Jiří Jelínek, Karel Klíma (eds.)

Protection of Fundamental Rights and Freedoms in Criminal Procedure

Leges

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Contents

Criminal procedural risks of the possible legal entry into human values based upon the constitutional law

Karel Klíma

Metropolitan University Prague, Czech Republic

karel.klima@mup.cz

Abstract: *In principle constitutional rules allow law enforcement authorities to enter the field of fundamental human rights. Based on the judicial procedural rules, the judicial authorities then legitimise the courts to decide on guilt and punishment and to decide on the penalty. A possible penalty is subsequently a more or less drastic intervention into constitutional natural law. Even while maintaining the legality of any interference with human rights, everything depends on the intensity of the use of procedural law measures, its proportionality to the actual situation, the correct choice of the measure, etc. In this sense, constitutional principles regarding the right to a fair trial are not only confronted in terms of the legality of these measures, but also, in terms of the principle of non-arbitrariness, principle of proportionality and subsidiarity, etc.*

Key words: *law enforcement, human rights, guilt, punishment, penalty, fair trial, proportionality*

1. Introduction

This dissertation concerns a special relationship audit, which addresses the legal situation where criminal procedural law measures aimed at proving guilt and at fair conviction simultaneously interfere with the value system of each person who is the object of suspicion, accusation, pre-trial criminal proceedings, judicial proceedings, as well as possible criminal repressive penalties. Therefore, the Czech Republic legal system guarantees the legal basis of these measures, and pay attention to the functional and control supervision of their use, including the legal measures of their review, and also, prevent risks within their use. Therefore, it is possible to establish a hypothesis in the sense that the Constitution, Constitutional Acts and the relevant legislation and the Czech Republic legal system sufficiently protect natural persons who (especially as offenders of criminal activity) have become the object of substantive measures of the criminal procedure. It is especially necessary to address the issue regarding protecting those who are the object of criminal proceedings, in terms of the criterion with regard to the impact of these measures on human (and constitutional) natural law.

2. Constitutional natural law as a purpose and object of criminal law protection

The Fundamental Rights and Freedoms Charter follows-up on the constitutional protection of human life by requiring the preservation of dignity, privacy and also protecting family relationships and ties. Therefore, criminal law and all state criminal law measures, including operationally interventional instruments are aimed at protecting these values, and also at the necessary interference with these values, strictly on the basis of the laws. At the same time, it should be remembered that only freedom of thought is absolute (i.e. unrestrictable by law).[1] Based on the above, the Charter is defined by the protection system of the Criminal Code's "special part", namely as protection of: a) life and health, b) freedom and dignity, c) privacy, including confidentiality of letters, d) human dignity in sexual matters and e) protecting children and families. Therefore, the constitutions of democratic states (including our Charter) build on the value system of natural law and criminal codes, including the concept of the Czech Criminal Code, treat the protection of natural law as a key subject of this protection.[2] Therefore, of course, the focus of substantive criminal law particularly acquires a constitutional significance and the Charter's implementing effect. The concept of the criminal offences "material elements" should be understood as a legally autonomous matter (independent of the Charter), but in terms of its potential effect (especially the protection of natural law) as a quasi-constitutional matter.

Therefore, on the basis of the above-mentioned approach, it is possible to assess the criminal procedural measures from the viewpoint of their lawful use, when their purpose is to detect, investigate and prove guilt and decide on punishment. Therefore, they are directed against a natural person (suspected of committing a criminal offence, detained after or during its commission, people prosecuted in custody, tried and convicted, etc.). Given that it is the person and their freedom that is potentially and affected, natural law is the main object of state power in this relationship and of the state decisions and interventions regulated by law. In general, the crucial constitutional risk in this relationship, which is repressive in principle, is: pre-trial criminal proceedings (investigating a case), prosecuting a person in custody, the course and length of judicial proceedings, including the appeal proceedings, and subsequently, where appropriate, the actual service of an imprisonment term.[3]

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[1] Cf. Constitutional principle of the possibility to refuse giving testimony in: KLÍMA, Karel a kol. (et al) *Komentář k Ústavě a Listině. 2. díl (Commentary to the Constitution and the Charter. 2nd volume).* Plzeň: Aleš Čeněk, 2009, ISBN 978-80-7380-140-3, p. 1341.

[2] Analysis of this matter is given by the author in: KLÍMA, Karel. *Listina a její realizace v systému veřejného a nového soukromého práva. (The Charter and its implementation in the public and new private law system).* Praha: Wolters Kluwer, 2014, ISBN 978-80-7478647-1, p. 148 et seq.

[3] Regarding this, the author in the chapter: "*Pojetí a realizace některých zásad a hodnot Listiny ve vztahu k lidským právům a svobodám (The concept and implementation of certain principles and values of the Charter in relation to human rights and freedoms)*", In: KLÍMA, Karel. *Listina a její*

3. European bases of legality of criminal measures and interpretative extension of the European Court of Human Rights case-law

In assessing the national concepts of constitutional (and especially statutory) implementing regulation of permitted ways of state interference in the sphere of inviolability and freedom of a human person, the starting point is the concept of the European Convention on Human Rights and Fundamental Freedoms, as a fundamental institutional and procedural framework of legality, particularly a punitive repressive state activity. Therefore, the Convention concept interpreted and developed by the European Court of Human Rights impose certain fundamental requirements on the content of substantive national law, particularly criminal law, as well as on its application by national authorities in criminal proceedings. Consequently, these authorities are primarily responsible for the proper and correct investigation of the case so as to clarify its criminal nature (material truth).[4]

In terms of the above-mentioned, the recent "written", as well as the European Council case-law concept and "its" European Court of Human Rights concentrates on certain starting points that generally define (restrictive) interventions of state power especially in the human rights field (of a natural law character). In general, the exclusivity of state power based on public interest in relation to criminal activity primarily guarantees that a decision on guilt and punishment is only rendered by the court, and that any deliberate manipulation of the process will be ruled out when assigning cases to judges. On the one hand, in criminal proceedings the law determines procedures for proving guilt, and on the other hand, it simultaneously ensures the possibility of a person defending themselves within the procedure, including the assistance of a lawyer, and to prove innocence. The requirement in the sense that any arrest is justified by fulfilling the intentions of the law is also considered to be essential. This procedure is usually of a detaining nature against a person suspected of having committed a criminal offence, due to the concern that the person continues in the criminal activity or absconds.

From a more specific viewpoint, the "European concept of the rule of law" guarantees the requirement that a minor who is not criminally liable may be deprived of their liberty, for the purposes of reformatory supervision. People suspected of spreading an infectious disease, mentally ill people, alcoholics, drug addicts and vagrants may also be legally detained.[5] In relation to the "external sovereignty" of the

realizace v systému veřejného a nového soukromého práva. (The Charter and its implementation in the public and new private law system). Op. cit. pp. 17 to 25.

[4] See in: KMEC, Jiří et al. *Evropská úmluva o lidských právech a základních svobodách. (European Convention on Human Rights and Fundamental Freedoms).* 1st edition. Praha: C. H. Beck, 2012, ISBN 978-80-7400-365-3. p. 598 et seq.

[5] However, it is necessary to distinguish between a person who is infected or a person who is suspected of being infected with an infectious disease.

state, a person may also be arrested to prevent entry into the territory, including the possibility of their legally based expulsion.

The case-law concept of the European Council, i.e. the European Court of Human Rights, is fundamentally directed towards the criminal procedural safeguards of a fair trial and the complex of guarantees of procedural protection of the natural persons concerned. From this point of view, it is essential that this doctrine sees the criminal proceedings as basically 3 different phases of criminal proceedings (in the "Czech" application as: pre-trial criminal proceedings, the respective trial proceedings, review proceedings), while the classical constitutional principles of trial proceedings are proportionately and potentially applied in each of them (it is demonstrated below particularly on the right of defence, the procedure's adversarial principle, or the presumption of innocence). However, it should also be emphasised that the theory and case law of the European Court of Human Rights, or, also, the "national" constitutional judiciary, also derived principles that may be considered as quasi-constitutional, i.e. – principle of prohibition of incrimination of oneself is an important principle, but also a Member State's legislation requirements so the system provides for the possibility of second-instance review in criminal matters. In the context of pre-trial criminal proceedings, the European Court of Human Rights considers the criminal policy regarding people in custody to be the most serious interference with personal liberty, while constantly emphasising that decision on custody must be proportionate to the need to interfere with personal liberty. In this sense, the requirements of prosecution of a person in custody must be strictly observed and the decision on custody must be rendered as a matter of priority.[6]

4. Pre-trial proceedings as a constitutionally "risky" part of a fair trial

According to Article 3 of the Convention, "*no one will be subjected to torture or to inhuman or degrading treatment.*" Article 8 of the Fundamental Rights and Freedoms Charter (as part of Constitution, Constitutional Acts and the relevant Czech Republic legislation) regulating personal freedom further expands the constitutional guarantee of the inviolability of a person as a natural subject, which can be understood as fundamental constitutional protection against public intervention which would not have legal grounds.[7] In the case of the European Court of Human Rights law concept, the protection of a person is extended by prohibiting the

[6] See in: KMEC, Jiří et al. *Evropská úmluva o lidských právech a základních svobodách. (European Convention on Human Rights and Fundamental Freedoms).* Op. cit. p. 508 et seq.

[7] The Charter, in connection with the historically established principle of British constitutional history, in the well-known document of the constitutional nature of the „Habeas Corpus act" emphasises the protection of the human individual against the usual risk of misconduct in public power, more specifically in: KLÍMA, Karel. *Ústavní právo. (Constitutional law).* 5th updated edition. Plzeň: Aleš Čeněk, 2016, ISBN -80-7380-606-4, p. 496.

so-called arbitrariness, where a state authority is provided with legal measures to use them in certain situations, but at the same time, it has an immediate need to decide without delay (and therefore without the time permitting to assess the adequacy of the measures used), or before the decision to have a quiet space of so-called discretion. Therefore, state power has considerable discretion in the use of detention measures for security and prevention, when it comes to distinguishing between deprivation of liberty and various types of liberty restrictions in terms of the intensity of detention (especially of a preventive nature). The concept is based on the exclusion of any non-legal violence, where the criterion of constitutionality is not only the legality regarding an authority's decision-making (or the so-called legality test), but the necessity of using the measure (testing the necessity of the measure's use) or exceeding the intensity of the measure's use (testing proportionality of the measure's use). The criterion of the necessity of using a certain measure is understood as the inevitability of using the measure on the basis of comparison of its application and the intended aim.

Consequently, in connection with pre-trial criminal proceedings, it is necessary to deal with the constitutional aspects of the performance of police activities and the use of legal measures in restricting human rights. Therefore, we will focus on the legal concepts such as detention, interrogation of suspects and accused people, decisions on custody and its service, operational and technical measures of police authorities, and in this context also exercising the right of defence. The so-called coercive measures of police authorities (according to Czech law) also have constitutional aspects, where as part of pre-trial criminal proceedings, they directly encounter the right of defence principle necessarily induced up to this stage. The constitutional right to defence is primarily specified in the Criminal Procedure Code by a number of accused person's rights, such as: a) the right to inspect the file and obtain extracts and copies from them [§ 65 (1)], b) the right to request a review of the procedures of the police authority and the public prosecutor [§ 157a)], c) the right to participation of the defence counsel and the accused in the individual acts of the investigation, including the right to ask questions of people under investigation (§ 165), d) the right to examine the file after the investigation's termination (§ 166).[8] At the same time, every law enforcement authority decision must contain instruction on the right to file an application for remedial measure, so as to ensure that the accused (defendant) exercise their rights.

The European Convention, in so far as it regulates evidence, deals with testimony in criminal matters [Article 6 (3) (d) of the Convention]. Therefore, leaving it to each contracting Member State to regulate the evidence issue in its own national legal system, in terms of the admissibility of the evidential value and the burden of proof. As a result, the European Court of Human Rights encourages presenting ev-

[8] It should be remembered that the inclusion of relevant articles under Title V of the Charter contains a certain conceptual contradiction, as *expressis verbis* it does not concern a "right to judicial and other legal protection" but fundamental guidelines for the exercise of the criminal judicial function of the State.

idence in favour and against the plaintiff in a way that ensures a fair trial.[9] Special attention should be paid to unlawful evidence and omitted evidence, the accused should have a right to summon witnesses with relatively few restrictions.[10]

5. Coercive measures and restrictive measures according to Czech law

Pursuant to the Act on the Czech Republic Police, this branch of state power performs a number of tasks in connection with the pre-trial criminal proceedings, while the police officer is bound by the public prosecutor's instructions. [cf. § 3 (3) of the Act]. Particularly, when carrying out police interventions and acts, the police officer is in conflict with natural persons, acting very independently in this way, immediately or on the order of the intervention commander. They enter directly into the rights of natural and legal persons, their privacy and dignity. As a consequence, the compliance of so-called police law with the values of natural law (protected by the Charter) is a special sphere of the Charter's implementation. According to the law, every police intervention must be carried out in a manner that is proportionate to the situation.[11] Therefore, the Act stipulates numerous lawful authorisations of a police officer, of which we only exclude some as "risky" in terms of subject matter and established hypothesis of this dissertation, while in a catalogued order and within the nature of individual lawful authorisations we monitor their "risk intensity".

A number of coercive and restrictive measures under Czech law have a direct connection to the "initiation" of the pre-trial criminal proceedings and, if applicable, also with its course. Some of the legal procedural remedies are related to this phase, and the constitutional "risk" here is that law enforcement authorities (especially police investigators) have (often) almost unlimited *discretion* in choosing the intensity of legal measures. In this sense, it is possible to start with the police authority's authorisation to request an explanation from a person who can contribute to clarifying the facts important for detecting the offender, and this request is enforceable by law by possibly bringing the person before the authority. The authori-

[9] European Court for Human Rights judgement on July 12th, 1988 in the case of Schenk v. Switzerland no. 10862/84.

[10] It follows from the case law of the European Court of Human Rights that this right is not absolute, see the European Court of Human Rights judgement on October 24th, 2002 in the case of Pisano v. Italy, no. 36732/97, European Court for Human Rights judgement on May 18th, 2004 in the case of Destrehem v. France, no. 56651/00.

[11] Generally, police intervention and in particular, the issue of intensity of its interventions is an essential issue and frequent criterion addressed by the case law of the European Court of Human Rights, as part of the constitutional principle of "inviolability of a person", see J. Kratochvíl under clause 4, as the so-called "permitted use of force", in: KMEC, Jiří et al. *Evropská úmluva o lidských právech. (European Convention on Human Rights). Komentář (Commentary).* Praha: C. H. Beck, 2013, ISBN 978-80-7400-365-3, p. 357.

sation to detain a person who through their conduct, directly endangered the lives and property of other people, tried to escape, verbally insults people in the surroundings, damages or pollutes the environment, was caught committing the criminal offence, or there is a concern that they will continue in the criminal activity, would certainly be stronger with regard to intervention and its functioning.[12] We can proceed to the restriction of movement of aggressive people who attack police officers or other people, who damage property, or try to escape, by attaching them to a fixed point. The authorisation of the competent state authorities to use supportive investigative means for searching and tracking such as cover documents, conspiratorial measures, security technology, using informants etc. may be considered as certainly constitutionally incidental and as a consequence, potentially "risky". Legal authorisation for requiring various professional medical examinations, blood sampling and urine tests to detect alcohol and other addictive substances aims at obtaining evidence, i.e. they are procedures aimed at proving a criminal offence, etc.

More specifically, pursuant to Act on Police, operative investigative measures of searching and tracking, and particularly, as they may not be fully classified under the constitutional principles (due to their general and only generic-specific concept), even though they are constitutionally compliant measures, as mentioned above, i.e. permitted by the law.[13] They are not based on fundamental principles of constitutionality, such as protecting a person who is the subject of surveillance, detection, investigation or accused, i.e. the expected transparency of a file concerning a particular person and is available for inspection (of that person and their lawyer). These measures are potentially capable of not only violating the privacy of the potentially affected person, but also of the home, professional context, and especially the wider family privacy (concerning so-called family "third" persons). In addition, legal operative investigative searching and tracking measures are based (as expected, purposefully and therefore logically) on concealment or even confusion of the surroundings.[14]

Constitutional aspects may also be found in so-called police cells, which are set up as rooms for the placement of detainees.[15] It is an instrument for detention

[12] If the reasons for detention cease to exist, the police officer is obliged to release the person, and the detention may last only 24 hours as of the moment of deprivation of liberty, see more in the commentary to Article 8 (2) of the Charter, in: WAGNEROVÁ, Eliška et al. *Listina základních práv a svobod. Komentář*. (*Charter of Fundamental Rights and Freedoms. Commentary.)* Praha: Wolters Kluwer, ČZ, 2012, ISBN 978-80-7357-750-6, p. 216 et seq.

[13] The so-called "cover document" is as a written instrument or other document a purposeful measure aimed at concealing a person's true identity or at other similar purposes. Pursuant to § 73 of the Police Act, the police may use an informant as a person providing information to the police who may not be revealed.

[14] In particular, the so-called informant may be the source of information that is difficult to verify. Which potentially enter the zone of presumption of innocence in the material sense.

