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# Limitation of Freedom of Speech and of the Press by Penal Law in the Final Decades of the Russian Empire

## 1. Introduction

At what point does open criticism of governmental power become a crime instead of exercise of freedom of speech and a display of the citizen's courage? Is criticism a crime only when it is followed by a call to do something to change the current political situation? These questions may seem out of place or even weird in the 21st century, but just a hundred years ago, expressing one's convictions in either oral or written form was relatively restricted, not only in autocratic Russia but elsewhere too. In the case of several Scandinavian countries, for example, a situation in which criticism levied against the government remained criminalised even in a situation of overall freedom of speech and the press has been identified in connection with monarchist regimes and with the state's near embodiment in a specific ruler.<sup>\*1</sup> Patterns manifested in such cases and beyond may be of relevance for many parts of the world where these issues are relevant today – even, to some extent, in societies where they may seem far removed from day-to-day life..

The territory of modern-day Estonia belonged to the Russian Empire in the early years of the 20th century and was subject to regulation by tsarist Russia's law. Although Russia had already begun a project of modernisation and attempted perfection of its penal law in the first half of the 19th century,<sup>\*2</sup> this process

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<sup>1</sup> The research for this article has been supported by Estonian Research Council (IUT20-50).

This is addressed in the work of Lars Björne, who is about to complete his extensive review of the history of the freedoms of speech and the press in the Nordic countries, 'Ytringsfrihet i Norden 1815–1914 – en oversikt'. His undertaking is part of a larger project, titled 'Offentlighet og ytringsfrihet i Norden, 1815–1900', under the leadership of Oslo University's Professor of Legal History Dag Michalsen and the same institution's history research fellow Ruth Hemstad (see <http://www.uio.no/forskning/satsinger/norden/forskning/forskergrupper/offentlighet-og-ytringsfrihet-i-norden-1815-1900>, most recently accessed on 24.4.2018). The initial results of the project, including the positions taken by Björne, have already been introduced. T. Nickelsen, M.S. Smedsrud. *Diamanten i frihetens diadem* ['The Diamonds in the Diadem of Freedom']. – *Apollon. Forskningsmagasinet* 2017; online: [http://www.apollon.uio.no/artikler/2017/3\\_diamanten-i-diademmet-introsaken.html](http://www.apollon.uio.no/artikler/2017/3_diamanten-i-diademmet-introsaken.html) (most recently accessed on 24.4.2018).

<sup>2</sup> S.V. Poznyshev. *Osnovnye nachala nauki ugovornogo prava: Obshchaja chast' ugovornogo prava* ['The Fundamental Principles of the Science of Criminal Law: General Criminal Law']. Moscow 1912; Rossiiskoe zakonodatel'stvo X-XX vekov. V devjati tomah. T. 1–4 ['Russian Legislation of the 10th to 20th Centuries, in Nine Volumes: Parts 1–4']. Moscow 1985; R. Pipes. *Russia under the Old Regime*. New York 1974, pp. 287 ff. For discussion focused primarily on the penal law in force in the Baltic provinces, see M. Luts-Sootak, M. Sedman. Ambivalences of the legality principle in penal law of the Baltic provinces

turned out to be too laborious for the tsarist state. Numerous parallel laws and even entire legal codes regulating penal law were in force simultaneously, and penal law was characterised by extreme disunity even in the final years of the imperial state.<sup>\*3</sup>

This article addresses the legal situation that prevailed in the Estonian territory of the Russian Empire until 1918, when instigating a mutiny and insubordination to state authority remained punishable as offences. On 17 April 1905, Tsar Nicholas II brought into force his so-called Freedom Manifesto<sup>\*4</sup>, which, among other freedoms, granted the subjects of the Russian autocracy a freedom of speech. On 23 April of the following year, the Fundamental Laws of the Russian Empire were established, the second chapter of which outlined fundamental rights.<sup>\*5</sup> Among the other fundamental rights declared (the right to private property, choice of one's occupation and residence, a right to a fair hearing, a right to hold meetings, etc.), Article 37 established a right of all persons to 'express their convictions orally and in writing, as well as to distribute such convictions in press or any other way'. This was a step forward from the 1905 manifesto, Article 1 of which 'gave [the Russian concept, *даровать*, covers also conferring, granting, and bestowing upon] the population irrefutable bases for civil liberties in personal integrity and freedom of conscience, speech, association, and alliances'. At the same time, even the 1906 Fundamental Laws did not provide for absolute freedom of speech and the press; rather, these were set within the 'boundaries provided by law'.<sup>\*6</sup> Those boundaries were still very narrow and at times extremely strict in the tsarist empire. One example of the actions that were not permitted is calling the tsar a 'plumber', which was considered an offence against the state as an insult to His Majesty and, accordingly, could see the offender sent to perform hard labour for a term as long as 12 years. Nevertheless, such strict sentences were usually rare in practice. Imposing punishments more lenient than the average established extent was quite common practice for the courts. This can be asserted with certainty, verified on the basis of cases heard by the Tallinn County Court<sup>\*7</sup>, though the practice of local courts-martial may have been different.<sup>\*8</sup>

A new court system had been established with the 1864 Russian court reform<sup>\*9</sup>, which was extended to the Baltic governorates in November 1889.<sup>\*10</sup> In the post-reform system, the courts of first instance were peace courts that did not deal with serious offences. In the event of crimes, the court of first instance was a county court. There was one county court for the entire Governorate of Estonia, and it was the

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in the Russian Empire (1710–1917). – G. Martyn et al. (eds). *From the Judge's Arbitrium to the Legality Principle: Legislation As a Source of Law in Criminal Trials*. Berlin 2013, pp. 317–349. Although there were several fields in which the Baltic provinces had legislation of their own that differed from that of the so-called internal governorates of Russia, penal law was a judicial realm in which they remained in line with all the developments in Russian penal law, from the adoption of the 1845 code all the way through to the fall of the tsarist state.

<sup>3</sup> For more on the multiplicity of acts in penal law, see M. Sedman. The historical experience of Estonia with the plurality of penal law acts. – *Juridica International* 2010/17, pp. 227–235.

<sup>4</sup> Vysochaishii Manifest ob usovershenstvovanii gosudarstvennogo poriadka [‘The manifesto on the improvement of state order’]. – *Полное собрание законов российской империи / Polnoe sobranie zakonov rossiiskoi imperii* (hereinafter ‘PSZ’), 26803, 17 October 1905.

<sup>5</sup> Vysochaisha utverzhdennye Osnovnye Gosudarstvennye Zakony [‘The fundamental laws passed by the highest power of the Empire’]. – PSZ, 27805, 23.4.1906. For discussion of fundamental rights in the Russian Empire and its Baltic governorates, see H. Siimets-Gross, M. Leppik. Estonia: First landmarks of fundamental rights. – M. Suksi et al. (eds). *First Fundamental Rights Documents in Europe*. Cambridge 2015, pp. 295–308. – DOI: <https://doi.org/10.1017/9781780685281.024>. There are researchers who want to see existence of fundamental rights already in the 1864 justice laws, which entered into force in the Baltic governorates in 1889. T. Anepaio. Justice Laws of 1889 – a step in Estonia's Constitutional development. – *Juridica International* 2005/10, pp. 150–160.

<sup>6</sup> In Russia, fundamental rights have been treated in a unique way, which deviates from the traditional Western understanding even today. For more discussion, consult the work of L. Mälksoo. *Russian Approaches to International Law*. Oxford 2015. – DOI: <https://doi.org/10.1093/acprof:oso/9780198723042.001.0001>.

