in the foreseeable future”. A year later, the third psychiatric expert examination shows a considerable complication of the clinical picture of the mental disorder. Terziyska “already shows permanent personal deviations in the context of the main illness and its development has a tendency towards chronification and continuity. In the aspect of necessary treatment, the experts made an integrative analysis of the medical condition and the social functioning of the defendant at which considerable risks were determined”. In this way the psychiatric knowledge has traveled from the concept of “danger” to the notion of “risk”. What do the psychiatrists really say to the judges through this meaningful change in their scientific discourse? They state: It is not necessary anymore to determine guilt in the juridical sense of the word, only the level of criminal probability of the defendant should be estimated; and our task is to reduce the risk of criminality to the minimal possible level with this mentally ill woman.

REFERENCES:

- Bean, P. 1981: *Punishment: A Philosophical and Criminological Inquiry*. Martin Robertson: Oxford University Press.
- Bottomley, A. 1980: *Decisions in the Penal Process*. Martin Robertson: Cambridge University Press.
- Carland, D. 1990: *Punishment and Modern Society: A Study in Social Theory*. Oxford: Clarendon Press.
- Durhêeim, E. 1993: *The Normal and the Pathological*. In: Kelly, D. (ed.), *Deviant Behavior*. New York, NY: St. Martin's Press.
- Eysenck, H. 1964: *Crime and Personality*. Boston: Houghton Mifflin.
- Foucault, M. 1980: *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. New York: Pantheon.
- Foucault, M. 2000: *Power: Essential Works of Foucault, 1954-1984*. New York: New Press.
- Gibbs, J. (éd.). 1968: *Suicide*. New York: Harper & Row.
- Goffman, E. 1993. *The Moral Career of the Mental Patient*, In: Kelly, D. (ed.), *Deviant Behavior*. New York, NY: St. Martin's Press
- Phillipson, M. 1971. *Sociological Aspects of Crime and Delinquency*. London: Routledge and Paul Paul Kegan.
- Rutherford, A. 1986. *Prisons and Process of Justice*. Oxford: Oxford University Press.

- Schabas, W. 2002. *The Abolition of the Death Penalty in International Law*. Cambridge: Cambridge University Press.
- Sceff, T. (ed.). 1976. *Mental Illness and Social Process*. New York: Harper & Row.