[15] The cell must be hygienically sound and must not contain objects that could be misused to endanger the lives of the person placed therein or even the people working for the police.

potentially interfering with the fundamental rights and freedoms of a person detained, arrested, taken from custody or service of prison sentence to execute any act of the criminal proceedings, etc.[16] If necessary, the police officer may also use legal coercive measures by which they can accelerate the detention act into the fundamental human rights.[17] The use of the relevant coercive measure is entirely part of the police officer's discretionary decision-making, it should be appropriate for the situation and follow the purpose prescribed by the law and be proportionate to the situation that has arisen.[18]

6. Right to review the criminal case proceedings

The right to an effective remedy (see Article 13 of the Convention) constitutes a very important part of a fair trial. In that sense, the guarantees provided for in Article 6 of the Convention also apply to appeal proceedings.[19] The main emphasis of the European Court of Human Rights is to ensure that the remedies are effective and accessible. However, the very effectiveness of the remedy does not depend on whether a favourable outcome is achieved.[20] With regard to Article 13 of the Convention, the European Court of Human Rights has directly held that it guarantees the accessibility of the remedy in order to strengthen the protection of the rights and freedoms enshrined in the Convention.[21]

[16] Here, the police authority is heavily bound by the instructions "of a protective and assistant nature" with regard to these people, as: separating juveniles from adults, enlisting the seized items, returning the seized items after release from the cell, providing a medical examination if necessary, preventing self-harm or even suicide, etc.

[17] This particularly concerns a possible use of measures pursuant to § 51 of Czech Republic Police Act, on such as hand-to-hand combat, handcuffs.

[18] It is also necessary to remind the necessary guarantees related to the personal data processing by the Czech Republic Police, because according to a special Police Act provision (§ 66) when performing its tasks, the police are entitled to request the provision of information from the competent data controller or processor of a register operated on the basis of a special legal regulation, request information from the database of participants in the public telephone service, from the register of identity cards, from the register of travel documents, from the register of diplomatic and service passports, the register of drivers, etc., for more information see in: KLÍMA, Karel. *Listina a její realizace v systému veřejného a nového soukromého práva. (The Charter and its implementation in the system of public and new private law).* Op. cit. p. 185 et seq.

[19] See the European Court for Human Rights judgement on January 20th, 1970 in the case of Delcourt v. Belgium, no. 2689/65.

[20] Cf. European Court for Human Rights judgement on February 23rd, 1993 in the case of Costello Roberts v. United Kingdom, no. 13134/87, or the European Court for Human Rights judgement on October 30th, 1991 in the case of Vilvarajah and others v. United Kingdom, no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87.

[21] In the European Court for Human Rights judgement on April 27th, 1988 in the case of Boyle and Rice v. United Kingdom, no. 9659/82; 9658/82.

7. Criminal proceedings and protection of juveniles and constitutional "upgrade" of this regulation

From the point of view of the application of humanism related to the approach to criminal repression, the legislative basis of the criminal procedure in the Czech Republic includes a special approach of social and generational nature in relation to juveniles so that all law enforcement authorities can proceed with a preference for "milder" measures over the usual criminal law measures.[22] The intention is to give priority to measures of a liberalisation nature, as well as excluding any measures of detention nature, depending on the situation.

Special Act No. 218/2003 Sb., on the Responsibility of Juveniles for Unlawful Acts and on Juvenile Justice, regulates conditions for the responsibility of juveniles for unlawful acts specified in the Criminal Code. It also regulates measures imposed for such unlawful acts, the procedure, decision-making and justice administration in juvenile matters. The relationship of this law to the constitutional protection of human values consists in the fact that its matter is a specialised variant of the constitutional principles of criminal responsibility and punishment in relation to juveniles. The Act with such aim pursues the preventive educational activities in the application of criminal measures so that the hearing of unlawful acts committed by children under 15 years of age and juveniles is aimed at the use of such a legal measure that will help to prevent further criminal activity and eventually find a social assertion corresponding to their age and other, particularly, psychological dispositions. Therefore, the law establishes a cautious and prudent criminal policy, which leads to a certain constitutional "upgrade" of this regulation in relation to minors.

The above-mentioned can be largely be inferred in law aspects where there is a de facto a special "type" of court, i.e. in the person of a specialised judge at the relevant instance. A special guarantee then consists in ensuring special treatment of the offender, which is proportionate to their age, and especially to their mental maturity. Special procedural emphasis is placed on ensuring adequate professional defence, which is permanently reflected in the peculiarities of (especially judicial) instruction of the juvenile offender concerning their rights.[23] Of course, a juvenile offender has the right to a defence counsel from the moment when measures pursuant to the special law were applied against them, or acts pursuant to the Criminal Procedure Code were carried out, including exigent and unrepeatable acts.[24]

[22] For example, in § 57, the law uses the wording *"... it is necessary to proceed with consideration and to protect his personality ..."* in relation to interrogating the accused.

[23] The juvenile offender also has the right to a defence counsel in enforcement proceedings (in the case of conditional release of a juvenile), there are also peculiarities in the right to a defence counsel within a complaint for the violation of law, in appellate review proceedings, and in proceedings to sanction a new trial.

[24] We should also add that a juvenile who at the time of committing a criminal offence did not reach such intellectual and moral maturity to assess their actions, is not criminally responsible for such act, and they may be imposed the so-called *protective measures* pursuant to § 21 of the Act.

8. Constitutional approach to "own risks" of criminal proceedings

The application of the principles of a fair criminal procedure is not static and is therefore of a jurisdictionally developmental nature. In addition, the requirements for the constitutionality (fairness) of the procedure apply to its total duration and to any measures taken by the state in its course. Therefore, it is necessary to also consider the "precedence" of certain principles of criminal procedure before the actual trial. The state power collects facts and evidence here, seeks and investigates, that is – the search, investigation and gathering of evidence, therefore subsequently constitutes a "matter relating to a legal claim". A s a consequence, pre-trial criminal proceedings are an important basis for the adversarial grounds on which the indictment is based, which is subsequently brought before the court.

The right to a fair trial as a consolidated constitutional concept has its dynamics thereto, which is based on the incidental concept, on the basis of which the precedent activities of the European Court of Human Rights, the Czech Republic Constitutional Court and the Czech Republic Supreme Court are defined by criminal procedure safeguards, limitation of state intervention, as well as the concept of inhuman or anti-human treatment. Such precedent right is set to *a priori* protect the individuals. Therefore, its subject-matter not only becomes the legality for the use of procedural measures, but also the search for a fair balance between the general interests of society and the requirements for the individual's protection of fundamental rights and freedoms. This is also the essence of the principle of proportionality in conjunction with the principle of protection effectiveness. Therefore, the principle of legality is understood more broadly in terms of constitutional law, rather than just strictly formalistically.

First of all, the issue of the legitimate goals regarding state intervention arises. In this sense, in connection with the legal, and permitted interventions, it is necessary regarding fundamental human rights to assess whether they are in line with the so-called legitimate objectives of state interventions. The best example can be given regarding the right to respect with regard to private and family life, where protecting health and morals is the overriding legitimate objective of society.[25] In relation to the constitutional guarantees of freedom of thought, conscience or religion, we will emphasise the legitimate objective for the protection of public order and the protection of the rights and freedoms of others.[26]

It is also important that the system ensures sufficient guarantees against arbitrary application of law. This is particularly the case for those measures of criminal proceedings where the system leaves a certain discretion to the state authorities (pro-

[25] European Court for Human Rights judgement on January 17th, 2006 in the case of Elli Poluhas Dodsbo v. Sweden, no. 61564/00, or the European Court for Human Rights judgement on December 7th, 2004 in the case of Mentzen also known as Mencena v. Latvia, no. 71074/01.

[26] European Court for Human Rights judgement in the case of Gil and others v. Turkey (2010), the European Court for Human Rights judgement on February 22nd, 1989 in the case of Barfod v. Denmark, no. 11508/85.

cedural discretion), and "*it is therefore necessary to clearly define the extent of the discretion conferred on the relevant authorities and how to exercise this discretion*".[27] This is related to the broader concept of legality principle regarding the used law measures, which not only requires that the procedural intervention with a fundamental human right be sufficiently legally based (the so-called formal legality), but that it is of high quality from the legal doctrine point of view with regard to the function (the legal level requirement), and also that it includes guarantees against arbitrary application of law (the so-called immanence of anti-arbitrability).[28]

Even the mere legal restriction of certain constitutionally guaranteed rights must not jeopardise their essence.[29] Another issue regarding the broader (constitutionally incidental) concept of legality is the related defined form of the concept of inhuman and degrading treatment. In this sense, inadequate (disproportionate) use of legal measures can evoke feelings of fear, anxiety, inferiority, coercion, mental blackmail, etc. There is a constitutional guarantee of possible refusal to give testimony but conducted interrogation and operative coercive circumstances and the facts presented by police may as a result discourage exercising this right. It is also necessary to object to the potentially possible purpose-made, and therefore unlawful, shift of the burden of proof. The issue of duration of the trial is a constant "risk" to the application of justice. Given that the right to a fair trial absorbs also the constitutional-audit assessment of the pre-trial phase of criminal proceedings (i.e. pre-trial criminal proceedings). Here, too, the presumption of innocence, the defence preparation, the prohibition of self-blame, but also the non-restriction of witness interrogations, must be observed. The right to a reasonable detention duration must also be deduced.

The actual trial in criminal matters is, of course, constitutionally based directly on a list of constitutionally guaranteed procedural principles. However, the concept of the right to a fair trial associates the concept of a "fair decision" by precedence with some "complementary" safeguards that extend the "demands" on its quality. In order not to interfere in the independent tactics of conducting the trial (meaning: any general criminal court), the Czech Republic Constitutional Court case law (this time), focuses on the quality of decision-making and court decisions.

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[27] See the cases of Samon Uitgevers v. the Netherlands or Rotaru v. Romania, commentary in: KMEC, Jiří et al. *Evropská úmluva o lidských právech. Komentář. (European Convention on Human Rights. Commentary.)* Op. cit. p. 109. Reference is made in this way for the example of authorised interception of telephones, where it is required to set limits for these interceptions, i.e. to define: whose telephones may be intercepted, in which cases and for how long (so in: Kruslin v. France).

[28] See the Judgment of the European Court for Human Rights of 25 March 1983 in the case of Silver v. United Kingdom, no. 7052/75, 5947/72, Judgment of the European Court for Human Rights in the case al-Nashiv v. Bulgaria, etc.

[29] Commentary to Article 4 of the Charter (the so-called limits of fundamental rights restrictions), preferably Wagnerová, in. WAGNEROVÁ, Eliška et al. *Listina základnch práv a svobod. Komentář.* (*Charter of Fundamental Rights and Freedoms. Commentary).* Op. cit. p. 131 clauses 34 to 42.

Therefore, above all, the principle of free evaluation of evidence must not be an expression of arbitrariness, i.e. the evidential requirements must be exhaustively described, logically and factually justified (cf. for example, one of the first judgments III. ÚS 464/99).[30] The court is also obliged to justify the failure to bring evidence (see III. ÚS / 99), and if it fails to do so, this is the so-called omitted evidence (I. ÚS 413/02). From the viewpoint of second-instance court decision-making, the disposition is determined in the sense that the court's legal opinion of the first instance must not be in extreme conflict with the factual findings in this case by the court (cf. III. ÚS 74/02).[31] The right to a fair trial operates at general level (when reviewing the constitutionality of the rules) as well as at an individual level (i.e. in proceedings on constitutional complaints). However, the concept of this dissertation focuses for cause on decision-making on constitutional complaints, i.e. on situations where *"..... incorrect application of law by a court extends into the sphere of fundamental rights and freedoms"*.[32]

9. Conclusion

The constitutional approach to criminal procedure clearly enriches the concept of the rule of law and simultaneously makes it a judicial-procedural application model. As a consequence, the concept of applied justice has a dynamic nature, therefore not only developing legislation but also its own constitutional safeguards. Therefore, it is usefully able to interpret one of the key constitutional principles intensively, namely the permission to restrict fundamental human rights, but only on the basis of specific legal provisions. For that reason, it can be concluded that even legal limitation as a possible restriction of the essence of fundamental human rights has its limits. And these are linked to the operative (specific) application of criminal-procedural instruments and their necessary proportionality in the substance of the matter.

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[30] This actually is already implied from Section 125 of the Criminal Procedure Code.

[31] It would also be possible to refer to the principle of subsidiarity, where a "confidential witness" may be used only when the protection cannot be ensured otherwise (Judgment of the Constitutional Court of the Czech Republic of 22. October 2001, file no. IV. ÚS 37/01).

[32] In this sense, commentary to the Judgment of the Constitutional Court of the Czech Republic, file no. III. ÚS 269/99 in. KOSAŘ, David et al. *Ústavní právo. Casebook. (Constitutional law. Casebook.)* Praha: Wolters Kluwer, 2014, ISBN 978-80-7478-664-8, p. 552 et seq.

Providing cooperation through data retention in the context of respect for the individual's fundamental rights and freedoms

Jana Tlapák Navrátilová

Faculty of Law, Charles University

novakoja@prf.cuni.cz

The following chapter addresses a newly introduced institute in the Criminal Procedure, which permits law enforcement authorities to order third parties to cooperate in securing data in a computer system. The institute is examined primarily from the perspective of possible violations of the right to privacy. Part of the chapter compares the new institute with the provisions concerning surveillance of persons and items. Attention is also paid to the Slovak legislation. Further, the institute is addressed in relation to a lawyer's duties. The chapter concludes with evaluation of the unauthorized interventions to the fundamental rights and freedoms of individuals.

1. Introduction

A provision of Section 7b has been inserted to the Criminal Procedure Code by the Government amendment No. 287/2018 Coll. effective from 1st February 2019. It provides law enforcement authorities with a possibility to require a person holding data or having control over data stored in a computer system or any other information medium to keep such data unchanged for the time specified in an order and take necessary measures to prevent disclosure of the data retention order. The owner of data is also forbidden to allow other persons to access such data. Thus obligation of active participation of third parties in criminal proceedings was subordinated to the institute of cooperation. According to the institute in question, necessary cooperation consists not only of providing information or submitting specific data, but it is required by third parties to secure and store data that can subsequently be used in criminal proceedings to prove crime, while at the same time the cooperating party is forbidden to disclose the activity of the law enforcement authorities. Cooperation provided under Section 7b of the Criminal Procedure Code may thus take the form of executing criminal proceedings by persons not otherwise involved in proceedings by which, at the same time, rights and freedoms of individuals related to the stored data are significantly affected. In practice, by imposing the obligation to provide assistance under Section 7b of the CPC, law enforcement authorities require obligated entities to engage in action that interfere with fundamental

rights and freedoms of individuals in a manner reserved exclusively to public authorities in accordance with the principle of enumerated powers. At the same time, an order to provide such an assistance and the possibility of imposing such an obligation shall not be subject to any authorization regime under which the legitimacy and merits of the intervention would be supervised by a court. Therefore, constitutional conformity of the provision of cooperation under Section 7b is undoubtedly questionable.

2. The core of Section 7b CPC and the purpose of its adoption

Before its adoption, Act No. 287/2018 Coll. amending the Criminal Code and the Code of Criminal Procedure with effect from 1st February 2019 was widely discussed in the Czech Republic in relation to introducing the crime of obstruction of justice, however the changes regarding the institute of cooperation remained unnoticed in the legislative process, and the provision in question was approved as originally drafted. Consequently, the provision of Section 7b of the CPC constitutes a major intervention not only as for the concept of interception of wire and surveillance of persons and items, but above all, without setting the necessary limits, it interferes with the fundamental rights of individuals whose data is to be stored.

According to the newly adopted Section 7b CPC:

„*(1) Where it is necessary to prevent loss, destruction or alteration of data relevant to criminal proceedings which are stored in a computer system or on a data medium, a person who holds or controls such data may be ordered to retain it unchanged for the period specified in the order and to took necessary measures to prevent disclosure of the data retention order.*

(2) Where necessary to prevent the continuation or recurrence of a criminal offence, a person who holds or controls the data stored in a computer system or on an information medium may be ordered to prevent other persons from having access to such data.

(3) Issuing of an order under subsection 1 or 2 shall be authorized by the President of a Chamber, or by a public prosecutor or a police authority in case of pre-trial proceedings. The police authority needs a prior consent of the public prosecutor to issue such an order; without a prior consent, the order can be issued by a police authority only if the prior consent cannot be obtained and the case cannot be delayed.

(4) An order referred to in subsection 1 or 2 shall indicate data to which the order applies, the reason for which the data shall be stored or not to be accessed, and the time for which such data should be stored or accessed. The time shall not be longer than 90 days. An order must include instructions as for the consequences of not following the order.

(5) The authority which issued an order pursuant to subsection 1 or 2 shall immediately deliver it to the person concerned.“

The adopted provision extends general provisions on cooperation by laying down specific legal prerequisites, both in relation to the range of obliged persons and in relation to the manner of providing cooperation. Thus, a person in a specific position, i.e. a person who holds relevant data or controls such data, is obliged to provide cooperation, regardless of what entitles such a person to hold the data. Most often, it will be entities providing public communication networks or providing electronic communication services, but it can be anyone. Even a private person whose phone stores data such as photos, mail communication, or nowadays quite common private communication through various chat applications (WhatsApp, Messenger, WeChat, etc.). Similarly, it can be, for example, a security agency providing property protection, which, as a part of execution of a contract, monitors private facilities and has records of entries and movement of persons and their behaviour within the guarded areas, as well as the interior of a house, connected to the centralized security desk.[1] The form of cooperation does not consist in providing information or immediate transfer of data relevant to criminal proceedings to the law enforcement authorities, but in an activity of the obliged entity replacing the activity of law enforcement authorities, **i.e. handling data in the required manner, providing their storage and security without user's or owner's knowledge and will**. Thus, an entity that does not belong among law enforcement authorities acts in a way which interferes with the rights of individuals, persons to whom the data concerns or owners of the data, and consequently performs an act of criminal proceedings, which, in the future, can be used to prove criminal activity of specific persons. In other words, public-law pretension to the rights of individuals in criminal proceedings is passed on private-law entities, which are intended to replace the activities of law enforcement authorities. In a specific case, it may happen that the user has realized his will to delete a harmful communication, but despite of that fact the server administrator had not removed the communication because, in pursuance of obliged cooperation, the data must be kept unchanged, moreover in a way that does not let the user know it remained stored and therefore the communication had not been deleted.