<sup>7</sup> O. Kivistik. ‘I know! This is the plumber I know!’ Crimes of *lèse-majesté* in Imperial Russian criminal codes and in the practice of Tallinn County Court, 1906–1916. – M. Luts-Sootak, I. Kull, K. Sein, H. Siimets-Gross (eds). *Legal Pluralism – cui bono?* Tartu University Press 2018, pp. 76–93.

<sup>8</sup> For a general historical perspective on courts-martial, see N.N. Polianskiĭ. *Tsarskie voennye sydy v borb'e s revoljutsiei* [‘Tsarist Military Courts in the Anti-Revolution Struggle of 1905–1907’]. Moscow 1958.

<sup>9</sup> On the Russian court system in general, see S. Kucherov. *Courts, Lawyers and Trials under the Last Three Tsars*. Westport, Connecticut, 1953.

<sup>10</sup> T. Anepaio (see Note 5); *idem*, Die Justizreform in der zweiten Hälfte des 19. Jahrhunderts in den Ostseeprovinzen – Russifizierung oder Modernisierung? [‘The judicial reform in second part of 19<sup>th</sup> century in Baltic provinces – Russification or modernization?’]. – *Acta Baltica: Liber Annalis Instituti Baltici* 1997/XXXV, pp. 257–272; *idem*, Kriminaalõiguse muutumise 1889. aasta reformi käigus [‘Changing of criminal law during the reforms of 1889’]. – *Tractatus Terribiles*. Tallinn 2009, pp. 139–158.

above-mentioned one located in Tallinn.<sup>\*11</sup> Whilst crimes against the state were handled via the courts-martial, these were special courts that had jurisdiction only over servicemen, although in exceptional circumstances their purview encompassed civilians also.<sup>\*12</sup>

The situation that developed in these circumstances is an intriguing one. For a good understanding of it, the article provides an overview of the penal legislation that was valid in the Estonian territory in the early 20th century and imposed boundaries to freedom of speech and the press. Since these boundaries existed mainly in cases of so-called instigation of mutiny, these are the provisions that are analysed more thoroughly in the sections that follow. Separate attention is turned to the case law of the Tallinn County Court with regard to charges of instigation of mutiny, for examination of how these provisions were implemented in practice and to pinpoint the life situations in which the embryonic attempts of the tsarist regime to ensure modern fundamental rights may have fallen victim to the repressive penal legislation and policy of the same regime. We have deliberately left aside the case law of courts-martial and considered only the cases before general courts. The latter should be especially clear indicators of whether and how a state may execute various (legal) policies beyond the special conditions of exceptional circumstances addressed via various particular branches of law.

## 2. The legislative basis formed by diverse penal-law acts and codes

There were attempts at compiling a uniform criminal code even in the days of Tsar Alexander I, but, just as the codification attempts of that time remained unfinished<sup>\*13</sup>, so too did compilation of a coherent criminal code. The next step toward codification of criminal law was taken by Tsar Nicholas I. During his rule, compilation of the Digest of Laws of the Russian Empire (*Свод законов Российской империи/Svod zakonov Rossiiskoi imperii*) began. This collection consisted of 15 volumes, with penal-law provisions mostly drawn together in its last, 15th volume. In a pattern continuing from the earlier legislation of Russia, penal provisions were present also in other laws. It should be stressed in this connection that the Digest of Laws was aimed not at establishing new law but at collecting and organising what already existed.<sup>\*14</sup> In fact, substantial legal reforms and law-related innovations had been unambiguously forbidden by the conservative Tsar Nicholas. The sources, therefore, of the penal-law provisions in the 15th volume was the Conciliar Law Code of 1649 (*Sobornoe Ulozhenie*),<sup>\*15</sup> the ukases of Peter I<sup>\*16</sup>, and numerous individual statutes. Crimes against the state were collated into a chapter in Volume 15 of the Digest of Laws denoted as dealing with crimes against the state in line with ‘the first two clauses’.<sup>\*17</sup> The Digest of Laws of the Russian Empire was ratified in 1832, and it entered into force on 1 January 1835. Only a decade later, however, it was joined by

<sup>11</sup> H. Schneider. *Kohtud Eestis: minevikus ja tänapäeval* [‘Courts in Estonia: Past and Present’]. Tartu 1994, p. 22.

<sup>12</sup> M. Sedman. Military penal law – not only for military personnel: Developments in Estonian penal law after the First World War. – M. Luts-Sootak, F. L. Schäfer, S. Osipova (eds). *Unity and Plurality of Law in the Legal History of the Baltic Sea Area* (Rechtshistorische Reihe 428). Frankfurt am Main 2010, pp. 262 ff.

<sup>13</sup> On the codification attempts during the rule of Alexander, see M. V. Andreeva. U istokov kodifikatsionnykh rabot M. M. Speranskogo [‘On the origins of the codification work of M. M. Speranskii’]. – *Pravovedenie* 1983/1, pp. 64–71; S. V. Kodan. K istorii issledovaniia ugolovnogo zakonodatel’sva v doreformnoi Rossii. Istoriko-iuridicheskie issledovaniia pravovykh institutov i gosudarstvennykh uchrezhdenii SSSR [‘On the History of the Codification of Criminal Law in Pre-reform Russia: Historical and Legal Studies of Legal and State Institutions of the USSR’]. Sverdlovsk 1986, on pp. 102–116; A. I. Kolesnikov. Sistematizatsiia zakonodatel’sva v Rossii v nachale XIX v., provedennaia M. M. Speranskim [‘Systematisation of legislation in the early 19th century as implemented by M. M. Speranskii’]. – *Uchenye zapiski VNIISZ* 1966/8, pp. 29–41. Also see T. Borisova. Legislation as a source of law in late Imperial Russia. – G. Martyn et al. (eds) (see Note 2), pp. 295–315.

<sup>14</sup> T. Borisova. Emergence of Russian national legal tradition: *Svod* versus *Ulozheniye* in nineteenth century Russia. – *Diritto @ Storia* 2009/8, online available at <http://www.dirittoestoria.it/8/Contributi/Borisova-Russian-National-Legal-Tradition.htm> (most recently accessed on 3.4.2018).

<sup>15</sup> For more detailed discussion, with references to the earlier literature, see F.S. Kollmann. *Crime and Punishment in Early Modern Russia*. Cambridge 2012, pp. 10 ff. and *passim*. – DOI: <https://doi.org/10.1017/CBO9781139177535>.

<sup>16</sup> On these, see P. S. Romashkin. *Osnovnye nachala ugolovnogo zakonodatel’sva Petra I* [‘The Basic Principles of Criminal Law under Peter I’]. Moscow 1942.

<sup>17</sup> This was a direct reference to the statutes of Peter I. On 25 January 1715, Peter established penalties for crimes against the state on the basis of two clauses, dealing with 1) ‘all ill-natured actions against the tsar or treason’ and 2) ‘rebellion’. See O nechinenii donosov, o podmetnykh pis’mah i o szhiganiu onykh pri svideteljah na meste [‘On incoherence of denunciatory works, on anonymous letters, and on burning these in the presence of witnesses’]. – PSZ, 2877, 25 January 1715.

the Penal Code, officially known as the Code of Criminal and Correctional Penalties (hereinafter ‘CCCP’), which can be considered the first systemised penal code of Russia.