In case of telecommunication traffic, the nature of data is changed without knowledge and will of the subscriber, to data stored on an information medium whose protection regime may be weakened. Regardless of the fact that the Code of Criminal Procedure does not even address the issue of costs associated with such an activity (which in the case of large amounts of data stored up to 90 days may not be negligible at all). It appears that under the guise of cooperation, the law enforcement authorities delegate their activities to third parties in a manner which does not respect the fundamental rights and freedoms of individuals.

[1] For example the application MyJablotron which allows remote monitoring was used by more than 100,000 users in 2016 (data available from: https://www.jablotron.com/en/aboutron-company/#jablotron-v-cislach, as of 11. 3. 2020) The data from their security devices, including cameras, are stored in the cloud storage of Jablotron, i.e. even this data in relation to any user of the service may be of interest to the police, and therefore their preservation and subsequent extradition may be requested only on the basis of a request for cooperation.

According to the Explanatory Memorandum to Act No. 287/2018 Coll., legislation enabling rapid storage of data in a computer system or on a medium for the purpose of criminal proceedings is needed in order to ensure full implementation of Articles 16 and 29 of the Convention on Cybercrime of 23rd November 2001 (No 104/2013 Coll. i.t.) requiring expedited data retention for the purpose of their subsequent seizure in criminal proceedings. As the Memorandum observes: *"the current legislation of the Czech Republic does not specifically provide for preliminary data retention. In practice, the general provision of Section 8 of the Criminal Code on cooperation (if the criminal proceedings are being conducted in the Czech Republic) or general police procedures are used for that purpose. It, therefore, seems to be desirable to lay down a specific provision in the Criminal Procedure Code, regulating the possibility of preliminary storage of data for the purpose of criminal proceedings, which would clearly allow for such a procedure, and, consequently, to regulate cooperation in given cases with other States."*

The Czech Republic is bound by the Convention on Cybercrime. However, the way in which the obligations of the Convention have been implemented is not the most appropriate and corresponds neither to its objective nor to the requirements imposed on the signatory States. The primary purpose of the Convention on Cybercrime is to combat cybercrime and to facilitate the detection, investigation and prosecution of criminal offences classifiable as cybercrime. At the same time, the Convention also defines the conduct that should be punished as a criminal offence. Implementing the commitments regarding procedures aimed at combating cybercrime, it directly regulates the institutes which make it possible, one of them being accelerated retention of data stored in the computer system. Thus, the institute should not be of a general nature used in any kind of crime, but the requirement of adopting such a measure applies "only" to cybercrime, i.e. acts which the Convention deems punishable as criminal offences also under national law. The Convention on Cybercrime therefore does not require measures to be taken to store any computer data but only specific computer data and traffic information, and the nature of such measures must be subject to the regime under Articles 14 and 15 of the Convention which limit the scope of such measures. These restrictions apply not only to the type of a specific crime but also to the type of evidence which should be used to its detection and demonstration.

In Article 15 (1), the Convention on Cybercrime directly states that the procedures provided for in the Convention are to be implemented and used exclusively in a certain manner: *"Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure."* The method of implementation chosen by the Czech legislature clearly does not correspond to this obligation, since this procedure applies to all criminal offences and without prior authorization of an act affecting the fundamental rights of individuals by the court.

3. Provision of cooperation under Section 7b CPC vs. the right to privacy

Depending on the nature of data, the requirement to retain computer data potentially interferes with privacy of the individuals affected by the data in a very intensive manner. Despite this, the legal regulation of Section 7b CPC does not fulfil the necessary prerequisites for the legal interference with the right to privacy at all.

The right to privacy is a right protected at the constitutional level, and that not only by the Charter but also by international treaties, in particular Articles 7, 10 and 13 of the Charter of Fundamental Rights and Freedoms, Article 7 of the Charter of Fundamental Rights of the European Union, and last but not least also by Article 8 of European Convention for the Protection of Human Rights and Freedoms. Under Article 8 (1) of the Convention, everyone has "*the right to respect for his private and family life, his home and his correspondence*." However, interference with the right to privacy is possible only in pursuit of one of the legitimate objectives exhaustively defined in Article 8 (2) of the Convention and at the same time fulfils other prerequisites for the implementation of such an intervention. There is no doubt that detecting and clarifying crime and detecting its perpetrators will be a legitimate objective classifiable as the State interest in protecting security and preventing crime. However, in order to achieve the desired goal at the expense of interfering privacy, it is necessary to meet the requirements of legality, proportionality and subsidiarity, and it does not suffice that a certain procedure of law enforcement authorities is allowed by law (legality). The fulfilment of these prerequisites should be provided by the legislation itself, however the decisive part will always lay in the interpretation and application in specific cases.

The concept of privacy is interpreted broadly. In interpreting the individual attributes of the right to privacy, the ECHR case-law plays an important role, and its interpretation should not be set aside when the institute is applied by national institutions in criminal proceedings which interfere with the right to privacy. In its case-law, the ECHR has also repeatedly emphasized the need for adequate and effective safeguards against abuse of national legislation allowing for privacy interference.[2] It is beyond doubt that the Czech Republic did not accept the trends arising from the ECHR's decision-making practice when introducing Section 7b of the CPC. The adopted legal regulation of Section 7b of the CPC does not respect limits of the legitimacy of interfering with the right to privacy. It makes no distinction between types of data stored and crimes of various natures to determine the most appropriate procedure, and does not at all take into account using more considerate means to achieve the desired goal. On the contrary, the very classification of the provisions

[2] See, for example, the rulings of the European Court of Human Rights in Khan v. The United Kingdom of 12th May 2000, Liberty and others v. The United Kingdom of 1st July 2008, Roman Zakharov v. Russia of 4th December 2015, Szabó and Vissy v. Hungary on 12th January 2016, Dragojević v. Croatia on 25th October 2016 and others.

of Section 7b of the CPC under "cooperation" marginalizes possible intensity of the restriction of rights of an individual and undermines the very concept of legislation regulating acts of the authorities involved in criminal proceedings related to investigation or securing evidence. For instance, in the Slovak Republic, international obligations regarding data retention were implemented in the re-codification of the Criminal Procedure Code in 2005. The retention and publication of computerized data is regulated by Section 90 of the Code of Criminal Procedure and systematically integrated in the title regulating detention of persons and objects. Thus, in the Slovak Republic, data retention is not classified under the cooperation of third parties, and the regulation of retention regime is stricter than in the Czech Republic (an order cannot be issued by a police authority, but only by a public prosecutor or court). Despite this, even more stringent approach of the Slovak legislation cannot be considered sufficiently respectful for the right to privacy, its interpretation can also be ambiguous and its way of implementation is criticized by the legal professionals.[3]

4. Provision of cooperation under Section 7b CPC vs. eavesdropping

The systematic classification of the obligation to keep data under the cooperation of third parties also violates the concept of legislation regulating the interception of telecommunication traffic. Telecommunication traffic is a form of the electronic communication, so the provision of cooperation may also apply to data relating to the electronic communication. Wiretapping, or more precisely the legal regulation of wiretapping, is itself subject to a long-term criticism of the legal professionals. The theory and application practice have already established conclusions distinguishing orders under Section 88 and 88a of the Criminal Procedure Code by time (the order under Section 88 regulates the content of communication after issuing the order, while the order under Section 88a regulates the content of communication in the past). The newly adopted provision of Section 7b CPC and its application breach the concept, as it allows for computer data (including data relating to communication content) to be frozen without a court's authorization, and to keep it and subsequently make it available to law enforcement authorities without having complied with the legal license for breaching the right to privacy. The procedure by which law enforcement authorities request stored data is also questionable.

[3] ABELOVSKÝ, T. Zaistenie elektronického dôkazu vo svetle rekodifikácie trestného poriadku. *Revue pro právo a technologie*. Year 6, issue 11(2015), p. 35; RAMPÁŠEK, M. Uchovanie a vydanie počítačových údajov v trestnom konaní. *Bulletin slovenskej advokácie*. Vol. 19, issue 5 (2013), p. 21–26.

In practice, the order of action taken by law enforcement authorities is as follows:

1. The law enforcement authority (the president of the chamber, pre-trial prosecutor or police authority with the consent of the prosecutor, or even without his prior consent in matters which cannot be delayed) shall issue an order for data retention under Section 7b CPC, stating the range of data and for how long it should be kept.

2. Based on the order, the person who holds or is in control of the data shall be obliged to preserve the data for a specified period of time, and shall also inform about having done so the law enforcement authority who has issued the order.

3. The law enforcement authority will then consider whether the stored data needs to be retrieved for the purposes of criminal proceedings. If so, it proceeds (in my opinion, totally inappropriately) as per Section 158d of the CPC regulating the procedure of surveillance persons and items. Based on the court's decision to permit monitoring as per Section 158d (1), (3) of the Criminal Code, the retained data are requested by the Department of Specialized Activities of the Police Presidium of the Czech Republic, while the day of obtaining does not belong to the period for which monitoring as per Section 158d of the CPC is permitted. Data is stored first and only subsequently, most often after a few days, the monitoring is approved.

Such a practice is used by law enforcement authorities despite the fact that surveillance can be only permitted for the future and no other interpretation can be concluded from the wording of Section 158d (3) of the CPC, but that a court's authorization must precede interference with inviolability of residence, letters or investigation of the contents of other documents and records kept in privacy by use of technical means and records kept in private using technical means, expressly stating that it can only be "done with the prior permission of a judge". The unrestrained interference with the right to privacy by police procedures can also be illustrated by my own experience. In connection with the analysed procedure of police authorities, I had met with a request for data retention in which the Department of Specialized Activities of the Police Presidium of the Czech Republic used following wording: "*we are requesting an act of surveillance persons and items as per Section 158d (1.3) of the Criminal Code under the conditions of Section 88 (1) of CPC, namely to deliver the contents of the e-mail box from the backup created as per the order.…*", in other words, an entity, which is not a law enforcement authority, was asked to perform a surveillance act! The adopted regulation and its practical application is thus in clear contradiction to the legal regulation of wiretapping, according to which only data on telecommunication traffic can be requested retrospectively, and not the content of communication based on a court order. Following the above-mentioned procedure, law enforcement authorities acquire "frozen" data on the basis of a court's approval to monitor persons and objects under Section 158d (1) and (3) of the CPC retrospectively, however such data consists not only of data on telecommunication traffic but also of its content, i.e. they also include data only requestable by an order issued as per Section 88 of the CPC in a legitimate process. The thing is that Section 88 of CPC sets limits to the legitimacy of the interference into the privacy of individuals

not only as for time, i.e. an interception order must precede its actual implementation, but also by defining a range of criminal offences in which such interference is justified by public interest and fulfils the condition of proportionality. At the same time, it defines the necessity of a proper justification of the need for wiretapping by impossibility to clarify relevant circumstances in any other way not related to such significant interference with individual rights (subsidiarity). Finally, it also sets out other necessary conditions not only for issuing an order but also for the actual wiretapping.

In the Czech Republic, legislation regulating surveillance is subject to long-term criticism, especially in relation to the production of video and audio recordings for monitoring persons and things as per Section 158d (1, 2) CPC (also referred to as spatial eavesdropping). Respect of law enforcement authorities towards requirements for interference with the right to privacy is considered insufficient by the legal professionals.[4] However, requesting data from a computer system operator under Section 7b CPC goes even further. In practice, it serves as means of obtaining communication content and data on telecommunications traffic for the time preceding the time for which monitoring is allowed even without a surveillance order as per Section 88 or Section 88a of the CPC. Thus, law enforcement authorities get hold of the content of communication and data on telecommunication traffic outside the legal regulation of interference in the Criminal Procedure Code, which is unacceptable.

At the same time, by circumventing the statutory interference regime when requiring cooperation as per Section 7b of the Criminal Procedure Code, law enforcement authorities run the risk of inapplicability of in such a way obtained information and facts as evidence in criminal proceedings.[5] Zaoralová points out the inapplicability of data acquired in a situation where the law stipulates a different regime of their collection, e.g. in collecting information as per Section 158d CPC, while the provisions on interception should be taken into account instead; the argument being that the provisions on interception are more specialized than the legal regulation of surveillance of persons and items under Section 158 of the Criminal Code.[6] The same reasoning can be used in assessing the proportion to the knowledge obtained on the basis of cooperation as per Section 7b of the CPP, which, given the nature of the data, should have been obtained by applying the provisions on interception.

[4] Cf JELÍNEK, J. K chybějící právní úpravě tzv. prostorového odposlechu v trestním řádu. Bulletin advokacie, 2018, (7–8), pp. 13–19. ISSN 1210-6348.

[5] For the inapplicability of unlawful evidence, see: GALOVCOVA, I. *Využiteľnosť informácii z neúčinných dôkazov*. In Ústavně právní limity trestného práva: k odkazu Jiřího Herczega. Praha: Leges, 2019, 198 p. ISBN 978-80-7502-349-0, p. 111.

[6] ZAORALOVÁ, P. *Procesní použitelnost důkazů v trestním řízení a její meze*. Praha: Leges, 2018, p. 252.

5. Conclusion

Cooperation provided to law enforcement authorities by third parties as per Section 7b of the CPC, i.e. cooperation consisting in storing data in a computer system and on an information medium is an institute with more than problematic legislation. The practice of ensuring data relevant to the criminal proceedings by third parties, and not exclusively by law enforcement authorities, while ignoring the impact of such activities on the fundamental rights of individuals whose data is seized, is undesirable in a democracy with the rule of law. The conflict between interests in detecting crime and punishing its perpetrators on the one hand, and respecting the fundamental rights of individuals on the other, cannot be approached with unilateral solutions that do not respect the fundamental constitutional requirements and prerequisites for limiting guaranteed rights. From the point of view of the police authority, the easiest way to data may in practice mean that it is not applicable in further course of criminal proceedings, and that not only for disrespecting the regulation of interference with an individual's fundamental rights by public authorities, but also for circumventing relevant procedures of obtaining certain types of data, i.e. circumventing special procedures of interception to obtain data in the content of telecommunication traffic. The procedure used by the law enforcement authorities in requesting cooperation under Section 7b of the Criminal Procedure Code and the subsequent request for delivering data as per Section 158d (1), 3 of the Criminal Procedure Code described in the previous chapter, completely circumvents the legal regulation of telecommunication traffic data seizure.

Failure to observe legal procedures and conditions of conducting interception and their circumvention with reference to the provisions of Section 7b of the CPC in conjunction with Section 158d (1), (3) of the CPC is an unlawful interference with the fundamental rights guaranteed to individuals, especially with the right to privacy. Shortcomings in the legislation on the provision of cooperation through data retention may also be reflected in other areas of fundamental rights. Criticism of legal professionals as for the provisions of Section 7b CPC also focuses on possible violations of the rights of defence, or more precisely the right to legal assistance in general, one of the important attributes of which is the confidentiality of the client/attorney relationship reflected also in the duty of confidentiality. In his detailed analyses of the provisions of Section 7b of the CP in relation to the lawyer's obligations, Sokol points out not only possible technical limitations of the lawyer's ability to meet the required demand for cooperation under Section 7b of the CP, but also a possible conflict of such activity with a lawyer's obligations. The fact that the application of the current legislation of the institute of cooperation under Section 7b of the CPC may lead to its abuse in an inadmissible manner requires not only the attention of legal professionals, but above all the legislator's intervention. It calls for legislative changes respecting the fundamental rights of individuals on the one hand, which, on the other hand, should still allow law en-

forcement authorities to preserve and retrieve computer data related to specifically defined cybercrime. However, the procedure should certainly not include activities of persons not involved in criminal proceedings carried out solely on the basis of cooperation.

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On the issues of spatial eavesdropping in criminal proceedings and the missing legislation in the Czech Code of Criminal Procedure[1]

Jiří Jelínek

Faculty of Law, Charles University

jelinek@prf.cuni.cz

This chapter deals with the lack of legal regulation of the so-called spatial eavesdropping (in an apartment, in a restaurant, at school, at work etc.) in the Czech Code of Criminal Procedure. Spatial eavesdropping is, actually, used in practice and the facts ascertained because of it serve as evidence in criminal proceedings. The author strongly recommends incorporating an explicit legal regulation of spatial eavesdropping in the Czech Code of Criminal Procedure. He presents the requirements for such regulation.

The second part of this article is devoted to the right of the eavesdropped person to request, after the interception is finished, the Supreme Court to review the legality of the interception order and the lawfulness of the interception itself. The author considers that it would be desirable to introduce the possibility of an unlawfully eavesdropped person to challenge, by means of an extraordinary remedy, decisions as to their substance arising from the unlawful interception.

1. Introduction

The topic of this chapter is the issue of the so-called spatial eavesdropping in the Czech criminal proceedings and the missing legislation in the Czech Code of Criminal Procedure. This is an extremely topical and extremely socially serious issue, as is always the case in criminal proceedings when it comes to serious interference in the civil rights of an individual guaranteed by the Charter of Fundamental Rights and Freedoms[2] and international documents, in particular the European Convention on Human Rights.[3] In this case the rights in question are the right to privacy,

[1] The chapter belongs to the publication output falling within the programme of the institutional support of science at Charles University Q 02 called "Publicization of Law in European and International Comparison."