The next real development came on 15 August 1845, when Tsar Nicholas I signed an ukase<sup>\*18</sup> for enforcement of the CCCP throughout almost the entire Russian Empire<sup>\*19</sup> from 1 May 1846. This included the three Baltic provinces: Estonia, Livonia, and Courland.<sup>\*20</sup> When the court reform of 1864 later established a separate penal code for courts of peace,<sup>\*21</sup> the associated provisions were removed from the CCCP, which was issued again in 1866 accordingly, in a new redaction.<sup>\*22</sup> The special committee acting on the orders of Tsar Alexander II concluded not long after this, in 1867, that, in fact, an entirely new penal code would be necessary.<sup>\*23</sup>

In 1881, Alexander III formed a commission<sup>\*24</sup> to modernise the norms of the CCCP pertaining to crimes against the state.<sup>\*25</sup> By 1895, that commission had managed to create a draft that covered the whole penal code, not just crimes against the state. Tsar Nicholas II approved the draft on 22 March 1903.<sup>\*26</sup> The resulting New Penal Code (hereinafter also ‘NPC’) did not take effect immediately; instead, the tsar promised to inform everyone at a future date as to when the New Penal Code would enter into effect.<sup>\*27</sup>

The heightened felt need to reform regulations on offences against the state remained topical even for Alexander III. To understand why, we must take a look at what the NPC contained. Its Chapter 3, on crimes against the state (titled ‘Бунт против верховной власти и преступные деяния против священной особы императора и членов императорского дома’/‘Bunt protiv verhovnoï vlasti i prestupnye deianiiia protiv sviashchennoï osoby imperatora i chlenov imperatorskogo doma’, for ‘mutiny against the highest power and criminal actions against His Imperial Highness and the members of the imperial house’), was the first part of the entire code to be enforced, entering into partial force on 7 June 1904.<sup>\*28</sup> By the relevant ukase, its articles 99–119, 121, 123, 126–132, and 134 became enforceable. Enforcement of the other articles of this chapter was to be implemented at an undetermined point in the future. These articles were followed in implementation by the parts on crimes against religion, with changes to the provisions of the CCCP, though not all of these parts actually contradicted the provisions of the NPC, on 14 March 1906.<sup>\*29</sup> Not long after

<sup>18</sup> Ulozhenie o nakazaniiah ugovolnyh i ispravitel’nyh [‘The code of criminal punishment and corrections’]. – PSZ, 19283, 15 August 1845.

<sup>19</sup> The CCCP did not enter into force then in Finland and Poland, which belonged to the Russian Empire. In Finland, the Swedish law book *Sveriges Rikes Lag*, from 1734, was valid until adoption of the Finnish penal code, in 1889, and in the Polish territories belonging to Russia, a separate penal code did not enter force until 1847, when it replaced the Polish code from 1818. The Russian CCCP did gain force, in parallel, in Poland, but this began only in 1876 and already in the redaction of 1866. For discussion of the status of special penal law in the Finnish and Polish territories, see N. S. Tagantsev. *Russkoe ugovolnoe pravo. Chast’ obshchaia. Tom I* [‘Lectures in Russian Criminal Law. General Part, Vol. 1’]. St Petersburg 1902, pp. 246–252. Under different conditions and with certain restrictions, the CCCP applied also in Siberia, Central Asia, and Caucasia.

<sup>20</sup> Since the official and court language of the Baltic provinces was German, an official German translation was published straight away: *Gesetzbuch der Kriminal- und Korrekstionsstrafen: nach dem russischen Originale übersetzt in der zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei*. St Petersburg 1846.

<sup>21</sup> Ustav o nakazaniiah nalagaemyh Mirovymi Sud’iami [‘Charter of punishments imposed by justices of peace’]. – PSZ, 41478, 20 November 1864.

<sup>22</sup> *Svod zakonov Rossiïskoi imperii* [‘Digest of Laws of the Russian Empire’], Vol. XV (Svod zakonov ugovolnyh) [‘Collection of Penal Laws’], Book I: Ulozhenie o nakazaniiah ugovolnyh i ispravitel’nyh [‘Code of Criminal and Correctional Penalties’]. St Petersburg 1866. An official German translation of this was published also: *Gesetzbuch der Criminal- und Correctionsstrafen, nach dem russischen Originale des ersten Buches des fünfzehnten Bandes (Ausgabe vom Jahre 1866) des Allgemeinen Reichs-Gesetzbuchs, übersetzt in der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Canzellei*. St Petersburg 1866.

<sup>23</sup> N. S. Tagantsev. Ugolovnoe ulozhenie 22 marta 1903 [‘Penal Code of 22 March 1903’]. St Petersburg 1904, pp. XIII f.

<sup>24</sup> On the commission and its functions, see S. A. Tul’skaia. *Moskovskoe iuridicheskoe obshchestvo (1865.–1899. G). Iz istorii rasvitiia prava i pravovoi nauki Rosii vtoroi poloviny XIX veka* [‘Moscow Legal Society (1865–1899). About the History of the Development of Russia’s Law and Legal Science in the Latter Half of the 19th Century’]. Moscow 2011, pp. 158 f.

<sup>25</sup> V. M. Kleandrova et al. *Razvitie russkogo prava vo vtoroi polovine XIX – nachale XX veka* [‘The Development of Russian Law in the Second Half of the 19th and Early 20th Century’]. Moscow 1997, p. 177.

<sup>26</sup> Vysochaishie utverzhdennoe Ugolovnoe Ulozhenie [‘The Penal Code approved by the Highest Power of Empire’]. – PSZ, 22704, 22 March 1903.

<sup>27</sup> Ob otverzhenii Ugolovnogo Ulozheniia [‘On the terms of the Penal Code’]. – PSZ, 22703, 22 March 1903.

<sup>28</sup> O nekotoryh izmeneniiah v poriadke proizvodstva po delam prestupnyh deianiih gosudarstvennyh i o primenenii k onym postanovlenii novogo Ugolovnogo Ulozhenija [‘On certain changes to the procedure for development of acts on criminal law and on the application of these provisions to the New Penal Code’]. – PSZ, 24732, 7 June 1904.

<sup>29</sup> O soglasovanii nekotoryh postanovlenii ugovolnogo zakonodatel’sтва s ukazom 17 apreliia 1905g ob ukreplenii nachal veroterpimosti i o vvedenii v deïstvie vtoroi glavy novogo Ugolovnogo ulozheniia [‘On the coordination of certain decisions

that, amendments (brought into force with the same law) related to smuggling were made, on 27 March 1906.<sup>\*30</sup> There were then seven modified articles issued that dealt with solicitation of prostitution and trafficking in women, released on 25 December 1909,<sup>\*31</sup> and two modified articles on copyright infringement, issued on the 20 March 1911<sup>\*32</sup>. Things never went much further than this, though: the NPC was never fully implemented. Even when the new provisions from the special part of the code were supposed to be in force in the areas of law decreed as now established, the general part of the NPC was not in force. Hence, the provisions of the general part of the CCCP had to remain valid. At the same time, some of the provisions of the general part of the NPC were to be implemented nonetheless, because the types of punishments and the system established in NPC differed from those under the CCCP.

The implementation act did not set out the precise relationship between the CCCP and NPC provisions or indicate which, if any, provisions of the CCCP should be considered cancelled. The ukase stated only that proceedings for crimes against the state must be based on the valid legislation on judicial hearings. Although the intent behind the preparation of the new code was to harmonise penal provisions, the code's piecemeal entry into force and the accompanying lack of clear prescriptions caused even more confusion in cases that involved conflict of laws. This situation has been described succinctly and accurately by Jaan Sootak: 'In a sense, the new code had taken Russia from bad to worse.'<sup>\*33</sup> According to Estonian lawyer Karl Grau, however, the New Penal Code was still a huge step forward from the CCCP, in the sense of both legal technical solutions and harmonisation of the penal legislation. Grau concluded that the New Penal Code was clearer, eliminated many of the archaisms, was less strict, and was relatively short.<sup>\*34</sup> We will next consider whether his assessment could be agreed with in the case of the provisions pertaining to incitement to mutiny.

### 3. Regulations on inciting to mutiny in the Russian Empire's penal codes

The target of a crime against the state was considered to be the security of the state as a whole. For an act to be deemed a crime against the state, this was a compulsory element. Offences committed against a single part of the system of state power or a specific state body without being aimed at damaging the state as a whole were not considered crimes against the state.<sup>\*35</sup> Therefore, to be punishable as incitement to mutiny, an act had to be directed, first and foremost, at the national integrity and security of the Russian Empire.

Incitement to mutiny could take place in various ways and for any of various purposes, and the offence had to be qualified on that basis. In the CCCP, incitement to mutiny was dealt with in Article 251. Under Article 251 (1) of the CCCP, there were punishments in place for people who disseminated written or printed advertisements, pictures or other works when the aim of said activity was to incite a mutiny or insubordination to state power. The sentence was stripping the person of all class rights and sending him for 8–10 years of hard labour in a stockade. Article 251 (2) of the CCCP laid down the same punishment for people who maliciously spread works inciting to mutiny or insubordination to state power, took part in that crime, or gave ill-intentioned public speeches inciting to mutiny or insubordination. Then, Article 251 (3) specified punishments for people compiling, showing, or advertising the works referred to in Article 251 (1) in the absence of ill intent. A case of this nature was defined as still expressing intention to incite a mutiny but

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of the criminal legislation with the decree of 17<sup>th</sup> April, 1905 on strengthening the beginnings of religious tolerance and on the enactment of the second chapter of the New Penal Code']. – PSZ, 27560, 14 March 1906.

<sup>30</sup> Po proekty pravil o nakazaniiah i vsyskaniiah za kontrabandu i o poriadke proizvodstva del o kontrabande ['Activities under the draft terms on penalties, including penalties for smuggling and handling of smuggling cases']. – PSZ, 27616, 27 March 1906.

<sup>31</sup> O merah k presecheniiu torga zhenshzhinami v tseliah razvrata ['On measures against bargaining of woman for purposes of debauchery']. – PSZ, 32855, 25 December 1909.

<sup>32</sup> Ob avtorskom prave ['About copyright']. – PSZ, 34935, 20 March 1911.

<sup>33</sup> J. Sootak. *Veritasust kriminaalteraapiani. Käsitlusi kriminaalõiguse ajaloo* ['From Vendetta to Criminal Therapy. Treatises on History of Criminal Law']. Tallinn 1998, p. 209.

<sup>34</sup> K. Grau. Tarvidus Uue Nuhtlusseaduse maksmapanemiseks Eesti Vabariigis ['The need to assert the New Penal Code in the Republic of Estonia']. – *Õigus* 1921/5-6, pp. 97–101, on p. 98.

<sup>35</sup> Ugolovnoe ulozhenie. Ob 'iasneniia k proektu redaktsionnoi kommissii ['The New Penal Code. Explanation to the draft of Editorial Commission']. St Petersburg 1895, p. 7.

was to be punished instead by imprisonment in a stockade for anywhere from a year and four months to two years and eight months, together with deprivation of certain class rights under the terms of Article 50 of the CCCP<sup>36</sup>. The specifications continued with Article 251 (4), on sentencing of a person in possession of anti-state advertisements, works, or pictures whose activity did not indicate malicious dissemination when it was not proved that the materials were possessed by consent of the government. In situations of this sort, a court could impose a sentence of detention for seven days to three months. After the sentence was served, the person remained under police surveillance for 1–3 years. Similar provisions were made in articles 129 and 130 of the NPC, with the former establishing a sentence for people who, in a public act of speech, read or performed works (including presenting or making drawings), distributed them, or submitted them for public display when the aim was incitement to actions, of various types, against the state. This article of the NPC listed six conditions under which the deed could be qualified:

- 1) incitement to mutiny or treason;
- 2) incitement to overthrowing the regime;
- 3) incitement to subordination to the law, regulation system, or legal power;
- 4) incitement to commit a serious crime, except in the cases specified in items 1–3, above;
- 5) inciting an official to violate his military duties; and
- 6) incitement of hostility between social classes or between superiors and subordinates.

The punishment for violations of types 1 and 2 was deportation, that for violations of types 3 and 4 was a sentence of up to three years in a reformatory, violators under item 5 were to be sent to a reformatory, and violations of type 6 earned the person committing them a prison sentence.

In addition, Article 129 of the NPC articulated two aggravating circumstances: 1) incitement to use a method potentially dangerous to many people and 2) commission of a serious crime as a result of the incitement. When one of these conditions was met in cases covered by item 1 or 2 above, the sentence changed: the offender was sentenced to up to eight years' hard labour. In contrast, when one of the aggravating conditions existed in cases falling under item 3, 4, or 6, the offender was to remain at a reformatory indefinitely.

The elements necessary for an act to be deemed incitement to mutiny under Article 129 were considered present even when the person intended to commit the act but had no specific objective therein. First and foremost, this meant that the person distributing the material had to have understood that this material was prohibited by law, even if not necessarily planning or wishing for particular consequences. The Governing Senate<sup>37</sup> stated that material inciting to anti-state offences was criminal propaganda.<sup>38</sup> On 16 October 1906, the Governing Senate concluded that works referred to in Article 129 of the NPC need not have been actually created by the offender. The elements necessary for existence of the crime were deemed present also when the problematic text was rewritten from somewhere else and later published. In all cases, however, it was important to ascertain whether the person was aware of the unlawfulness of the text's content.<sup>39</sup>

Article 130 of the NPC, in turn, set out penalties for acts committed non-publicly. According to Article 130 (1), it was possible to charge a person who non-publicly disseminated teachings or views that instigated:

- 1) mutiny or treasonous activity;
- 2) overthrow of the regime;
- 3) insubordination to the law, regulations, or legal power; or
- 4) commission of a serious crime, except with regard to the deeds specified in items 1–3.

<sup>36</sup> In the case of noblemen, one was forbidden to enter into the service of the state or society, vote, or be elected to an official position (even as a trustee appointed by the Assembly of Noblemen). A non-clergyman was prohibited from being ordained as a cleric, while a clergyman was to be expelled from the clergy. For those classed as citizens and merchants, there was a prohibition from taking part in city council elections or being elected to an official position. Citizens of all other classes were prohibited from participating in city council elections and from being elected to an official position.

<sup>37</sup> The Governing Senate of the Russian Empire, 'Правительствующий сенат'/Pravitel'stviushchii senat), established in 1711, was the highest administrative body and also became the highest court. The Governing Senate served at the pleasure of the tsar. From 1864, it held the role of highest cassation body over the reformed courts. See A. N. Filippov. *Istoriia Pravitel'stviushchego senata za dvesti let. 1711-1911* ['The History of the Governing Senate over 200 Years, 1711–1911'], Vol. 1. St Petersburg 1911.

<sup>38</sup> Po delu deistvitelnogo statskogo sovetnika Leonida Hadskego i kollezhskogo asesora Artemiia Kotel'nikova. 14. marta 1906. goda. – Reshenii ugovovnago kassatsionnago departamenta Pravitel'stviushchago Senata ['The case of the state council Leonid Hadske and college assessor Artemi Kotelnikov. March, 14<sup>th</sup> 1906. The decision of the criminal cassation department of the Senate']. St Petersburg 1906, p. 17.