[2] The right to the inviolability of privacy and the right to secrecy of documents and records can be found incorporated in a strict sense in the Czech constitutional order, namely in Article 10 (1), (2) and Article 13 of the Charter. Article 7 (1) of the Charter stresses that inviolability of the person and of privacy is guaranteed and the limitations can only be imposed in cases specified by law.

[3] An infringement of the right to respect for private and family life within the meaning of Article 8 (1) of the Convention is particularly relevant here. This right also includes the protec-

the right to secrecy of messages communicated by telephone and other similar devices, the right to protection of his or her personal and family life.

When we refer to spatial eavesdropping, what we mean is the gathering of secret information by special technical means and devices which record images, sound, precise movement and activities of monitored persons in real time and space. Simply put, it is not about wiretapping telecommunications in a broad sense[4] or acquiring data about telecommunications traffic that has already taken place,[5] but about monitoring images and sound in privacy, in a house or an apartment, on the street, in the countryside, in the workplace, in a vehicle, in a restaurant, and just anywhere where it is technically possible.

Spatial eavesdropping is more invasive than wiretapping telephones. It interferes with the freedoms of a much larger number of people than just the person whose telephone is wiretapped. With spatial eavesdropping one can record everything and everyone. It is unexpected, unforeseen, unpredictable and it is also more efficient and versatile, as technical means for spatial surveillance continue to improve.

The term "spatial eavesdropping" is not defined anywhere in the Czech Code of Criminal Procedure. Defining the term is left up to legal literature and legal practice.

The application practice, in the absence of explicit legal regulation on spatial eavesdropping, "gets help" in its legalization by applying provisions in Section 158d (2) and 158d (3) of the Criminal Code because applying provisions in Section 88 and 88a (i.e. two classic cases of interception and recording of telecommunications regulated in the Criminal Code) would be unconstitutional.

Such a procedure is not only problematic from the point of view of legality, but the practical application of Section 158d (3) of the Criminal Code also brings a long series of theoretical and, in particular, practical problems, as is evidenced best by contradictory case law in the case of David Rath whose prosecution took many years.[6]

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tion of correspondence (i.e. the protection of correspondence while ensuring the safety of the conveyed letters and documents). However, the Convention, in Article 8 (2), permits interference of a public authority in this right when it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[4] Conf. Section 88 of the Czech Code of Criminal Procedure – Interception and Recording of Telecommunications.

[5] Conf. Section 88a of the Czech Code of Criminal Procedure.

[6] Conf. a judgement of the Regional Court in Prague of 7th April 2015, file no. 4 T 21/2013, an order of the High Court in Prague of 17th October 2016, file no. 6 To 106/2015, a judgement of the Supreme Court of 7th June 2017, file no. 6 TZ 3/2017 and a complaint (ref. no. MSP-87 /2017-03D- SPZ/1) for violation of the law filed by the Minister of Justice against the accused, Mr D. Rath. The relevant provisions of the Czech Code of Criminal Procedure are as follows: Section 158d (2): Surveillance, during which shall any audio, visual or other records be made, may be performed solely on the basis of a written authorization of a public prosecutor.

Both cases of the provisions of Section 158d (2) and (3) of the Code of Criminal Procedure serve only to ascertain operational information. This stems from their systematic placement in the Criminal Code, i.e. in Part Two ("Pre-trial Proceedings"), Chapter Nine ("Procedure Prior to Initiation of Criminal Prosecution") under the heading "Surveillance of Persons and Items." They are operative-search means pursuing a different objective than the verification of facts relevant to criminal proceedings.

Spatial eavesdropping represents a specific means of proof by which it is possible to acquire and seize facts and things important for criminal proceedings. Detecting and the taking of evidence of the most serious types of crime through classical means is ineffective and in some cases even impossible.

Effective and efficient detection and evidence-taking of the most serious types of crime requires the use of specific and at the same time strongly offensive means, which allow to gain objective and undistorted information about criminal behaviour.

Uncovering of specific types of crime (corruption, drug crime, solicitation, trafficking in human beings, illegal pornography distribution, money laundering, organized crime, terrorism) is in practice considerably difficult, causing disproportion between the public interest in its sanctioning and respect for the right to a fair trial.

It is necessary to realize that while spatial eavesdropping is an effective, offensive and efficient means of detecting serious types of crime, it is also an offensive means, which strongly affects the area of fundamental human rights, for which the European Court of Human Rights has also drawn attention to in its case-law. The use of interception and recording of telecommunications, i.e. not only the so-called spatial eavesdropping, should therefore always be carefully considered in criminal proceedings. In any case, it is necessary to ensure that the basic principles of criminal proceedings are respected and that the necessary legal conditions for the use of interception and recording of telecommunications are met. If these conditions are met, information, things or documents obtained in criminal proceedings are thus granted the nature of legal evidence.[7]

It is always necessary to consider carefully whether the use of such offensive means in a given situation is imperative, whether the set objective cannot be achieved by other means, as the interception and recording of telecommunications undoubtedly leads to interference with the privacy of persons. Similarly, the legal conditions set out in the regulations of criminal procedure must be met, while respecting the principles of a fair trial.

Section 158d (3): If the surveillance should interfere with inviolability of residence, inviolability of letters or if it should investigate the contents of other documents and records kept in privacy by use of technical means, it can be performed solely on the basis of a prior authorization of a judge.When entering residences, only steps related to placement of technical devices may be made.

[7] ZÁHORA, Jozef et al. *Dokazovanie v trestnom konaní*. Praha: Leges, 2013, p. 251.

Thus, the public's interest in detecting and fighting crime cannot be given precedence over the interest in the protection of innocent persons (albeit in the position of suspects) and the equally important constitutional principles of a democratic rule of law.

The current discourse on eavesdropping (i.e. not only spatial) in the Czech Republic focuses on questions such as which type of eavesdropping can be considered legal evidence and which cannot, who can carry out the eavesdropping (law enforcement authorities, private persons, intelligence services), whether the evidence from spatial eavesdropping taken in a dwelling can also serve as evidence against defendants in other criminal cases,[8] whether the information obtained by the eavesdropping in one type of proceeding (criminal) can be used in another type of proceeding (administrative), how to deal with the arbitrariness in issuing eavesdropping orders in situations where it is only up to the evidence carried out to establish whether the eavesdropped person has committed a crime, how to deal with the absence or insufficient justification of the eavesdropping order.

If the explicit regulation of spatial eavesdropping is missing in the Code of Criminal Procedure, then it is difficult to assess the legitimacy of the so-called spatial eavesdropping.

In the Czech Republic, the case of a High Court judge in Prague has recently attracted attention. The judge was accused of alleged crime in which "spatial eavesdropping" played an important role, in particular the spatial eavesdropping installed in the judge's administrative office.

The fact that the eavesdropping was carried out in the court building and the administrative room (office) assigned to this judge adds to the curiosity of this case. The eavesdropping undoubtedly also captured facts and information during the Senate's deliberation on a judgement which goes against the provisions of the Code of Criminal Procedure, particularly Section 127 (1) which stipulates that only judges, associate judges and a court reporter may be present at the deliberation and vote, no one else. Also, the content of the deliberations must remain confidential. Section 242 (2) of the Criminal Code on a closed session of the court can also be applicable here. The eavesdropping captured facts not only from the hearing that may have been the subject of the operational interest of the police in a certain case, but also an undetected (and probably undetectable) number of other hearings that may have had nothing to do with that one certain case. What's more, it happened repeatedly and no one knows what is the fate of the other records, irrelevant for the one certain case.

The fact that it took place in the court building, which has restricted access to designated persons and the building is guarded by the Judicial Guard and that it

[8] See Advokát Rampula: Státní zástupce Lata chtěl chybnou změnou stanoviska k použitelnosti odposlechů pomoci obžalobě. Česká justice. [online]. 2019 [cit. 2019-04-06]. Available at: https://www.ceska-justice.cz/2019/04/advokat-rampula-statni-zastupce-lata-chtel-chybnou-zmenou-stanoviska-k-pouzitelnosti-odposlechu-pomoci-obzalobe.

happened without the knowledge of the court officials adds extraordinary seriousness to the case.[9]

2. What is most important now – the explicit legislation in the Czech Code of Criminal Procedure

In my view, the conditions for the implementation and subsequent use of the facts acquired via spatial eavesdropping must be expressly provided for in the Code of Criminal Procedure. The upcoming recodification of the Czech criminal proceedings is a good opportunity for this. Chystaná rekodifikace českého trestního procesu je k tomu vhodnou příležitostí. I shall remind you of what I suggested and recommended earlier.[10]

1. The legal regulation of the so-called spatial eavesdropping is missing in the Czech Code of Criminal Procedure, although spatial eavesdropping in its implementation and consequences constitutes serious interference with constitutionally protected civil rights. This interference is not only comparable to cases of the interception and recording of telecommunications explicitly regulated in the Czech Code of Criminal Procedure (Sections 88 and 88a),[11] but it may be even more se-

[9] Cf. e.g. Zásah na Vrchním soudu v Praze: kdo je soudce Ivan Elischer, kterého zadrželi detektivové? iRozhlas. [online]. 2018 [cit. 2018-03-22]. Available at: https://www.irozhlas.cz/zpravy-domov/ivan-elischer-vrchni-soud-v-praze-zasah-policie-obvineni_1803131331_hm; or: Povolil soud odposlechy v kanceláři Vrchního soudu? Policie i státní zástupci mlčí. Česká justice. [online]. 2018 [cit. 2018-03-22]. Available at: http://www.ceska-justice.cz/2018/03/povolil-soud-odposlechy-kancelari-vrchniho-soudu-policie-i-statni-zastupci-mlci/. From open journalistic sources we can also learn that in the case the police, while keeping the judge's office under surveillance, illegally manipulated with his office computer, from which it obtained several protocols on voting in criminal matters, which the accused judge as chairman of the senate presided over. The police "evaluated" the course of the voting of the members of the senate. This evaluation was put in a file created for this criminal case and one copy of the evaluation was also received by a public prosecutor of the Municipal Public Prosecutor's Office in Prague, who is required by law to supervise legality in pre-trial proceedings. At present, this information, which should according to law remain secret and inaccessible, is contained in a file and therefore is accessible to other people who have access to the file, see: Policie si v případu soudce Elischera měla nezákonně opatřit protokoly o hlasování soudců. Česká justice. [online]. 2018 [cit. 2018-05-01]. Available at: http://www.ceska-justice.cz/2018/04/policie-si-v-pripadu-soudce-elischera-mela-nezakonne-opatrit-protokoly-o-hlasovani-soudcu. These facts suggest that the whole case will be viewed from different aspects, i.e. spatial eavesdropping, criminal law and criminal procedures. At the time of writing this article (March 2020), the case has not been finally concluded yet.

[10] JELÍNEK, Jiří. K chybějící právní úpravě tzv. prostorového odposlechu v trestním řádu. *Bulletin advokacie* no. 7–8/2018, p. 17–18.

[11] I leave aside the requirement that the legal and terminological modification of both "classical" types of eavesdropping should correspond to the development and terminology in the field of communication and information technologies – I consider it justified and self-evident. Cf. in this regard, in 2015 the Supreme Public Prosecutor's Office drafted a legislative proposal to change the institutes concerned, including a change in their name. Thus, for example, the "Or-

rious, which is related to its nature (it is unexpected, unforeseen, unpredictable) and the technical means for spatial eavesdropping that are being continuously improved making the method more efficient and versatile. The legal regulation of spatial eavesdropping is necessary so that spatial eavesdropping cannot be used as a normal (common) way of obtaining information in criminal proceedings and that the lack of explicit legislation does not lead to the belief and practice that it is possible to eavesdrop on anyone and anywhere. The absence of specific rules for its implementation in the Czech Code of Criminal Procedure is an essential shortcoming of the current legislation.

The application practice of pre-trial proceedings does not naturally percieve the absence of explicit legislation as a problem, since it considers that the so-called spatial eavesdropping is sufficiently covered by the provisions of Section 158d (2) and (3) of the Criminal Code. Such an opinion is wrong. Both provisions are operative-search means pursuing another objective (acquisition, processing, distribution of criminalistically relevant information). Moreover, the practical application of Section 158d (3) of the Criminal Code brings a long series of theoretical and, in particular, practical problems, as evidenced by the contradictory case-law in the case of the accused David Rath whose prosecution took many years.[12]

2. The existing non-exhaustive list of evidence referred to in Section 89 (2) of the Criminal Code will need to be complemented by a new type of evidence – spatial eavesdropping. In the future, however, it will be desirable, in my view, to introduce an exhaustive list of evidence instead of the existing non-exhaustive list (currently under Section 89 (2) of the Criminal Code). Legislative practice, nevertheless, has resisted the introduction of such an exhaustive list for many years. The proposed legal regulation would undoubtedly be more appropriate in terms of defence, or more precisely, in terms of legal certainty. If it was enshrined in law that evidence can only be obtained from certain sources, which are listed exhaustively by the law, this would fulfill the requirement of legality, legal certainty and protection of the rights of natural and legal persons. We can argue that the current state of affairs, where some evidence (such as scent traces, polygraph, DNA analysis, micro-traces) is not covered by criminal law at all and judicial case-law must rule on their applicability in criminal proceedings, is extremely problematic.[13]

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der for ascertaining data on telecommunication traffic" was supposed to be changed to "Order for ascertaining data on electronic messages", see RŮŽIČKA, Michal. K aplikačním problémům týkajícím se odposlechu, zjišťování údajů z telekomunikačního provozu a sledování osob a věcí v České republice. In ZÁHORA, Josef (ed.): *Teoretické a praktické problémy využívania informačno-technických prostriedkov v trestnom konaní*, Praha: Leges, 2017, p. 99.

[12] Conf. a judgement of the Regional Court in Prague, file no. 4 T 21/2013, an order of the High Court in Prague, file no. 6 To 106/2015, a judgement of the Supreme Court, file no. 6 TZ 3/2017 and a complaint (ref. no. MSP-87/2017-03D- SPZ/1) for violation of the law filed by the Minister of Justice against the accused, Mr D. Rath.

[13] This is a long-standing problem which was pointed out in literature already in 1982 by Bohumil Repík who also strongly argued: The reasons for only a non-exhaustive enumeration of evidence in the Code of Criminal Procedure, unless it is merely a confusion between the concepts

3. It would be appropriate to add the actual regulation of spatial eavesdropping in the Code of Criminal Procedure to the two existing conventional types of eavesdropping (Interception and Recording of Telecommunications under Section 88 and 88a), namely in Chapter Five of the Code of Criminal Procedure, which regulates Evidence, not in Chapter Four, which deals with the Seizure of Persons, Items and Other Assets, as is the case under current legislation. Indeed, even the most recent edition of the academic textbook on criminal law considers the interception and recording of telecommunications and surveillance as an exception to the rule that individual means of proof are placed in the fifth chapter of the Code of Criminal Procedure, entitled "Evidence."[14] After all, information obtained through the use of information technology is also considered to be a type of evidence. Legislation in a separate subdivision dealing with all three types of interception of communications seems to be desirable. The provision on spatial eavesdropping would first define it in the introductory paragraph.

4. The legal regulation of spatial eavesdropping should be consistent with both cases of classical interception of communications (Sections 88 and 88a of the Code). In particular, the law should specify types of seriousness of criminal offences for which spatial eavesdropping is possible to be used. So far, there is no such regulation in Section 158d of the Code. I would recommend the same regulation as in Section 88 of the Code, i.e. to limit spatial eavesdropping to cases of intentional criminal offences for which the law provides for a maximum term of imprisonment of at least eight years or a criminal offence for which the Czech Republic is bound by an international treaty to prosecute. By restricting spatial eavesdropping only to cases of serious crimes or crimes and their prosecution to which we are bound by international legal instruments, it would be necessary, as prerequisite for intervention, to express the subsidiarity of the use of these means and the nature of *last resort* among the means available to public authorities in carrying out their tasks (cf. Article 8 (2) of the Convention). The law should also explicitly consider the scope of persons who can be eavesdropped on.

5. In connection with the above-mentioned case of the High Court judge Mr. Elischer, where the so-called spatial eavesdropping was installed not only in his administrative office but also in the court's consultation rooms and could thus cap-

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of evidence and means of proof, as is sometimes argued, can rest solely on the concern that an exhaustive enumeration of types of evidence might hinder the flexible and practical application of new scientific knowledge in the process of evidence-taking. However, this concern is unfounded. Past experience has shown that the law changes more frequently and faster than the types of evidence used in practice for decades, if not centuries. In addition, the enumeration represents the penetration of new scientific procedures into the process of evidence-taking. This is also evidenced by the fact that within the framework of the Code of Criminal Procedure, new knowledge of modern sciences is continuously applied in criminalistics, see REPÍK, Bohumil. Procesní důsledky porušení předpisů o dokazování v trestním řízení. *Bulletin advokacie*, no. 7–8/1982, p. 133.

[14] JELÍNEK, Jiří et al. *Trestní právo procesní. 5. aktualizované vydání podle stavu k 1. 3. 2018*. Praha: Leges, 2018, p. 397.

ture information that were not related to the inspected case, the question arises as to whether spatial eavesdropping should not have been excluded in the so-called court consultation rooms, or in other places where the senate meetings were held. Such a regulation would obviously favour professional secrecy over the need to establish the circumstances necessary for criminal proceedings.