<sup>39</sup> Po delu Valentina Kozhevnikova. 16. oktobra 1906. goda – Reshenii ugovovnogago kassatsionnago departamenta Pravitel'stviushchago Senata ['The case of Valentin Kozhevnikov, October, 14<sup>th</sup> 1906. – The decision of the criminal cassation department of the Senate']. St Petersburg 1906, p. 48.

For someone to be charged with dissemination of these teachings and views, it was important that it have taken place among farmers, servicemen, workers, or people who did not mentally resist such opinions and whose incitement might have been dangerous to the state. Although at first sight the list above is a closed and exhaustive one, the provision leaves enough room for interpretation that one could consider it to encompass parts of society not directly mentioned. In further terms, the article's Section 2 provided for two aggravating circumstances:

- 1) the instigation encouraged use of a method that posed a threat to many people and
- 2) a serious crime was committed as a result thereof.

The NPC also established the elements for existence of an offence in circumstances wherein the act was not carried out in full. By Article 132 (1) of the NPC, a person could be sent to a stockade for up to three years when having prepared the works or pictures referred to in Article 128 or 129 with the intention of distributing or publicly displaying them but not having carried through on the latter. The same sentence applied, under Article 132 (2) of the NPC, when the works and pictures referred to in Article 132 (1) were copied, stored, and transported to a foreign country yet did not end up getting disseminated or publicly displayed. In principle, Article 132 could be seen as laying out the defining elements of an attempted offence.

In comparison to the CCCP, the NPC contained more legal provisions regulating crimes against the state. This may have been due to the historical context: the NPC came at a tense time in the history of the Russian Empire, when the revolutionary movement was gaining momentum<sup>\*40</sup> and a need was found for updating and supplementing legal terms that address crimes against the state. Accordingly, the NPC contained numerous new legal provisions that had not been present in the CCCP; in addition to the provisions on incitement to mutiny already presented, it specified punishments for organising and participating in various illegal public gatherings (addressed in articles 120–125). Thus, the penal law also set in place extremely narrow and strict limits to the constitutionally declared right of assembly. On the other hand, the descriptions of elements constituting an offence were more detailed in the NPC than in the CCCP and hence contributed to ensuring legal certainty. Also, the sentences listed in the NPC were more lenient than the ones in the CCCP.

Regardless of the confusion and multiplicity of the sources of penal law, judges needed to do their everyday work and administer justice. This paper is not the first one to address how the Tallinn County Court handled the legislative situation described above that obtained after the partial entry into force of the NPC. Previous studies have indicated that the judges handling cases of crimes against religion looked to both the CCCP and the NPC, opting for whichever provision entailed a stricter sentence.<sup>\*41</sup> In respect of offences related to insults to His Majesty, however, the courts found sources only in the provisions of the NPC, and the sentences were relatively lenient.<sup>\*42</sup>

## 4. Judgements of the Tallinn County Court in cases related to incitement to mutiny

We will now examine the decisions of the Tallinn County Court in cases related to incitement to mutiny in more detail. In the time of the validity of the NPC, from 1904 until the tsarist empire came to an end in 1917<sup>\*43</sup>, the Tallinn County Court made six decisions on cases related to incitement to mutiny. In addition, the records of two minors accused of such crimes reached this court.

<sup>40</sup> For material on the immediate socio-political context of the time of the NPC's enforcement, see E.H. Judge. *Plehve: Repression and Reform in Imperial Russia, 1902–1904*. Syracuse, New York, 1983.

<sup>41</sup> O. Kivistik. 'A judge is faced by two gods, two justices, and a bitter need to serve one or another, or maybe even both at the same time.' – *Juridica* 2012/III, pp. 169–175. In analysis of the case law regarding offences against religion, it appeared that, although the aim for the NPC was to regulate offences against Church property as regular criminal offences against property, it did not work that way in practice, and in four judgements analysed, the judge implemented terms related to qualified elements of stealing Church property that had been established in the CCCP and provided for a stricter sentence.

<sup>42</sup> O. Kivistik (see Note 7).

<sup>43</sup> Although penal laws from tsarist times remained in force in the Republic of Estonia declared in 1918, the courts and the court system were already new. Also the regime and the constitution of the new state principally differed from the earlier one.

The revolutionary events of 1905<sup>\*44</sup> awakened the political masses and stirred populist movements. In Estonia, the weakening of the empire was utilised by local political figures who used the ideologically oriented newspapers of people who had political mainstream leanings – *Teataja*, *Postimees*, and *Uudised*.<sup>\*45</sup> Konstantin Päts, editor-in-chief of the Tallinn-based paper *Teataja*, initiated a campaign of memoranda with his editorial board to demand autonomy for Estonia of a similar nature to what Finland already enjoyed as a part of the Russian Empire. Regrettably, the aspirations for local autonomy did not spark something greater, and in December 1905 the central authorities launched an attack. Päts's newspaper was closed down, and Estonian leading political figures were in danger of being arrested.<sup>\*46</sup> Päts and other central figures of local politics found out about the arrest plan and hence had a chance to escape, heading abroad.<sup>\*47</sup> While in exile in Switzerland, they happened to find out by way of a Russian newspaper that a court-martial had sentenced Päts to death for his rebellious activities. This decision had been taken by Major-General Vladimir Bezobrazov in a court-martial of the punitive troop, but no official documents on the events have been preserved. They were lost, fell victim to accidental fire, or were deliberately destroyed.<sup>\*48</sup> As alluded to above, in addition to the NPC and still partially valid CCCP, the 1868 Military Penal Code was still in force.<sup>\*49</sup> As a rule, courts-martial had the jurisdiction to settle cases under the Military Penal Code when the accused was a serviceman. However, by way of exception, also a private person could end up subject to trial by court-martial if having committed the alleged offence in a territory affected by a state of war or state of emergency. Indeed, a state of war or of emergency was not an unusual situation in the tsarist empire or, for that matter, in the Republic of Estonia that followed, as a legal heritage of empire.<sup>\*50</sup> Undermining the national integrity of the Russian Empire by demands for autonomy of provinces had to be deemed a crime serious enough to be heard in court-martial without the presence of the accused. The above-mentioned court-martial decision meant that Päts needed to hide longer from the Russian police authorities, and in 1907 he left Switzerland not for Estonia but for the Grand Duchy of Finland, which had the advantage for him of being near Estonia and close to the capital of the empire. He spent the next three years there. During that time, utter confusion arose around the death sentence – it turned out that the court-martial had exceeded its authority and that many documents had been either lost or destroyed in fire. The only remaining document in evidence against Päts was a letter and appeal by Tallinn workers' representatives that had been published in *Teataja*<sup>\*51</sup>, which the prosecutor's office had concluded contained expressions inciting to mutiny. However, publishing such writings was grounds for not a death sentence but a significantly more lenient punishment, in fact.<sup>\*52</sup> Under the NPC<sup>\*53</sup>, incitement to mutiny could have led to exile or a prison sentence. Since there was no longer so significant a sentence keeping Päts away from Estonia, he voluntarily went to Tallinn to stand before an investigator in 1909.<sup>\*54</sup> The Tallinn County Court took up the case of

<sup>44</sup> See, for instance, A. Ascher. *The Revolution of 1905: Russia in Disarray*. Stanford, California 1988; R. Weinberg, L. Bernstein. *Revolutionary Russia: A History in Documents*. New York 2011. About revolutionary events and movements in the Baltic provinces, see T.U. Raun. *Estonia and the Estonians*, updated 2nd ed. Stanford, California 2001, pp. 82 ff.; *idem*, *The Revolution of 1905 in the Baltic provinces and Finland*. – *Slavic Review* 1984/43, pp. 453–467. – DOI: <https://doi.org/10.2307/2499401>; E. Benz. *Die Revolution von 1905 in Livland, Estland und Kurland* [‘The Revolution of 1905 in Livland, Estonia, and Courland’]. – *Acta Baltica* 1990/XXVIII, pp. 19–167, 1991/XXIX–XXX, pp. 117–196; T. Karjahärm. *1905. aasta Eestis: massiliikumine ja vägivald maal* [‘The Year 1905 in Estonia: Mass Movement and Violence in the Countryside’]. Tallinn 2013.