The idea that spatial eavesdropping should be ruled out in the above-mentioned cases provokes an angry reaction from the authorities involved in pre-trial proceedings. For example, the argument is criticized in the sense that "*such a regulation would, in particular, provide space for unpunishable spread of the so-called cabinet justice.*"[15]

First of all, the term "cabinet justice" is not used in criminal proceedings as a synonym for a meeting of several people in a room or an office, but as a sign for violating the principle of a legal judge, which is one of the attributes of a fair trial. This is, however, not the case.

But apart from that, using the *ad absurdum* argument, we would conclude that we do not need to maintain the secrecy of the senate's vote and deliberations at all. This secrecy is unnecessary, exhausted and outdated. We could make the deliberations and court voting so public that it could literally be reported live. Instead of fictitious and staged television programs, which are usually completely contrary to the applicable law, broadcast in the afternoon, we would include a regular live session of the criminal senate of the Municipal Court in Prague (for example). Maybe then even the ratings of such programs would be higher.

6. In the future legislation, spatial eavesdropping would be authorized only by the president of the senate and in the preliminary proceedings by a judge, which is currently missing in Section 158d (2) of the Code of Criminal Procedure (here the authorization is given by the public prosecutor). With the consent of the eavesdropped person, it would be possible to carry out the eavesdropping even without the order of authorized persons.

7. Spatial eavesdropping could only be allowed for a certain period of time, with the duty of the police authority to continually evaluate the reasons that led to the use of spatial eavesdropping. The extension of spatial eavesdropping should only be possible, again, for a fixed period of time and under more stringent conditions. Continuous evaluation of the results and course of spatial eavesdropping is necessary because it constitutes a significant breach of the right to the protection of privacy. The court is also obliged, by its own duty, to provide such evidence, which proves the legitimacy of the ordered eavesdropping or rather authorized eavesdropping, unless the public prosecution authorities already do so within the scope of their duties.[16]

[15] ŠČERBOVÁ, Veronika. Zamyšlení nad skutečně aktuálními problémy právní úpravy tzv. prostorových odposlechů, *Státní zastupitelství* no. 4/2019. ISSN 1214-3758. [online]. 2019 [cit. 2020-03-10]. Available at: https://www.noveaspi.cz.

[16] JELÍNEK, Milan. Ústavní meze prostorových odposlechů ke sledování osob a věcí podle § 158d trestního řádu, *Bulletin advokacie*, 2010, no. 5, p. 32.

8. In the Code of Criminal Procedure, it would be urgently desirable to explicitly state the basic principles of inadmissibility of evidence. Such general legal regulation would also apply to cases of inadmissible spatial eavesdropping. Such a solution would certainly be more appropriate than if these criteria were included directly in the provision on spatial eavesdropping.

9. The new legislation should also uniformly regulate the further handling of the records of eavesdropping, including the conditions under which the records may be destroyed.

10. A separate question, common for all cases on interception and recording of communications, is the obligation to inform the eavesdropped person, which should also be uniform for all three cases of eavesdropping. In particular, however, the law should redefine the consequences of illegal eavesdropping. In view of the principles of the rule of law, it is necessary that the person affected by the interception of communications be informed of such interference with fundamental rights and freedoms and, in the event of the illegality of eavesdropping, be able to defend oneself, i.e. legally challenge it. This should also apply to cases of spatial eavesdropping.

This requirement is addressed by the provisions of Section 88 (8) and (9) of the Code of Criminal Procedure, according to which the public prosecutor or Police authority, by whose decision was the case finally and effectively concluded, and in trial proceedings the presiding judge of the senate of the court of the first instance after final and effective conclusion of the case, shall inform the person about the ordered interception and recording of telecommunication traffic, if this person is known. The information shall contain identification of the court that issued the order for interception and recording of telecommunication traffic, duration of the interception and the date of its termination. A part of the information is an instruction about the right to lodge a petition to the Supreme Court to review the legality of the order for interception and recording of telecommunication traffic within six months from the day of delivering this information. The presiding judge of the court of first instance shall give the information immediately after concluding the case, the public prosecutor by whose decision was the case effectively concluded immediately after expiration of the time period for review of his decision by the Supreme Public Prosecutor according to Section 174a, and the Police authority, by whose decision was the case finally and effectively concluded, immediately after expiration of the time period for review of its decision by the public prosecutor according to Section 174 (2) e).

The information shall the presiding judge, public prosecutor or Police authority not give in proceedings on a crime, for which the law prescribes a sentence of imprisonment with the upper limit of at least eight years, committed by an organized group, in proceedings on a criminal offence committed for the benefit of an organized criminal group, in proceedings on a criminal offence of participation in an organized criminal group (Section 361 of the Criminal Code), in proceedings on a criminal offence of participation in a terrorist group (Section 312 of the Criminal

Code) or if more persons participated in commission of the criminal offence and in relation to at least one of them was the criminal proceedings not yet finally and effectively concluded, or if a criminal proceeding is conducted against the person, to whom is the information to be given, or if giving such information could thwart the purpose of the criminal proceedings, or if it could imperil the security of State, life, health or rights and liberties of persons.

At first glance, it is not clear whether the above-mentioned exemption from giving information in the case of criminal proceedings to which the law provides for a maximum term of imprisonment of at least eight years applies only if the offence was committed by an organized group or whether these are two separate reasons for which the law enforcement authorities are not obliged to inform the eavesdropped persons. Given that all other cases are linked to cases of collaborative crime, but also because of the need to interpret more favourably to the circle of authorized persons, it must be concluded that these are cumulative conditions (criminal proceedings with the maximum term of imprisonment of at least eight years with the crime being committed by an organized group), which must be fulfilled so that the law enforcement authorities are not obliged to inform the person concerned.

According to Section 88 (8) of the Code of Criminal Procedure, it is therefore possible for the eavesdropped person to file a petition to review the order for the interception and recording of communications to the Supreme Court.

The proceedings before the Supreme Court are then regulated in the provisions of Sections 314l to 314n of the Code of Criminal Procedure. The court decides on the petition in closed session and if it finds that the law has been violated, it declares the violation of law by a resolution. An appeal against such decision is inadmissible. Violation of the law may occur when the order for the interception and recording of telecommunication traffic is issued, when the interception and recording of telecommunications is executed or when the interception and recording of telecommunications is both issued and executed.

On the basis of which facts the Supreme Court decides on the legality of the interception of communications can be viewed as problematic. In order to be able to assess responsibly whether the interception of communications was lawful in a particular case, the court would first have to have at its disposal the information available to the judge who ordered the interception, including information of an operational nature which cannot be provided.

However, for the entitled person, i.e. the eavesdropped person, the statement of the Supreme Court opens the possibility of potential compensation for non-material damage. On the other hand, the statement has no effect on the legal force of the judicial decision arising from the case in which the interception and recording of telecommunication traffic took place. Such legislation can hardly be described as correct.

There are two options for the future legislation.

The first option is for the entitled person whose rights have been violated by unlawful interception and recording of telecommunication traffic to file a qualified

complaint to the Minister of Justice in the event of such a statement by the Supreme Court. In such a situation, the Minister of Justice would be obliged to file a complaint for violation of the law, under which the previous final decision on the merits of the case could be annulled by the Supreme Court. Renewal of proceedings or appeals, taking into account their conditions (limited to certain decisions, time limits for filing, range of irregularities that may be objected, etc.), do not constitute an effective means for the entitled person by which the final decision on the merits of the case with regards to the unlawfulness of the eavesdropping could be annulled.

If the above-mentioned solution were not appropriate, for example because it would interfere with the exclusive competence of the Minister of Justice to lodge this so-called official remedy, there is another option, namely that in cases where the Supreme Court declared the illegality of ordered or executed interception of communications, the complaint for violation of the law could be filed by the President of the Supreme Court. This option has its logic in that the President of the Supreme Court could, but would not have to, file this extraordinary remedy, and therefore could consider whether the effective protection of the rights of the eavesdropped person or the interest in a fair decision in a particular criminal case would require that such an extraordinary remedy be brought in. At the same time, an extraordinary legal remedy would be preceded by expert evaluation and selection of those cases in which possible violation of the rights of the eavesdropped person would not affect the correctness and legality of the subsequent substantive decision.[17]

3. Conclusion

The implementation of spatial eavesdropping as a means of obtaining information necessary for criminal proceedings and as a possibility to use the records of eavesdropping as evidence in criminal proceedings is not explicitly regulated in the Czech Code of Criminal Procedure. It seems urgently desirable to change this situation and to lay down explicit legislation in the Code of Criminal Procedure. The gravity of this issue and its timeliness require the legislators to address the issue before adopting an overall new legislation on criminal procedural law. I do not agree that this issue should be postponed until the forthcoming recodification of the criminal procedural law, as it has been suggested by Michal Růžička, probably because of the fear that it could lead to a reduction of the instruments to eliminate crime.[18]

[17] JELÍNEK, Jiří. Odposlech a záznam telekomunikačního provozu v České republice – záruky přezkoumání zákonnosti příkazu k odposlechu. In ZÁHORA, Jozef. (ed.): *Teoretické a praktické problémy využívania informačno-technických prostriedkov v trestnom konaní.* Praha: Leges, 2017, p. 43.

[18] RŮŽIČKA, Michal. Op. cit. p. 117.

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Adversariality – Reality or Chimera of Czech Criminal Proceedings?

JUDr. Vladimír Pelc, Ph.D.

Faculty of Law, Charles University

pelc@prf.cuni.cz

Adversarial principle or adversariality, in the Czech doctrine named as "princip kontradiktornosti" or "kontradiktornost" (from the Latin *contra dicere,* i.e. to speak against), can, as an equivalent of a foreign expression (words) "contradiction", assume different meanings. In the Czech language, contradiction is mainly used to express a statement that is inherently contradictory, an announcement whose falsity can be proved by the application of the rules of formal logic.[1] It is therefore a pure contradiction (oxymoron) and the original Latin meaning, which expresses in particular the polemical character of adversariality, is receding into the background. The legal language, as well, uses contradiction in the meaning of oxymoron, when weighing the truthfulness and value of a statement as the so-called *contradictio in adiecto* (contradiction in an adjective). In the concept of adversariality within the legal environment, however, in addition to the first meaning, the second meaning is also increasing its importance, emphasizing the importance of discussion, in which there is a conflict of different (legal) arguments.

The traditional authoritative way of legal finding in a democratic state under the rule of law is court proceedings. Then, the fact that, within the course of court proceedings, there are conflicting different statements, their interpretation and the submission of various legal arguments that lead to the opposite conclusions, is in line with the general social preconception. There is a legal dispute. According to this idea, a legal conflict, which is a controversy (debate) over what happened, but also how to legally qualify it, shall be fairly settled by an independent court.

The goal of this chapter is to consider whether there is such a legitimate conflict of views and arguments in the Czech criminal proceedings or whether the connection of the adversarial Czech criminal proceedings is rather contradictory at its basis (*contradictio in se*).

[1] See Kraus, J. et al. Nový akademický slovník cizích slov. Prague: Academia, 2006, p. 436.

1. Adversariality in Czech Criminal Law Doctrine

Until recently, the adversarial principle was only associated with contentious civil proceedings,[2] which is sometimes referred to synonymously as adversarial proceedings (contentious).

Although there is a relatively extensive case-law of the European Court of Human Rights from the last century on the issue of the adversarial nature of criminal proceedings, the adversariality is still not sufficiently elaborated in the Czech criminal doctrine. Certain, not insignificant, references to the adversarial nature of criminal proceedings can be found in the case-law of the Constitutional Court, which connects adversariality even with the detention proceedings (No. 215/2013 of the Collection of Decisions of the Constitutional Court[3]) and, for example, with the recovery proceedings (No. 175/2016 of the Collection of Decisions of the Constitutional Court[4]). Thus, ordinary courts do not often work with the concept of adversariality.

Even in the commentary and textbook literature, there cannot be found many references to adversariality, some textbooks do not mention it at all. If they do, it is primarily in connection with other principles and rules (particularly the rights of the defense, the principle of equality of parties, etc.) and not separately. Exceptionally, some works speak of the criminal proceedings as adversarial proceedings,[5] thus, adversariality is identified as an attribute of the right to a fair trial within the meaning of the Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the essence of which is to ensure procedural equality between the parties in proceedings based on the principle of equality of arms, allowing a criminal matter to be tried under conditions that do not place the counterparty in a disadvantageous position.[6] In the past, there were made some good points to adversariality by Sokol, who dealt with adversariality in the judicial phase of the criminal proceedings.[7]

However, the attention of doctrine has recently been increasingly turning to adversariality. In 2018, Galovcová published an excellent chapter on adversariality and in that essay she focused on adversariality in relation to the issue of evidence and even brought findings from the French literature to the Czech discourse.[8] In

[2] Cf. Stavinová, J. Entry „Zásada kontradiktornosti" In: Hendrych, D. et al. Právnický slovník. 3rd Edition. Prague: C. H. Beck, 2009.

[3] Judgment of the Constitutional Court from 11th December 2013, File No. I. ÚS 2208/13, published under No. 215/2013 of the Collections of Decisions of the Constitutional Court.

[4] Judgment of the Constitutional Court form 14th September 2016, File No. I. ÚS 1377/16, published under No. 175/2016 of the Collection of Decisions of Constitutional Court.

[5] See Jelínek, J. et al. Trestní právo procesní. 5th Edition. Prague: Leges, 2018, pp. 48 and 161.

[6] *Ibidem*, p. 365.

[7] Sokol, T. Kontradiktornost v soudní fázi trestního řízení. In: Právní rádce No. 10/2003, p. 59.

[8] Galovcová, I. Uplatnenie zásady kontradiktórnosti pri dokazovaní v trestnom konaní. In: Jelínek, J. Dokazování v trestním řízení v kontextu práva na spravedlivý proces. 1st Edition. Prague: Leges, 2018, pp. 128–138.

a certain sense, this essay is followed by Mulák with his detailed article on adversariality from the last year.[9] He points to the different perceptions of adversariality in relation to the criminal proceedings and, correctly, advocates the concept of adversariality, which is based on the doctrine developed by the European Court of Human Rights. Nevertheless, in my view, the general approach to adversariality is, ultimately, too narrow, when it emphasizes the right to be informed about evidence in all possible aspects and the right to express his view to evidence, but partly leaves aside the issue of the *adversarial debate (controversy)* on the alleged facts and the circumstances which have come to light, and the legal opinions on them and on the procedural steps relating in particular to taking of evidence.

As the initial treatise on adversariality in the Czech doctrine, I still consider text of Repík in his classic work named European Convention on Human Rights and Criminal Law from 2001.[10] It was he who brought to the Czech doctrine the perception of adversariality as a general principle of law, which *arises from natural law* and is inherent to any judicial process, not only civil contentious procedure. He even referred to the adversarial principle as *the most important principle of the judicial process*, because it is impossible to speak of a judicial process without adversariality, since its essence is the confrontation of two parties. The prerequisite for this is that each party to the process has to have an opportunity to comment on the proposals of the other party, deny them, comment on arguments of the other party and oppose them, put forward proposals and present its own arguments. Very nice is the quotation that Repík uses: *"adversarial debate is a royal road in searching for the truth"*. More important than the above quoted argument is this one: *"there is no justice without the adversarial debate and the sooner it occurs, the greater is the chance to objectivity"*.

Therefore, it can be concluded that although adversariality is still the subject of debates, its comprehensive (monographic) elaboration in the Czech literature is still missing. First of all, given the upcoming recodification of criminal procedural law, it would need to be elaborated in its entirety, i.e. not only to perceive it in relation to various rights of defense and individual procedural acts that are part of the taking of evidence. but also as *a real conflict between the prosecution and defense* before an independent court. Thus, adversariality is not merely a principle of criminal proceedings, which is more or less related to other principles of criminal proceedings with which it is balanced, but it must be understood as *a principle of criminal proceedings*. In relation to the proceedings before the court (i.e. at the stage of trial and appeal proceedings), it constitutes *the very essence* of this stage of the criminal proceedings.

[9] Mulák, J. Zásada kontradiktornosti v trestním řízení – evropské souvislosti a česká reflexe. In: Bulletin advokacie No. 3/2019, p. 33 et seq. This article is based upon the author's dissertation on the basic principles of criminal procedure. Mulák, J. Základní zásady trestního řízení a právo na spravedlivý proces. Prague: Leges, 2019, 337 pp.

[10] Repík, B. Evropská úmluva o lidských právech a trestní právo. Prague: Orac, 2001, esp. p. 147 et seq.

2. Enshrinement of Adversariality in Code of Criminal Procedure

The current Code of Criminal Procedure does not define the adversarial principle anywhere. As mentioned by Galovcová, the Czech Code of Criminal Procedure does not even include the requirement to examine evidence in an adversarial manner and to make an assessment of adversariality in relation to the execution of these procedural acts is possible only on the basis of legal regulation of individual legal institutes.[11] Adversariality could be *de lege ferenda* regulated within the basic principles of the criminal proceedings at the beginning of the Code of Criminal Procedure. The basis and principles of the new Code of Criminal Procedure available on the website of the Ministry of Justice[12] and the previously published numbered paragraphs of the forthcoming framework of the new Code of Criminal Procedure[13] provides for a definition of adversariality within the basic principles of criminal proceedings. The formulations in both documents are diametrically different, which in some way indicates the development of work on the recodification of the Code of Criminal Procedure.

The background and principles of the new Code of Criminal Procedure on page 20 define the adversarial principle as follows:

Adversarial principle

(1) In the taking of evidence in the proceedings before the court, the parties have the right to take evidence under the same conditions. Evidence shall be taken by the party that offered this evidence. If evidence is offered by more than one party, the president of the chamber shall decide which of these parties shall take the evidence.