<sup>45</sup> S. T.U. Raun. *Violence and activism in the Baltic provinces during the Revolution of 1905*. – *Acta Historica Tallinnensia* 2006/10, pp. 48–59.

<sup>46</sup> T. Karjahärm (see Note 44); *idem*, *Ida ja lääne vahel. Eesti-Vene suhted 1850–1917* [‘Between East and West. Relationships between Estonia and Russia 1850–1917’]. Tallinn 1998.

<sup>47</sup> K. Päts. *Minu elu. Mälestusi ja kilde eluloost* [‘My Life: Memories and Pieces of Life’], edited by H. Runnel. Tartu 1999, p. 51.

<sup>48</sup> T. Karjahärm. *Vabameelne opositsionäär Konstantin Päts* [‘Liberal Opposition Konstantin Päts’]. Tartu 2018, p. 208.

<sup>49</sup> *Voïnskii ustav o nakasaniiah* [‘Military Charter of Penalties’]. – ПИСЗ, 1st ed., Vol. 43, Part 1 – 45811, 5 May 1868.

<sup>50</sup> For the years 1918–24, see M. Sedman (see Note 12), pp. 268 ff.

<sup>51</sup> *Töökomiteede manifest* [‘Manifesto of works committee’]. – *Teataja*, No. 263 / 5 December 1905.

<sup>52</sup> For further discussion, consult E. Laaman. *Konstantin Päts. Poliitika- ja riigimees* [‘Konstantin Päts: Politician and Statesman’]. Stockholm 1949, p. 62.

<sup>53</sup> On the constituent elements of crimes against the state and the sentences for such offences in the NPC, see §3 of the same article.

<sup>54</sup> H. Walter. *Ausalt & avameelselt. Eesti suurmeestest: Johan Laidonerist, Jaan Poskast, Konstantin Pätsist, Jaan Tõnissonist* [‘Honestly and Frankly about Estonia's Great Men: Johan Laidoner, Jaan Poska, Konstantin Päts, Jaan Tõnisson’]. Tallinn 1990, p. 41.



Päts and *Teataja*, wherein Päts as editor-in-chief of the newspaper was accused of enabling publishing of articles, poems, and advertisements related to the ‘Estonia meeting’<sup>\*55</sup> and a description<sup>\*56</sup> of the bloodbath of 16 October 1905.<sup>\*57</sup> The most serious accusation was a censor’s complaint regarding a call for a strike by representatives of workers in Tallinn<sup>\*58</sup>. On 10 December 1905, the Court of Appeal of St Petersburg had decided to seize issue 263 of *Teataja* and stop the publication of the newspaper until the court could pass judgement in consideration of ‘the extraordinary relevance of the criminal activity’.<sup>\*59</sup>

On 4 February 1910, Päts was interrogated.<sup>\*60</sup> He was accused of enabling distribution of materials inciting to mutiny and insubordination to the legislative authority. He as the editor was accused also for publishing issue 263 of *Teataja* on 5 December 1905, which included a letter of the workers’ representatives to the editorial board. According to the accusation, the letter called for overthrow of the government, extraordinary summoning of the Parliament (State Duma), and not paying state taxes. According to the statement of charges, the case involved two distinct offences: incitement to overthrowing of the government and incitement to non-payment of state taxes. In addition, Päts was accused of publishing *Teataja*’s issue 257, with an article that featured workers’ demands for calling of an extraordinary meeting of Tallinn workers’ representatives and, in connection with that, turning Russia into a democratic republic.<sup>\*61</sup> The article contained, in addition, a threat that the proletariat of Tallinn, in solidarity with the proletariat of the entirety of Russia, would take ‘all possible measures’ until all traitors and others acting against the interests of the people ‘are overthrown, together with the autocracy that has reached its natural end’.<sup>\*62</sup>

Hence, Päts was accused firstly of public distribution of materials inciting to overthrow of the regime under Article 129 (1) 1) of the NPC. Under that article, Päts was accused of distributing or publicly displaying drawings or other works that incite rebellious or treasonous activity that was punishable by exile. The description of the elements necessary for this offence was the same as what was valid under Article 251 (1) of the CCCP, but the punishment dictated by the CCCP would have been stripping of all class rights and 8–10 years of hard labour in a stockade. On a normative level, the NPC had brought more lenient sentences.

For that offence, the court sentenced Päts to indefinite exile under Article 17<sup>\*63</sup> of the NPC. Since the court found mitigating circumstances connected with Päts’s activities, this was replaced with one year of imprisonment.<sup>\*64</sup> Regrettably, the court did not specify the nature of the mitigating circumstances. It is possible that some role was played by Päts’s own proactive steps and voluntarily surrendering himself to the investigator.

The judgement specified the second offence of Päts also: incitement to non-compliance with the law under Article 129 (1) 3) of the NPC. The relevant terms were set out in Article 129 (1) 3) of the NPC, which established a sentence of up to three years at a reformatory. The exact meaning of such a sentence was specified in Article 18 of the NPC.<sup>\*65</sup> Since the court identified mitigating circumstances in Päts’s activities in connection with this offence too, the sentence was replaced by three months of imprisonment.

<sup>55</sup> A meeting was supposed to be held on 11 December 1905 in the rooms of the Estonia Society, but it was decided to move this to the Volta factory. In addition to workers, representatives of rural municipalities arrived. On the night after the meeting, squads of workers left Tallinn and went on to loot and burn down manors.

<sup>56</sup> Tallinna sündmused [‘Events in Tallinn’]. – *Teataja*, No. 226 / 18 October 1905, p. 1.

<sup>57</sup> *On 16 October 1905, a bloodbath took place on the New Market of Tallinn, where soldiers opened fire at a peaceful rally, killing 94 people and injuring 200 (8,000–10,000 people had come to the rally).*

<sup>58</sup> Tallinna uudised [‘News of Tallinn’]. – *Teataja*, No. 257 / 28 November 1905, p. 2.

<sup>59</sup> Peterburi kohtupalati otsus Teataja sulgemise kohta [‘Decision of the St Petersburg Appeal Court on the closing of *Teataja*’]. Estonian National Archives (hereinafter ‘ENA’) EAA.52.1.556, p. 3. See T. Karjahärm (see Note 48), pp. 197 ff.

<sup>60</sup> Delo po ovbineniju redaktora gazety “Teataja” K. Pjats v opublikovanii vozzvanija Revel’skogo Komiteta sotsial-demokratičeskoj rabočej partii s prizyvom k političeskoj abastovke [‘The case on the accusation of the editor of newspaper *Teataja* K. Päts in the publication of the appeal of the Revel Committee of the Social Democratic Labor Party with an appeal for a political strike’]. ENA EAA.105.1.7974, p. 41.

<sup>61</sup> Kirjad toimetusele. Kaaskodanikkudele! [‘Letters to the Editor: To fellow citizens!’]. – *Teataja*, No. 257 / 30 November 1905, p. 3.

<sup>62</sup> *Ibid.*, pp. 4–5.

<sup>63</sup> Article 17 of the NPC stated: ‘The exile is indefinite. Convicted offenders shall be sent for exile to a designated territory that is determined every three years by the Minister of Justice and the Interior’.

<sup>64</sup> Delo po ovbineniju redaktora gazety “Teataja” K. Pjats v opublikovanii vozzvanija Revel’skogo Komiteta sotsial-demokratičeskoj rabočej partii s prizyvom k političeskoj abastovke [‘The case on the accusation of the editor of newspaper *Teataja* K. Päts in the publication of the appeal of the Revel Committee of the Social Democratic Labor Party with an appeal for a political strike’]. ENA EAA.105.1.7974, pp. 59–60.

<sup>65</sup> Article 18 of the NPC stated that a sentence in a reformatory shall last up to 1,5–6 years. Firstly, the convicted offenders are held in solitary confinement for 3–6 months, after which they are transferred to the general section of the prison. All

As to the extraordinary call for a meeting of workers' representatives that had been published in 1905 in issue 257 of *Teataja*, the court found no evidence supporting the contention that Päts was responsible for publishing the material, and he was acquitted under Article 5<sup>\*66</sup> of the CCCP. In this case, there was not an arbitrary choice between two penal codes. The general part of the NPC was not in force. Therefore, the judges needed to refer to the general provisions of the CCCP when sentencing offenders and to the special provisions of the NPC that articulated the elements constituting the relevant offences.

The court based its determination of the sentence on Article 5 of the CCCP and Article 60 of the NPC<sup>\*67</sup>, thereby concluding that the punishment should be an aggregate one and that the stricter sentence shall prevail. In this case, a one-year term in a stockade became nine months of solitary confinement. When the sentence was imprisonment in the stockade, the offenders did not have to work while imprisoned, while labour was among the additional obligations in cases of solitary confinement.

The judgement in the case of Päts and the reasoning laid out for the court's decision were relatively thorough, which may have been due to the fact that the accused was highly active politically and formerly editor of the newspaper *Teataja*. It is worth mentioning explicitly that the Tallinn County Court did not take into consideration the decision of the court-martial, on account of the paucity of evidence in its decision, and issued a significantly more lenient decision than had the court-martial.

A crime against the state was considered to exist also in a situation in which someone publicly distributed a work that incited hostility between social classes or between superiors and subordinates. One of the cases heard by the Tallinn County Court started with a notice<sup>\*68</sup> published by one of the mouthpieces of the working-class labour movement,<sup>\*69</sup> the newspaper *Kiir*. There was no author stated in the text, and the editor of the newspaper, A. Hanson, was held liable. On 30 January 1914, the Tallinn County Court issued a decision<sup>\*70</sup> that the text incited hostility between superiors and subordinates. The following statements were deemed to have indicated the above: 'The Waldorf factory found a way of improving conditions for the workers, thanks to which the work day is now 18–36 hours long'; 'The Waldorf factory is known for its occupational accidents that generally take place during overtime'; that 'the more cultured and aware workers are trying to find a way to get rid of the overtime work, while the management hold on to it tightly because this is a matter of life and death' and that said managers 'want to complete all the tasks during overtime, regardless of the blood and sweat, as long as the percentages produced by the capital would not go down'; that 'such torturing of human beings is in the flesh and blood [i.e., the very marrow] of the management'; that those 'who found out the names of the workers who refused overtime [...] imposed on them illegal fines in the amount of 50 kopecks for going home at the right time'; and that 'hopes and prayers have let the workers down, so they are forced to seek other possibilities for defending their rights'. The accusation stated that pointing out the workers' rights or directing attention to the inhumane treatment of the employees incites hostility and could bring about a mutiny among the workers. The court agreed; it considered publication of these statements sufficient to constitute the elements of the offence in question and sentenced Hanson, as the editor of *Kiir*, to five months in prison under Article 129 (1) 6) of the NPC.

The court did not, however, just punish Hanson. By its decision of 14 August of the same year<sup>\*71</sup>, publishing of the newspaper *Kiir* was forbidden under Article 129 (1) 2) and 6) of the NPC. The Tallinn County Court justified this mainly with the argument that the newspaper had repeatedly violated Russian legislation,<sup>\*72</sup> it had displayed an anti-government attitude, and the continuous dissemination of that paper

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offenders must carry out the tasks appointed to them. For male offenders, also the option existed of being sent to perform tasks outside the prison.

<sup>66</sup> Article 5 of the CCCP stated: 'A person shall be acquitted of an offence committed without intention'.

<sup>67</sup> The NPC's Article 60 stated that a person, when having committed several offences, shall be sentenced on the basis of the article of law that provides for the stricter/strictest punishment.

<sup>68</sup> Töörähvaliikumine. Streigid. Töökohtades: ... Pärnu ['Working class movement. Strikes. Workplaces: ...Pärnu']. – *Kiir*, No. 80 / 20 July 1913, p. 3.

<sup>69</sup> For the masthead of the newspaper, this was expressed by the title 'Töörähwa ajaleht', meaning 'Newspaper of the Working People'.

<sup>70</sup> Delo po obvineniiu redaktora gazety "Kiir" A. Ganson v pomeshchenii stat'i revoliutsionnogo sodержaniia ['The case on accusation of the editor of the newspaper Kiir A. Hanson in the premises of the article of revolutionary content']. ENA EAA.139.1.4075, non-paginated file.

<sup>71</sup> Delo po obvineniiu redaktora gazety "Kiir" A. Ganson v pomeshchenii statej revoljucionnogo sodержaniia i narushenii cenzurnogo ustava ['The case on accusation of the editor of newspaper „Kiir“ A. Hanson in the premises of articles of the revolutionary content and violation of the censorship statute']. ENA EAA.139.1.4138, p. 17.

<sup>72</sup> The court, however, did not specify the specific laws the newspaper had broken.

could dispose the people against the state. In addition, the activity of the newspaper was geared toward inciting hostility between classes or between superiors and subordinates. While Article 251 of the CCCP had already presented a similar offence, it did not separately refer to incitement of hostility between national groups or between superiors and subordinates. Certain social developments had taken place in the Russian Empire between 1845 and 1903 that allowed for emergence of stratification into classes, nations, etc. on new bases in addition to the societal order solely based on estate. The compilers of the NPC took these developments into account.

After *Kiir* was shut down, a new newspaper emerged that was similar to it, *Narva Kiir: Marxistic Newspaper of Working People*. That too would not remain untouched by the state's penal power. On 13 March 1914, the Tallinn County Court made a decision<sup>\*73</sup> by which the editor of the newspaper, Aleksander Puusepp, was found guilty in publishing the article on hard conditions for workers at Vladivostok in issue 4 on 25 September 1913.<sup>\*74</sup> The court found that the article incited hostility because it contained comments that 'the superiors keep mowing the last hairs from the workers' backs', 'the superiors used lies to lure people to work', and 'the workers afterwards had to thank the tsar for the crumbs falling from the table'. The court found that this possessed the defining elements of incitement to mutiny and, accordingly, sentenced the editor to four months in prison under Article 129 (1) 6) of the NPC.