(2) If evidence is taken by a court, the parties have the right to express their opinions on the evidence presented. If evidence is taken by means of examination of a witness or an expert, each party has the right to put questions under the same conditions.

(3) The accused must not be convicted solely or predominantly on the basis of evidence on which he or she has not had an opportunity to express his or her view, or, if it is the case of examination of a witness, to put questions to him.

On contrary, the draft version of the framework of the new Code of Criminal Procedure enshrines the adversariality principle as follows:

[11] Cf. Galovcová, I. Uplatnenie zásady kontradiktórnosti pri dokazovaní v trestnom konaní. In: Jelínek, J. Dokazování v trestním řízení v kontextu práva na spravedlivý proces. 1st Edition. Prague: Leges, 2018, pp. 128–138.

[12] Available online on 11th March 2020 here: http://portal.justice.cz/Justice2/MS/ms.aspx?j=33&o=23&k=4980&d=281460.

[13] Available online on 11th March 2020 here: https://tpp.justice.cz.

§ 8

Adversariality of procedure

(1) The accused has the right, in the manner and under the conditions prescribed in the law regulating criminal proceedings, to be have knowledge of the case against him or her, the criminal offence of which he or she has been accused and evidence gathered by the law enforcement authorities in pre-trial procedure, both in favor of and against him or her, and to express his or her view on them.

(2) Regarding the source of evidence or means of proof, parties have the right to seek, present, propose them to be taken or to take them in accordance with the law, to put questions to the persons interviewed and to express their views on the evidence taken and the evidence resulting therefrom.

I believe that the draft version of the framework of the new Code of Criminal Procedure is a significant step back from the previous version contained in the principles and background of the new Code of Criminal Procedure, since it returns to the archaic (very narrow) concept of adversariality. where there is no formulation of the principle of equality, both in general and in relation to the examination of a witness and an expert. The deletion of the right to personal taking of evidence proposed by a party is likely to be related to the abandonment of the idea directed towards strengthening the activity of parties to the proceedings so that the trial court will not in principle be the subject, which will take evidence but actually stand above the parties as an independent arbitrator only moderating activities of the parties relating to evidence that will not, in principle, be replaced by activities of the court. For reasons of prudence, there was even a deletion of the generally respected rule according to which the accused must not be sentenced on the basis of evidence on which he had no opportunity to express his or her view and on the basis of an examination which was not adversarial. Given that the draft version of the framework of the new Code of Criminal Procedure does not even express in its fundamental principles the right to defense, it cannot be expected that the future Code of Criminal Procedure will strengthen the adversarial elements of criminal proceedings.

In my view, however, none of the above mentioned concepts corresponds to the importance of adversariality in the criminal proceedings. Given that adversariality is not a mere rule, but a principle that constitutes the very essence of criminal proceedings, I think that it should be expressed within the very purpose of the Code of Criminal Procedure. If the legislator maintains the practice of recent years and decides not to express the purpose of the law,[14] the adversariality of criminal proceedings should be expressed in its introductory provision, e.g. within a de-

[14] The purpose of the law is not even expressed in comprehension criminal legislation which meant a certain revolution in criminal law. Cf. Act No. 45/2013 Coll., on Victims of Crime and on Amendments to Certain Acts (Act on Victims of Crime) or Act No. 418/2011 Coll., on Criminal Liability of Legal Entities and Proceedings against Them.

scription of the subject matter of the legislation. I agree with Galovcová[15] that one of the possible inspirations could be the French legislation, which states right in the introductory provisions that *criminal proceedings must be fair and adversarial and must respect the rights of the parties* (cf. Article I, first sentence of the French Code of Criminal Procedure).

3. Adversariality from Initiation of Criminal Prosecution until Conclusion of Trial

The pre-trial investigation and the prosecution phase begins with a resolution on initiation of criminal prosecution against which the complaint is admissible. This resolution is typically issued by a police authority and the complaint is usually decided on by the supervising public prosecutor. Since the complaint can be submitted for incorrectness of the operative part of the resolution or for breach of the provisions on proceedings which took place prior to the resolution [cf. Section 145 (1) of the Code of Criminal Procedure] and at the same time may be justified by new facts and evidence [Section 145 (2) of the Code of Criminal Procedure], the adversariality is maintained with respect to the stage of criminal proceedings in which the public prosecutor does not have the status of a party [cf. Section 12 (6) of the Code of Criminal Procedure]. The possibility of contesting the incorrectness of the operative part of the resolution is very wide, it may consist in illegality or lack of justification. A resolution can be vitiated both by errors of law or fact.[16] In doing so, however, from the point of view of adversariality and in the sense of a dispute or controversy with the conclusions of the police authority or public prosecutor, the anticipated activity of the defense (i.e. the accused and his or her lawyer) in the pre-trial ends. Although the accused may, through his or her lawyer, make submissions, by which the accused will express his or her views e.g. on the course of taking of evidence so far, nevertheless, the police authority and the public prosecutor are not obliged to respond to the arguments contained therein. The completion of the investigation is also connected only with the possibility to study the files and make proposals to supplement evidence [see Section 166 (1) of the Code of Criminal Procedure]. Pursuant to Section 166 (3) of the Code of Criminal Procedure, after the completion of investigation, the police authority submits to the public prosecutor a file with a recommendation for indictment or a recommendation for a decision pursuant to Sections 171 to 173 (referral of the case to other authority, termination and suspension of criminal prosecution), Section 307 (conditional discontinuance of criminal prosecution) and Section 309 of the Code of Criminal Procedure (settlement).

[15] Galovcová, I. Uplatnenie zásady kontradiktórnosti pri dokazovaní v trestnom konaní. In: Jelínek, J. Dokazování v trestním řízení v kontextu práva na spravedlivý proces. 1st Edition. Prague: Leges, 2018, pp. 128–138.

[16] Cf. Jelínek, J. et al. Trestní právo procesní. 5th Edition. Prague: Leges, 2018, p. 665.

The fact that current public prosecutors practically do not participate in taking of evidence does not contribute to an objective consideration of criminal cases. In the pre-trial, the public prosecutor, although he plays the active role in the pre-trial (*dominus litis*), does not usually take every piece of evidence. The public prosecutor participates in the investigative measures only sporadically and very rarely, even though the Code of Criminal Procedure gives him the possibility, during the pre-trial stage, to undertake practically every operation or measure to which the police authority is entitled.

The key decision that transfers a criminal case from the pre-trial stage to the trial stage, is the indictment. Unfortunately, *it does not have to respond to the previous defense of the accused*. Thus, even if the accused has made himself or through his or her lawyer a submission in which he or she claimed e.g. that the facts of which he or she is accused are not correctly legally qualified or that the factual assessment of taking of evidence so far is incorrect, the public prosecutor is not obliged to deal with such a defense, since the Code of Criminal Procedure does not impose such an obligation on him. This is a fundamental shortcoming that has in the past been criticized.[17]

It is noteworthy that this legislation was adopted by the democratic legislator, the original socialist legislation from 1961 required the indictment to contain both a description of factual situation with an indication of evidence on which it is based and the defense of the accused and the prosecutor's opinion on it with an indication of the facts, upon which the prosecutor considered the defense to be refuted or irrelevant, as well as the legal considerations that have been followed by the public prosecutor in assessing the facts according to the relevant provisions of the law [Section 177 (d) of the Code of Criminal Procedure in the version in force until 31st December 1993].

This was changed by the amendment to the Code of Criminal Procedure implemented by Act No. 292/1993 Coll., i.e. with effect from 1st January 1994.[18] The explanatory memorandum to this amendment states in its general part: "*In line with the prevailing tendency in European legal systems, the adversariality of the proceedings in the process of taking of evidence is strengthened and the principle of equality of the parties to the court proceedings is more taken into account.*" It is true that this amendment introduced a greater involvement of courts in the pre-trial stage, which in itself creates a prerequisite for fulfillment of the ideal of adversariality, but by deletion of the requirement to deal with the previous defense, adversariality was weakened.

Then, the explanatory memorandum does not state anything interesting about the specific amendment to Section 177 of the Code of Criminal Procedure: "*In ac-*

[17] See e.g. Vantuch, P. Odůvodnění obžaloby bez argumentů obhajoby a rovnost stran. In: Bulletin advokacie No. 4/2009, p. 19 et seq.

[18] Act No. 292/1993 Coll., Amending and Supplementing Act No. 141/1961 Coll., On Criminal Procedure (Code of Criminal Procedure), Act No. 21/1992 Coll., On Banks, and Act No. 335/1991 Sb., On Courts and Judges.

cordance with the strengthening of the importance of the judicial stage in criminal proceedings, the content of the indictment is simplified. The requirements to state reasons in the indictment shall be modified so as to indicate primarily evidence upon which the arguments are based and evidence which the public prosecutor proposes to take in court proceedings."

Nor the draft version of the new Code of Criminal Procedure (cf. Section x32) counts with the response to the defense of the accused.[19]

The absence of any adversarial legal argumentation at the stage of issuing an indictment is also not rectified by the legal regulation of the subsequent optional stage of criminal proceedings, which is a preliminary hearing.

I am of the opinion that many courts of first instance have not yet become sufficiently accustomed to a preliminary hearing. Moreover, after the indictment has been issued, the Code of Criminal Procedure does not stipulate any interaction with the defense, which could be *de lege ferenda* ensured e.g. by sending the text of the indictment by the court to the accused and his lawyer before the examination of the indictment with the possibility to express a view and make proposals within a specific period.

In the practice of the Czech courts, a preliminary hearing is very rare. There are even known cases in which the indictment is not examined within the meaning of Section 181 (1) and Section 186 of the Code of Criminal Procedure. Any confrontation between the prosecution and the defense before a trial is completely impossible by such a procedure, and even the "non-examinable" indictment can thus come to the trial.

In practice, there are quite often situations in which, in less serious cases, a penalty order is automatically issued after the indictment has been lodged. In my opinion, not only because the focus of the evidence is currently in the trial, the condition for issuing a penalty order, consisting in well-established facts of the case by evidence collected [cf. Section 314e (1) of the Code of Criminal Procedure], is rarely met. In such a situation, it is not possible to obtain an examination of the indictment, because after the penalty order has been lifted due to the objection filed in good time, the case must be referred to the trial [see Section 314g (2) of the Code of Criminal Procedure], the Code of Criminal Procedure does not provide for another procedure. Even in more serious cases, it is rare to find a procedure in which the case is referred to the trial within a few days after the indictment has been issued, and it is therefore clear that the indictment has not been properly examined, because it necessarily requires to study the entire file.

In the trial, the adversarial principle should essentially be enforced *without any restriction*. In this regard, however, the Czech legislation still has considerable reserves. Although the accused has the opportunity to express his or her views on the indictment as the first person, he or she must do so during his interrogation. The Czech criminal procedure does not know anything like an opening statement,

[19] Available online on 11th March 2020 here: https://tpp.justice.cz.

in which the accused could say whether he or she feels guilty or not guilty, and he could also express his or her view on the indictment, including through his or her lawyer. Given that the public prosecutor issues the indictment at the beginning of the trial, the defense should also be able to influence the opinion of an independent court, which, in addition, then performs taking of evidence. In my opinion, this is particularly true in our concept of criminal proceedings, in which taking of evidence in the trial is mostly in the hands of a court.

Also during the course of taking of evidence in the trial, the controversy between parties to the criminal proceedings is limited and cannot be fully applied because of a lack of an explicitly enshrined possibility for the accused to express his or her view on the evidence taken through his lawyer. Some single judges and presidents of the chamber allow such a possibility, but some do not. In any case, criminal defense attorneys are not normally directly asked to express his or her view on the evidence taken, and if they wish to do so, they are placed in a difficult position in which they must react promptly and deftly so as not to disrupt the course of the trial and simultaneously not to miss the opportunity to express his or her view on the evidence taken, so they can affect the subjective beliefs of a judge. One part of the solution of this bad practice can be an agreement between the accused and his or her lawyer in advance that the accused requests a consultation with his or her lawyer before expressing a view on the evidence taken. However, such a solution is not ideal and does not solve all aspects of this problem. Inexperienced criminal defense attorneys (even due to this unsatisfactory legal regulation) sometimes, in an attempt to comment on the examination of a witness or other accused, tend to put suggestive or capricious questions when asking questions during the examination.

In my legal practice as a criminal defense attorney, when I consider it appropriate, I try to express my views on the evidence taken during the trial, which sometimes (usually when an enlightened public prosecutor participates in the trial) initiates a discussion on the issue of evidentiary situation or legal classification of the established facts. I usually do so either immediately after the evidence has been taken or at the end of a given sitting of the court, if the trial takes place in a few days. If such statements made by a criminal defense attorney are brief and concise, there is, in my view, no reason why a single judge or a president of the chamber should not allow them, on the contrary, it is an appropriate procedure especially with regard to the principle of substantive truth, the purpose of which is to establish the facts without reasonable doubt.

The only possibility provided by law for a qualified presentation of the arguments of the defense to the factual and legal situation (from the substantive and procedural point of view) are closing statements since the defendant‘s lawyer also has the right to a closing statement. In addition to a complaint against the resolution on initiation of criminal prosecution, this is the only genuine adversarial element in the course of which there can be a real and comprehensive polemic with the prosecution. Unfortunately, this happens shortly after the end of taking of evidence, i.e. often at the moment when the court already made decision on the outcome of the

proceedings. Assessing this in complete isolation, adversariality of criminal proceedings is fully implemented only in two moments of criminal prosecution, at the very beginning of the criminal prosecution (possibility to file a complaint against the resolution on initiation of criminal prosecution), when taking of evidence is still at its early stage, and at the end of the trial (in closing statements), when the decision is often already made.

4. Application of Adversariality in Detention Procedure

The principle of adversariality should undoubtedly also apply when taking a decision on detention. Detention is an institute that is an obvious exception to the principle of the presumption of innocence, because, in the same way as in the case of an unconditional sentence of imprisonment, detention affects a person who has not yet been finally convicted. From this point of view, adversariality should therefore be fully done in order to minimize the risk of various injustices that are difficult to remedy.

The Czech legal regulation of taking a decision on detention has undergone a substantial change, especially as a result of the positive influence of the Constitutional Court's decisions,[20] by amendment to the Code of Criminal Procedure through the Act No. 459/2011 Coll. with effect from 1 January 2012. The amendment in question regulated in some detail taking place of a detention hearing, within which a decision on detention is obligatory taken, except in cases where a decision on detention is taken within a trial or a public hearing.

In its practice, the Constitutional Court has also given an opinion in the sense that the adversarial principle is also applied in detention procedures, where it is reflected in two ways. Firstly, it is the duty of the law enforcement authorities participating in taking a decision on detention to present to the accused all the specific findings of fact substantiating a justification of the detention. Secondly, it is reflected in the right of the accused and his or her lawyer to express a view on all investigations and possible evidence taken, to call into question factual allegations and evidence and to refute them with other allegations and possible evidence in rebuttal in a similar way as in a trial (No. 215/2013 of the Collection of Decisions of the Constitutional Court[21]). In my opinion, such an approach is completely correct and corresponds to the recent development of the Czech criminal law, which relatively recently established more detailed provisions for the so-called detention

[20] Cf. esp. decision of the Constitutional Court from 19th February 2004, File No. III. ÚS 544/03, published under No. 6/2004 of the Collections of Decisions of the Constitutional Court, judgment of the Constitutional Court from 23rd March 2004, File No. I. ÚS 573/02, published under No. 41/2004 of the Collections of Decisions of the Constitutional Court and judgment of the Constitutional Court from 22th March 2005, File No. Pl. ÚS 45/04, published under No. 239/2005 of the Collections of Decisions of the Constitutional Court.

[21] Judgment of the Constitutional Court from 11th December 2013, File No. I. ÚS 2208/13, published under No. 215/2013 of the Collections of Decisions of the Constitutional Court.

procedure in the Code of Criminal Procedure and thus provided the necessary guarantees in this regard to those at risk of deprivation of liberty before a final conviction for a criminal offence.

However, such an approach is not sufficient to fulfill the ideal of adversariality in its entirety. The participation of the public prosecutor in the pre-trial detention procedure is not obligatory [cf. the provisions of Section 73f (2): "*The participation of the public prosecutor and the criminal defense attorney in the detention hearing is not necessary.*"], which is very problematic when it is a decision that can, to a large extent, violate the principle of the presumption of innocence and the public prosecutor is the person who proposes the detention of a certain person. Public prosecutors do not attend detention hearings in a large number of cases due to their high workload. Any confrontation of opinions before the judge between the defense and the prosecution is, of course, excluded in such cases. The same is true in the case of ruling of a superior court on a complaint against a decision in detention hearing. The legislation should therefore *de lege ferenda* provide for the mandatory presence of a public prosecutor in a detention hearing

5. Conclusion

In my opinion, the adversariality is a real maxim and not just a fundamental principle of criminal proceedings, as it is an immanent part of criminal proceedings if we want to characterize a criminal procedure as a fair trial and if we do not want the aim of criminal proceedings to be merely establishing the so-called formal truth, but establishing the objective facts of the case. The universality of adversariality is manifested and has historically manifested itself, among other things, in the fact that it is inherent in both judicial proceedings within the Anglo-American legal culture and judicial procedures under legal orders belonging to the continental system of law. It is important to bear in mind that if the adversariality of criminal proceedings is not sufficiently guaranteed, Czech criminal proceedings may become inquisitorial process, not in a modern sense, but in an earlier, archaic sense, clearly contrary to the basic legal principles of a democratic state governed by the rule of law.

From the considerations on adversariality in the Czech criminal proceedings and its individual elements and rules , it follows a fundamental finding that *all single factors of this principle are aimed at emphasis on a justification of the decisions* of law enforcement authorities and, on the other hand, they oblige both the accused and the criminal defense attorneys to greater procedural activity, which, however, is not an obstructive activity, but an activity aimed at establishing the facts without reasonable doubt (establishing the material truth). At the same time, there is a refinement of legal practice in matters of legal classification of the act and evaluation of various procedural situations.

Although the current Czech Code of Criminal Procedure provides for some basic guarantees of a fair trial and sets out the key preconditions for fulfilling the adversarial principle, it does not guarantee, as a whole, that certain criminal proceedings will be adversarial. In order to be able to describe a specific criminal proceeding as adversarial, in the Czech environment the accused (usually through the criminal defense attorney), the public prosecutor and the judge must act in a manner not explicitly assumed in the Code of Criminal Procedure. Criminal defense attorney must, above all, develop activity that is not foreseen by law and must be understood and accepted with helpfulness by the public prosecutor and the single judge or the chairman of the senate in the trial.

Unfortunately, the Code of Criminal Procedure does not motivate the parties to the necessary activity concerning the taking of evidence and legal thinking about the problems. If the public prosecutor does not want to, he can avoid any confrontation with the defense throughout the entire duration of criminal proceedings. The same is the case of a passive criminal defense attorney.

As for the question I have already asked in the title of this chapter, it can be concluded that although the „adversarial criminal process in the Czech legal environment" is not an obvious oxymoron, the adversariality in Czech criminal proceedings is a mere chimera rather than its reality.

The Czech legislation should *de lege ferenda* create an environment in which the parties to criminal proceedings will be in real dispute, both as to the interpretation of the facts and the interpretation of legal issues. The elements of adversariality should be present in all key decisions of pre-trial authorities. The sooner the adversariality in the sense of mutual polemics shall be introduced in criminal proceedings, the better in terms of objectivity. The adversarial element should exist at the end of the investigation. In the case of issue of an indictment, it is an absolutely necessary requirement. Thus, the procedure before a court should be fully adversarial.

Right of the Accused to Review Decisions in Criminal Proceedings[1]

Ivan Šimovček

Abstract
The revision of the decisions is based on the assumption that any decision of the law enforcement authorities and the court may be incorrect. Decisions in criminal proceedings are the result of solving complex factual and legal issues, which may lead to errors and shortcomings, which then affect their correctness. Effective review procedures increase the guarantee of decision-making by law enforcement authorities and courts, so that any valid and effective criminal decision does not raise doubts as to the fairness of criminal proceedings.

Key Words
Revision, decision, criminal proceedings, justice.

Introduction

The criminal proceeding consists of several successive stages. However, it may be that a decision taken at first instance is not satisfactory for all procedural parties representing conflicting interests. However, the subjective correctness of the judgment from the point of view of the parties is not a enough reason for the existence of remedial criminal proceedings as a special stage.

The redress procedure assumes that any decision by the law enforcement authorities and the court may be incorrect. Despite the quality of the legal regulations of the individual stages of criminal proceedings and despite the efforts of the competent authorities to make a substantive administrative decision, errors and deficiencies may occur due to the complexity and complexity of factual and legal issues, which then affect the correctness of the criminal decision.

Effective redress increases the guarantee in the decision-making of the law enforcement authorities and the court to ensure that any valid and effective criminal decision is correct as a result of legal and fair criminal proceedings.

Remedial criminal proceedings pursue the basic objective of criminal proceedings, i. ensure that the offense is duly detected, and the perpetrator is fairly punished by law. The appeal also seeks to verify the legality and regularity of the proceedings of the law enforcement authorities and the court and to ensure the most effective protection of the procedural rights of the defendant and other persons involved in such proceedings.

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The immediate purpose of criminal proceedings is to review a specific decision and, if it is found to be incorrect, to correct it. The redress procedure also provides for review of decisions of first instance law enforcement bodies and courts, allows for generalization of the findings and ensures uniform interpretation of laws.

The general principle of redress is that it must be adapted in such a way that it is accessible to all persons involved in criminal proceedings, both formally and in substance. On the other hand, the use of legal remedies in criminal proceedings must be devoid of all unnecessary formalism.

History

The revision principle in Slovak criminal proceedings has historically been based on an appeal as a remedy against a decision under Roman and Canon law. The appeal brought an all-round review of the decision; j. applying the full revision principle.

Criminal redress was introduced in our conditions only gradually. In Hungary during the period of feudalism, the ruling power was exercised by the monarch through its courts. The sovereign's right to cancel or change the rulings of the courts was more of a mercy. The criminal proceedings at the time, based on a private lawsuit, allowed a private initiative to amend or revoke that decision. With the plaintiff's consent, the convicted person could be released from prison, the sentenced sentence or imprisonment could be converted into monetary satisfaction.[2]

The universal introduction of remedies can be dated to the seventeenth and eighteenth centuries, when it was introduced that a party that was not satisfied with a court decision could initiate a new trial in a higher court. Appeals and appeals were created during the French Revolution as remedies under the three-instance procedure.

The appeal of the court of first instance had to be first appealed by the court of second instance, and only by the appeal of the second instance court was the cassation adjudicated by the court of third instance. In this way, the remedies under the Hungarian legal Article XXXIII of 1896 on the Code of Criminal Procedure,[3] which provided for regular remedies (appeal, recourse, confusion complaint) and extraordinary remedies (legal remedy and retrial) were also regulated.

A recourse (complaint) against the resolution could only be filed in cases enumerated by law. The recursion could be filed by the person affected by the resolution, including witnesses, expert witnesses, immediately upon its declaration, justification of the recursion was possible within eight days. The recursion was decided by the superior court after the so-called. overhaul.

[2] IVOR, J. a kol. 2010. Trestné právo procesné. Druhé, doplnené a prepracované vydanie. Bratislava : Iura Edition, 2010. p. 691.

[3] Ibid, p. 701.

Appellation (appeal) was possible against the judgment of the Court of First Instance and it was decided by the Royal Judicial Board. Appeals were not possible against judgments of the jury courts, judgments of the judiciary under the jurisdiction of the district court or administrative nobility, and judgments of the court of second instance. Appeal was possible against both the operative part and the reasoning of the decision and for errors which occurred at the main hearing and in the delivery of the judgment.

The king's representative was entitled to appeal against and against the accused, the accused, his spouse, in the case of a minor, his legal representative, also against his will, the defender also against the will of the defendant and the heir of the defendant against the verdict relating to the private right. In addition to the persons, the principal and the substitute private plaintiff, the injured party and the successor in title of the injured party were also entitled to appeal.

Appeals could be filed for formal deficiencies (for example, an unlawful court formation, a judge excluded by law as a member of a court of law, the absence of a defendant prosecuted at the main hearing, unlawful public exclusion from the hearing, unintelligence of the verdict) also for material deficiencies (for example, the court incorrectly determined the corresponding provision of the Criminal Code for the given act, wrongly assessed the saneness of the defendant, wrongly assessed the sentence, etc.).

In the interest of legal unity against a final decision or any other verdict of any criminal court that violated (offended) the law, the Crown representative could have recourse to the Royal Curia to maintain legal unity. The remedy could not be applied against the final decision of the Royal Curia. The appeal for the maintenance of legal unity was not time-bound and did not have suspensory effect. If the Royal Curia declared a violation of the law for procedural parties, this usually did not have any legal effect except for the possibility of acquittal of the convicted person, reduction of his sentence, annulment of the contested judgment and return of the matter to the relevant nobility.[4]

Renewal of the proceedings against the convicted person was only possible within the period of limitation of the case if new incriminating evidence appeared and the person entitled to file was a royal representative or principal private plaintiff. In favor of the convict was the possibility of reopening the proceedings on the convict's request as grounds of false documents, false expert opinion, new evidence, a case excluding illegality and so on. As a rule, the court which decided at first instance, as for the renewal of the administrative authority or the district court's judgment, was competent to decide on the renewal of the court in which they were located.

The renewal resulted in either confirmation of the original judgment, its total or partial revocation and the delivery of a new judgment. The principle of prohibition of reformationis in peius was already in force, since in the event of renewal in favor of the convict, it was not possible to measure a heavier punishment compared to the

[4] §§ 441–442 Zák. čl. XXXIII/1986, o trestnožalobnom pravotnom poriadku.

sentence imposed in previous judgments. It should be noted, however, that even in the case of restitution to the detriment of the convict, the results of the main hearing could have led to an acquittal or a lesser sentence.[5]

In Slovakia, despite the existence of the Czechoslovak state in criminal proceedings, the Hungarian law still applied. no. XXXIII/1896, which was amended was amended in 1908, the Amendment introduced a conditional sentence and procedure for juvenile offenses. Statutory Article. Art. VII/1914 stipulated a separate regulation of criminal proceedings against juveniles.

This amendment was in effect until 1950, when the National Assembly of Czechoslovakia adopted the Code of Criminal Procedure no. 87/1950 Coll. with effect from 1 August 1950, which applied to the whole territory of the Czechoslovak state and replaced all previously valid criminal codes, while also applicable to the military judiciary.

Current status of the accused's right to review a decision in criminal proceedings

The right of the accused to review a decision in criminal proceedings is one of the basic attributes of the fairness of criminal proceedings in a democratic society, since any decision in criminal proceedings may be wrong for objective and subjective reasons and therefore there must be legal means to review wrong criminal decisions.

The European Convention on Human Rights[6] (hereinafter: The Convention) did not initially contain the right to dual instances of criminal courts. This was changed by the Delcourt judgment, Series A, no. 6, 1968, in which it was stated that Art. Although the Convention does not force the States Parties to set up appeals or courts of cassation, but if they are established in the State, the States must guarantee the essential guarantees within the meaning of Art. 6 of the Convention, in order to prevent discrimination within the meaning of Art. 14 of the Convention.[7]

The revision principle in criminal proceedings was enshrined in the Convention by Additional Protocol No 7, Article 2 of which is amended, "anyone who has been shown to have committed an offense has the right to have the evidence and judgment reviewed by a higher court".[8] The exercise of this right is determined by law.

[5] §§ 445–462 Zák. čl. XXXIII/1986, o trestnožalobnom pravotnom poriadku.

[6] European Convention on Human Rights as amended by Protocols No. 11 and 14 with additional protocol and protocols no. 4, 6, 7, 12 and 13. http://www.echr.coe.int/Documents/Convention_SLK.pdf, (downloaded 28.1.2020).

[7] Rozhodnutie vo veci Monel a Morris, séria A, č. 64, 1983 a vo veci Sutter, séria A, č. 74,1984 In: REPÍK, B.: Požadavky Evropské úmluvy lidských práv na trestní proces. (II. Právo na spravedlivý proces). Bulletin advokacie č. 1/1993, p. 21.

[8] European Convention on Human Rights as amended by Protocols No. 11 and 14 with additional protocol and protocols no. 4, 6, 7, 12 and 13. http://www.echr.coe.int/Documents/Convention_SLK.pdf, (downloaded 28.1.2020).

The essence of the review of criminal decisions in the context of an appeal procedure as a stage of criminal proceedings is their examination in terms of their legality and justification as well as the correctness of the proceedings that preceded the issue of the examined decisions. The remedy also seeks to establish whether there are reasonable doubts as to the accuracy, legality and fairness of the decision.[9]

The possibility of revising a criminal decision is based on the principle of availability, e.g. a prerequisite for review of a criminal decision is a certain impetus by the accused in the form of a legal remedy.

The review of criminal decisions in the context of criminal appeal does not have the purpose of clarifying the factual and legal situation of the case. As a rule, new facts are not found in the appeal procedure and the legal assessment is reviewed based on the factual finding of the first instance body, or, for some remedies, supplemented or partially modified before the corrective body. At the same time, the appeal procedure verifies the correctness and legality of the contested first-instance decisions. The incorrectness of these decisions is manifested in errors of fact (error in facto), substantive (error in iure) and procedural (error in procedendo).

The scope and possibility of reviewing criminal decisions in criminal appeal proceedings are fully dependent on the application of the specific principles of the redress procedure, as well as on the nature of the ordinary or extraordinary legal remedies.

Possibilities and scope of revision of criminal decisions influence whether the appellate (reformative) or cassation principle applies in appeal proceedings or a combination of these elements.

The principle of appeal and cassation was originally created during the French Revolution as an appeal in the context of the trinity of the proceedings. Until 1950 it existed in our territory according to the Hungarian legal article no. XXXIII/1896 on judicial proceedings, according to which the appeal of the Court of First Instance had to be first appealed by the court of second instance, and only the second instance judgment was addressed to the cassation which was decided by the court of third instance.

Within the appellation system we recognize its two types. A complete appellation system that allows the parties to present new facts and propose new evidence (even in our law) even in the ordinary redress procedure, and a partial appellation system that does not provide the parties to the redress procedure with this possibility. According to the principle of appeal, the reviewing body, if it finds that the contested decision is incorrect, annuls the decision in question and remedies its errors itself and makes a new, flawless decision.

That principle is characterized by the possibility of challenging both the factual and legal errors of the decision and the possibility of altering the facts established by the Court of First Instance on the basis of its own wide evidence in the review

[9] MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P.: Trestní právo procesní. 3. přepracované a doplněné vydání. Praha, C. H. Beck, 2007, s. 875.

procedure. Its advantage is economy and speed of action, as it prevents the repeated annulment of successive decisions. The disadvantage of this principle is that there is a risk of fundamental changes in the finding of facts which, after this procedure, will no longer be able to be examined by ordinary redress.

It is typical of an appeal in cassation that, when it finds that the contested decision is incorrect, it annuls the decision in question and remits the case for reconsideration and the decision of the first instance. It is characteristic of that system that the facts established by the first instance body are binding and inviolable for the second instance. The application of the cassation system means emphasizing the principle that the most important part of the criminal procedure is in proceedings before the first instance, where the basic principles of criminal procedure are applied as fully as possible. Persons entitled to lodge an appeal shall not deprive them of the right to lodge a new appeal if they do not agree again with the new decision given in the following first instance proceedings.

Filing a regular remedy (complaint, appeal) in criminal proceedings usually has a devolutive effect, which ensures that the remedy is decided by another, usually superior body. The Code of Criminal Procedure also knows the so-called. fiction of devolutive effect, according to which the appeal is decided by a body of the same kind and degree, but in a different composition, which the law regards as a superior body (e.g. in case a complaint was lodged against the decision of the court of appeal, it is decided by another panel of this court, which in this decision has the position of superior body).[10]

In the event that a complaint has been filed, the law allows so-called self-medication, which is a special way of dealing with an appeal. The essence of self-mediation is that the body against which the order is directed can comply with it if the amendment of the original order does not affect the rights of another party to the criminal proceedings. The settlement of the case by this institute constitutes a new first instance decision and therefore a further complaint is admissible against such an order.

The application for a retrial does not have a devolutive effect, since it is the court with jurisdiction which has ruled or should have decided in the case of the indictment, if the case was finally concluded by a decision of the prosecutor at first instance.

In the case of an appeal, the Supreme Court always decides. The Prosecutor General decides on the petition for annulment of final decisions in the preliminary proceedings. These remedies are sometimes referred to as centralized remedies.

Filing an appeal in criminal proceedings may result in the suspension of enforcement of the decision. suspensive effect. This effect usually has remedies if enforcement of the decision would frustrate the purpose of the remedy or if the non-recognition of such effect would cause irreparable damage. If the law does not grant

[10] § 185 par. 3 of the Code of Criminal Procedure.

a suspensive effect, then the contested decision may be enforced even if it has not entered into force (e.g. a resolution on seizure of the victim's claim).

The suspensory effect of the law grants an appeal. An appeal relating to only one of several defendants does not prevent the judgment of the other defendants from becoming final and enforceable. A complaint has a suspensory effect only where expressly provided for by law. The appeal does not have suspensory effect, but the Minister of Justice or the Attorney General may postpone or suspend the execution of the decision against which he has appealed until a decision on the case is made. After the appeal has been lodged, the appeal court may also do so. Where an application has been made to allow the accused to be reopened, the court may, in view of the nature of the facts and evidence which has come to light, revoke or suspend the execution of the sentence lawfully imposed in the main proceedings.

In remedies, we also encounter the principle of beneficio cohaesionis. It is a principle whose principle is to change the decision also in favor of the person who did not appeal, if it benefits the reason for which the decision was changed in favor of the person who brought the appeal. This principle is evident in both regular and extraordinary remedies.

Equally important is the prohibition of reformationis in peius. It expresses a request to prohibit the deterioration of the procedural status of the accused person who lodged an appeal or for whom the appeal was lodged by another authorized person. The prerequisite for the application of this principle is that a remedy against such a person is carried out solely in his favor.

However, in the event of a retrial, there is only a limited prohibition of reformationis in peius concerning only the sentence on the sentence, which means that he or she may not be punished more severely than that imposed in the main proceedings by the new judgment.

In essence, the full principle of review means that the appellate body is required to examine all the operative part of the contested decision which may have been appealed, to assess the correctness of each operative part in the light of all the relevant factual or legal errors, the contested decision was preceded by procedural irregularities which could have led to an incorrect or missing statement.

The decision will therefore be examined in its entirety and in all relevant respects, irrespective of the errors made by the appellant to the contested decision. The higher authority is required to examine the contested decision in respect of all the persons affected by it, even if only one of those persons has appealed.