The next editor of *Narva Kiir*, Jakob Friedrichsmann, too was found guilty of incitement to mutiny, on 28 May 1914.<sup>\*75</sup> The court decided that the article 'Proletariaadi piiri tähendusest' ['On the Meaning of Limits to the Proletariat'] incited workers to resist their superiors. Friedrichsmann himself, in contrast, considered the text not to be unlawful; he held that it simply pointed out the hardships related to overtime work and the fact that superiors were unable to understand the difficult situation of the workers. In addition, the text mentioned unjustifiably low salaries of workmen and suggested that they could join together in a common organisation so as to resolve these issues. The court qualified this offence as incitement of hostility between superiors and subordinates under Article 129 (6) of the NPC and sentenced Friedrichsmann to a prison term of two months.

It is worth mentioning, however, that not all accusations of crimes against the state or incitement to mutiny ended in a guilty verdict. On 28 January 1909, the Tallinn County Court found that<sup>\*76</sup> printing 1,000 copies of a pamphlet titled 'Rahwa poliitika' ['Policy of the People'] in Estonian did not automatically constitute an offence against the state, although the accuser contended that the pamphlet contained a call for insubordination to the state power. In addition, it was claimed to have contained incitement to overthrow the Russian regime and violent seizing of power. The pamphlet was never published, because the police were able to seize it first. Having familiarised itself with the pamphlet, the court found the accuser's interpretation to be incorrect and concluded that the content of the material was not in actuality anti-state. According to the court, the message of the pamphlet was that workers need to take action not only for freedom but also for political power.

Cases of incitement to mutiny by minors were quite similar in their content. On 27 October 1904, the Tallinn County Court discussed the criminal matter of 16-year-old N. Deškin, who had distributed pamphlets criticising the state power and Tsar Alexander III.<sup>\*77</sup> The summary of charges mentioned, in addition, two other young men: M. Kalinin and V. Alekseejev. These two men whom Deškin had met were mentioned as people with whom the witness for the prosecutor's office had met but on whom there were no procedural documents on record. Deškin's record included an analysis of his comprehension abilities. This stated that the young man had a vocational education, he had worked for three years as a writer at a

<sup>73</sup> Delo po obvineniiu redaktora gazety "Narva kiir" A. Pusep v pomeshchenii stat'I revoliucionnogo soderzhaniia ['The case on the accusation of the editor of the newspaper "Narva Kiir" A. Puusepp in the premises of the article of revolutionary content']. ENA EAA.139.1.4117.

<sup>74</sup> S. a.. Vladivostoki tööorjad ['Labour Slaves at Vladivostok']. – *Narva Kiir. Marksistline töörahva ajaleht*, No. 4 / 25 September 1903, p. 4.

<sup>75</sup> Delo po obvineniiu redaktora gazety "Narva Kiir" J. Vinrigsman v napechatanii stat'I devoliucionnogo soderzhaniija ['The case on accusation of the editor of newspaper "Narva Kiir" J. Friedrichsmann in publishing article 'On the Meaning of Limits to the Proletariat' that has revolutionary content']. ENA EAA.139.1.4154, p. 26.

<sup>76</sup> Delo po obvineniiu redaktora-izdatelia gazety "Õigus" P. Ollak v izdании broshiury revoliucionnogo soderzhaniia "Narodnaia politika" ['The case on accusation of the editor-publisher of the newspaper "Õigus" P. Ollak in publishing pamphlet "Policy of the People" that has revolutionary content']. ENA EAA.139.1. 2538, pp. 15–16.

<sup>77</sup> Delo o revoliucionnoi agitacii i o rasprostranenii nelegal'noi literatury Mihailom Ivanovich Kalininym, N. A. Deshkinym i V. Alekseevym ['The case of revolutionary agitation and the dissemination of illegal literature by Mihail Ivanovich Kalinin, N.A. Deškin and V. Alekseev']. ENA EAA.105.1.11507, pp. 1–3.

correctional institution, and his relatives had stated that he is quite educated and mature for his age. Deškin was sent for a medical examination, but, regrettably, the records contain no documentation of the experts' findings or of the court's decision.

A prosecutor's statement of charges from 15 February 1907 reveals that 16-year-old Julius Davidov Grüntal was accused of possessing illegal literature that had been found in a search of his flat in Tallinn.<sup>78</sup> The young man claimed that the literature was not his. For some reason, the decision made mention of the fact that the father of the accused was 53 years old when the youngster was born, mentally unstable, and inclined to alcoholism. It was also deemed necessary to characterise the young man's state of health – he had nephritis and jaundice. The prosecution found that the accused had the necessary mental capacity and accused him of creating materials with the aim of inciting to mutiny, though without having a chance to spread them, relying in its arguments on Article 132 (1) of the NPC. The young man was sent for expert evaluation, but in this case too there are no documents attesting to the results of the evaluation or to the court's decision.

## 5. Conclusions

Fundamental rights enshrined in the Constitution or similar acts of legislation do not have much value if they cannot be enforced by the courts or if they simultaneously are considerably restricted by other legislation. The sword of penal power is especially sharp and may decisively slice through the protection of fundamental rights. This is precisely the example provided by the Russian Empire in its final decades: on the one hand, the freedom of speech and of the press had been established in Fundamental Laws (1906) as being in force, yet the penal law valid at the same time specified strict punishments for incitement to mutiny. Although the New Penal Code (1903) was more lenient than the old code had been, it contained new sets of constituent elements for an offence, based on the structure of an industrialising society under modernising influences. Hence, the putative guarantees notwithstanding, it was possible to deem actions not directed against the monarch or the regime to be incitement to mutiny.

In addition to the circumstances described above, this article has addressed cases before the Tallinn County Court of the Estonian governorate. Incitement to mutiny was exactly what editors of newspapers were charged with, yet in no case had their actions been aimed directly against the monarch or the monarchy. All of the court cases examined in this article had to do with workers' movement propaganda and demands for better work conditions and rights for workers. Although plants and factories were not state institutions, the workers' class struggle was still considered a crime against the state. The case law of the Tallinn County Court is a perfect example of how penal law enabled forcing the constitutionally declared freedom of speech and press into extremely tight boundaries by punishing the ones who actually dared to exercise these freedoms. While this piece has analysed the case law of only the Tallinn County Court, it should be remembered that in a state of emergency the court-martial too had a right to make decisions on freedom of speech and the press. Therefore, it cannot be ruled out that even more people than might be suggested by the foregoing discussion were found guilty in the Estonian governorate for asserting their fundamental rights during the era considered here.

Remarkably, there was not a single case in the body of Tallinn County Court case law in which the accusation was based on, for instance, Estonia's strivings for autonomy. This may be considered unsurprising, though, since the contemporary approach to penal law necessitated attacking the state as a whole or its integrity if one was to be considered guilty of a crime against the state, and the idea of Estonian autonomy was already widely discussed in those times. However, the jurisdiction of courts-martial cannot be ruled out in this connection either.

With the scope we selected – restricted to analysis of only the case law of a general court – the phenomena described above are clearly evident. Although studying the penal-law practice of the Russian Empire necessitates examining the court-martial case law also if one is to get the full picture, it is beyond doubt that said field paid even less attention to fundamental rights.

<sup>78</sup> Delo ob obnaruzhenii tiuka nelegal'noy literatory pri obyske doma na Sadovoi ulice v Revele [“The case of finding a bale of illegal literature while a house search in Sadovaya Street I Revel”]. ENA EAA.105.1.11508, pp. 5–6.