The complete revision principle is currently applied in the Slovak criminal proceedings within the framework of an extraordinary remedy, which is the annulment of final decisions in pre-trial by the Attorney General. Examination of decisions of bodies active in pre-trial proceedings by the Attorney General (the Supreme Public Prosecutor in the Czech Republic) is an extraordinary remedy introduced in Slovakia by the recodified Criminal Procedure Code.[11] In reviewing the decisions, the

[11] Act. no. 301/2005 Coll. with effect from 1.1.2006.

full principle of revision applies, as the Attorney General is not bound by the scope of the application for recourse to the present remedy and the principle of availability does not apply either ex-officio.

Furthermore, the provisions of the Code of Criminal Procedure allowing the prosecutor in the pre-trial procedure to carry out a single procedural act or even the entire investigation and thus the taking of evidence are also applicable.[12]

The Attorney General shall revoke the final decision of the prosecutor or the police if such a decision or proceeding preceded by a violation of the law. Breach of the law means a material misconduct that may have affected the decision in the matter. Where the decision or proceeding referred to in paragraph 1 concerns several persons or acts, the Prosecutor General may cancel only that part of the decision or proceeding concerning any of those persons or acts. The Attorney General in proceedings under paragraph 1 shall decide by an order which is not subject to appeal.[13]

By a resolution of the Constitutional Court of the Slovak Republic[14] it was established that there is no legal entitlement to the positive acceptance of a petition of authorized persons to file an extraordinary remedy, which is also the annulment of final decisions in pre-trial proceedings. It is up to the Attorney General to decide whether to take this extraordinary remedy. However, this does not mean that the Attorney General is not obliged to deal with the complaint under the relevant provisions of the Public Prosecutor's Office Act.

Likewise, the full principle of revision applies in proceedings on complaints against decisions of law enforcement authorities. In this context, it is suggested that the possibility of endless repetition of complaints by the accused should be limited by requiring the prosecutor to examine the complainant's further request on the same matter and to notify the applicant only if it contains new facts. The Prosecutor shall notify the applicant accordingly.

The principle of limited review (limited revision principle) examines the flawlessness of only the contested statement and its previous action. In doing so, only the plea put forward is examined in relation to the person who lodged the appeal or the appeal. in favor of which the appeal was lodged.

The limited principle of review applies to a regular appeal such as an appeal. That principle is more appropriate in view of the disposable nature of the remedy than the action initiating the remedy. If the appellate court does not dismiss the appeal or set aside the judgment, it shall examine the legality and the justification of the contested statements of the judgment against which the appellant appealed, as well as the correctness of the procedure preceding them. Where an appeal has been lodged in favor of the defendant against the conviction and the court of appeal does not annul that judgment, it shall also examine in its entirety the legality

[12] § 230 of the Code of Criminal Procedure.

[13] § 363 of the Code of Criminal Procedure.

[14] Resolution of the Constitutional Court of the Slovak Republic File I. ÚS No. 252/2010 of 30 June 2010.

and the justification of the sentence and other statements which have their basis in the guilty statement.[15]

The restricted revision principle does not apply to the appeal only in one case. The Court of Appeal shall only consider errors which have not been criticized on appeal if they would justify bringing an appeal.

The appellate court's review duty also determines the extent of the evidence in appeal proceedings. In the proceedings before the Court of Appeal, only evidence in good time proposed by the parties may be taken in the examination of a guilty and precedent judgment, without such a request only if the defendant is protected and assisted under a special regulation and in connection with his presence in the proceedings before the court is justified by the fear of endangering his life or health, or the life or health of his close person, being heard using technical equipment designed to transmit sound and video.[16]

Other evidence may also be taken in the examination of the statements following the guilty statement and, in the proceedings, preceding it.

Revision activity does not apply in the case of filing a statement of opposition to a criminal order where the criminal order is revoked. If the person entitled has lodged an objection to the criminal order, the single judge shall order the main hearing in which the single judge is not bound by legal qualifications, neither by the second and the sentence, nor by the verdict on the protective measure contained in the criminal order.[17]

However, in the event of opposition, the de lege ferenda proposals also aim at introducing a defined review obligation. In the present case, the prosecutor's opposition, the opposition brought by his defense counsel, the opposition brought by his agent for the injured party or the person concerned must also be adequately reasoned. If the single judge does not order the main hearing after the statement of opposition has been lodged because the opposition was lodged by an unauthorized person, was lodged late or was not substantiated, he shall reject the opposition by order. A complaint having suspensory effect is admissible against this order.

For extraordinary remedies, the limited revision principle applies exclusively in the appeal procedure. An appeal may be lodged if the so-called. grounds of appeal [§ 371 (1) CPP]. However, the accuracy and completeness of the facts found cannot be examined and changed by the court of appeal.

An interesting breakthrough in the above-mentioned calculation of the challengeable decisions by appeal was brought by the Constitutional Court's ruling, which the Constitutional Court allowed to appeal also against the decision not to allow the resumption of proceedings.[18] In response to this finding of the US SR, the expert public believed any review of extraordinary remedies decisions by other

[15] § 317 of the Code of Criminal Procedure.
[16] § 273 of the Code of Criminal Procedure.
[17] § 355 par. 3 of the Code of Criminal Procedure.
[18] Finding of the Constitutional Court of the Slovak Republic II. ÚS No. 284/2011 of 06/10/2011.

extraordinary remedies is inadmissible. If the legislature had such an intention, it would explicitly introduce it into the legislation.

The full principle of revision shall apply only in the case of the ground of appeal under § 371 para. 1, par. c) CPP. There have also been efforts to complete a review obligation, even in the case of an appeal, which, however, faces strong opposition, by judicial practitioners.

For example, in its opinion of 16 September 2008, the Judicial Council of the Slovak Republic pointed out that the proposed revision principle in the appeal procedure may ultimately lead to a slowdown of the proceedings. Thus, there is a real danger that the constitutional right of a citizen to a timely judicial decision and violation of the right to a fair trial within the meaning of Art. 6 par. 1 of the Convention on Human Rights. The Judicial Council of the Slovak Republic considers the present amendment of the appeal procedure (limited revision principle) enough.[19]

The complaint for violation of the law in the Czech Republic applies the principle of free evaluation of evidence to a narrower extent, since the Supreme Court, as a corrective body, is not entitled to annul the contested decision, if In the present case, the contested decision cannot be criticized for any error in the principle of the free evaluation of evidence.[20] The application of the cassation principle on appeal means that the center of gravity of the evidence is before the institution and the court of first instance and to a limited extent in the ordinary appeal proceedings.[21]

The Czech Code of Criminal Procedure stipulates a limited scope of evidence in an extra appeal procedure,[22] as the court of appeal cannot review the evidence already carried out without further possibility without the possibility to carry out such evidence itself in accordance with the principle of oral and immediate effect. If any circumstance needs to be clarified for the decision on the appeal, the presidential investigation or a member of the Board of Appeal designated by him, or at his request another law enforcement authority, shall carry out the investigations in question. In such an investigation, the means of proof within the meaning of the sixth title of the Code of Criminal Procedure shall be used. In urgent cases of urgent and unrepeatable acts, the means under the fourth title of the Code of Criminal Procedure, e.g. Procedures to seize persons and things.

Errors which cannot be remedied at a public session of the Court of Appeal are those errors in which the Court of Appeal would in principle replace the activities of the Court of First Instance and it has neither the power nor the means to do so. The Supreme Court, as an appellate body, is not entitled to extensive evidence but

[19] Minutes of the 17th Session of the Judicial Council of the Slovak Republic of 16 September 2008 http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=20&ved=0CHUQFjAJOAo&url=http%3A%2F % 2F (downloaded on 26.9.2013).

[20] NS ČR č. 53/1992 – I.

[21] MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P.: Trestní právo procesní. 3. přepracované a doplněné vydání. Praha, C. H. Beck, 2007, p. 882.

[22] § 265 para. 7 of the Criminal Procedure Code, Act no. 141/1961 Coll.

only to those which are strictly necessary in order to clarify those circumstances, without which it is not possible to adjudicate on the appeal.[23]

The definition of an extra appeal is expressly laid down in the provision that the court of appeal is bound by the circumstances relied on in support of the grounds of appeal put forward by the appeal. Likewise, the ground for refusing an appeal is introduced if the court of appeal finds that the grounds of the appeal are not met or additionally finds another ground.[24]

The revision of final criminal decisions is also possible based on a renewal which is directed against the factual errors of the contested decision. The retrial procedure is specific, as the court deciding on the authorization of the retrial does not control the decision already issued but assesses the fulfillment of the legal conditions for the retrial. The scope of the evidence in a retrial is not bound by the principle of review, since the filing of an application for a retrial does not examine the correctness of the decision in the main proceedings, but whether there are legal prerequisites for the new proceedings.

In proceedings for a request for recovery (iudicium rescindens), the court only carries evidence in relation to finding out whether the account of the facts or evidence previously known to the court or the law enforcement authority is unknown, which could by themselves or in conjunction with evidence earlier justify another decision. It also proves whether the law enforcement authority or the court has not breached its obligations in the main proceedings by conducting the facts of the offense. The taking of evidence shall be carried out only based on the parties' proposals.

Renewal shall only be permitted if facts or evidence previously known by the Court come to light which could, in themselves or in conjunction with facts and evidence previously known, justify a different decision. Evidence for the establishment of the facts is then reserved for the resumed proceedings (iudicium rescisorium),[25] where the extent of the evidence is based on the original indictment or in the preliminary proceedings on the definition of the act in the resolution on the initiation of criminal prosecution.

The proposals de lege ferenda aim at the possibility that the court of first instance rather than the court of first instance, not the court of first instance, should decide on the authorization of a retrial (iudicium rescidens). Court of Appeal. In this way, the objectivity and impartiality of the determining authority would be ensured in the verification of accuracy. Jurisdiction for the resumed proceedings (iudicium rescisorium) would already be the court hearing the case at first instance.

The principles of the prohibition of reformatio in peius, which is subject only to the prohibition of deterioration in terms of the sentence imposed in the retrial,

[23] SEKVARD, O.: Dovolání. Praha, Nakladatelství ORAC, 2004. p. 85–86.
[24] § 382 of the Code of Criminal Procedure.
[25] ŠÁMAL, P.: Opravné prostředky v trestním řízení. Praha, C. H. Beck 1999, p. 62.

should be clarified when authorizing the renewal expressly in favor of the accused that the accused must not be found guilty was based on the original decision.

It would be desirable to limit the prosecutor's right to file a retrial procedure within a time-limit depending on the type of offense committed. At the same time, the information duty[26] should also be adjusted to the fact if the Constitutional Court's judgment revokes the legal regulation based on which the judgment was issued.

The purpose of the resumption of proceedings is to remedy shortcomings in the factual findings of certain final decisions, in cases where their causes have come to light only after the original decision has become final.

It is also necessary to mention the application of the revision principle when filing a constitutional complaint against a valid criminal decision in accordance with the amendment to the Czech Criminal Procedure Code (Act No. 265/2001 Coll.). Proceedings before the Constitutional Court are governed by a special regulation. By analogy, the scope of the revision and thus the proof of a constitutional complaint can be deduced from the scope of the revision obligation when filing a petition for renewal. When deciding on a constitutional complaint, the Constitutional Court does not examine the correctness of the decision on the merits but examines whether the constitutional rights have not been violated by the decision in criminal proceedings. Proceedings following the annulment of a decision by the Constitutional Court are a special stage of criminal proceedings and in the professional literature it is also referred to as a post-judgment stage of criminal proceedings.[27]

By filing an individual complaint with the Constitutional Court,[28] a constitutional possibility to change the decision on extraordinary remedies was created. In several such proceedings, the Constitutional Court of the Slovak Republic has acted as a defender of fundamental rights and freedoms and annulled unconstitutional decisions on these institutes, which in one case also helped to initiate a change in legislation.

As an extraordinary remedy, a convicted person's request for reconsideration of his case by a court in his presence may be considered if the conviction was delivered in the proceedings against the lost person as a special remedy. The appeal procedure applies a limited principle of revision, as the court only determines the conditions for revision of the original decision and therefore the evidence focuses only on finding out whether the convicted person has complied with the statutory period of six months from the day he became aware of the prosecution and conviction . whether the relevant limitation period laid down in the Criminal Code has expired.

[26] § 396 par 4 of the Code of Criminal Procedure.

[27] MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P.: Trestní právo procesní. 3. přepracované a doplněné vydání. Praha, C. H. Beck, 2007, p. 920.

[28] Art. 127 (1) of the Constitution of the Slovak Republic and §§ 49–56 of Act no. 38/1993 Coll. on the organization of the Constitutional Court of the Slovak Republic on proceedings before it and on the status of its judges.

Conclusion

As a rule, the principle of criminal proceedings is that the right of the accused to review decisions should be adjusted to be formally and substantively accessible against all decisions concerning the accused at all stages of the criminal proceedings. The importance of the right of the accused to and the revision of the criminal decision lies in providing an increased possibility of finding the correct facts of the case and the correct legal assessment by examining previous procedures and conclusions of other law enforcement authorities or the court. The review procedure guarantees the legality of the decision-making and other activities of the law enforcement authorities and the court, as well as the elimination of errors and shortcomings of a specific decision in a criminal case.

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Confidentiality of Communication with a Lawyer as Part of a Fair Trial

Zuzana Vostrá

Metropolitan University Prague, Czech Republic

zuzana.vostra@mup.cz

Abstract: *The content of this paper is the issue of interference in the confidential relationship between the lawyer and their client. The nature of this relationship is supported by the duty of confidentiality, which is intended to help the client in the future to secure the full right of defence. A lawyer can only build a true and effective defence after their client has provided them with all the important information. Law enforcement authorities monitor interference in the confidentiality of this communication by public interest in detecting crime. The chapter discusses the constitutional and legal regulation of these institutes, as well as related judicial case law, especially the European Court of Human Rights. Attention will be paid to the critical assessment of this regulation and, using foreign practice, to present proposals for its amendment to provide maximum guarantees of a fair trial.*

Key words: *interference, relationship, confidentiality, right of defence, law enforcement, case law, constitutional and legal regulations, fair trial*

1. Introduction

One of the basic pillars of the democratic rule of law is universal confidence in justice,[1] whereby the essential guarantee is the independent and impartial decision-making of courts under the conditions of a full fair trial. The equality of arms principle and the right of defence (or legal aid) are among the indisputable requisites connected with the discussed topic.

The following article closely touches on the specific relationship of confidence between a lawyer and his client, which is the cornerstone of an effective defence. Its important part and the guarantee of its fulfilment is the institute of the confidentiality of a lawyer, which among other things, should ensure that sensitive information primarily communicated by a person suspected or accused of committing a crime to his lawyer remains mutually intimate. With knowledge of this information, the lawyer's task is to build a defence that ensures that their client is in the best possible position in criminal proceedings. If the above knowledge is acquired against the will of the person concerned, violation of human rights and fundamental freedoms, such as the right to privacy or secrecy of correspondence, may violate

[1] To this end, it should be noted that 'justice' is a difficult concept to define.

the right of defence and, as a result, violate the above principle of equality of arms, hence a fair trial.

The above-mentioned confidentiality issue and possible interference with it is so extensive that attention is only focused on its selected aspects, which relate to breaking the confidentiality of communication between a lawyer and their client (accused or defendant), specifically through interception and recording their communication, lawyer's office searches, monitoring people and things and obligations on the basis of the so-called AML Act. The case law interpretation provided primarily by the Czech Republic Constitutional Court (hereinafter referred to as the 'Constitutional Court') and the ECHR will be used.

The analysis results of the above should use foreign legislation to bring proposals *de lege ferenda* to strengthen the protection of professional secrecy and protect the right of defence.

Needless to say, the discussed issue connects human rights issues with criminal law, as criminal legislation and other used legislation develop the Charter and the question is whether their wording and subsequent application by public authorities do not support a restrictive interpretation of the above human rights.

2. Position of a lawyer in the field of justice and lawyer-client confidentiality

Lawyers occupy a special place in the organisation of justice, as they represent a kind of mediator or link between the disputing parties and judges. Therefore, they hold the position of 'assistants' of the judiciary. They play an important role in strengthening confidence in the judicial system, which the democratic rule of law cannot do without. It is crucial for its preservation that the public believes in the ability of lawyers to effectively defend their clients' interests.[2]

Consequently, lawyers become an integral part of the rule of law system. In this context, legal aid can be understood as the possibility of using the services of a legal professional – an expert, i.e., a person who knows the law and meets other requirements, who acts in the interests of their client. Simultaneously, various guarantees must guarantee that public authorities cannot act on them in a way that acts against the interests of the person they are representing. The provision of legal aid contributes to implementing equality of arms. The lawyer must also be able to obtain all the necessary data from the client to compile an effective defence, but the lawyer and the client must be guaranteed in the knowledge that these facts[3] are not

[2] Morová v France, Judgement on December 15th, 2011, Complaint No 28198/09, § 42; Amihalachioaie v Moldova, Judgement on April 20th, 2004, Complaint No 60115/00, § 27 and Kyprianou v Cyprus, the Grand Chamber judgement on December 15th, 2005, Complaint No 73797/01, § 105.

[3] Sometimes, of course, aggravating or incriminating.

known in advance to the 'other party', i.e., the relevant public authorities in criminal proceedings.[4]

The above-mentioned confidential relationship between the lawyer and the client is supported by the client's confidence in the lawyer's confidentiality.[5] It is not the lawyer's prerogative, which should establish their exclusion from the generally applicable legal order, but their obligation imposed in the client's interests. This corresponds to the obligation of state authorities to respect lawyer-client confidentiality. Lawyer-client confidentiality and its observance by a lawyer must therefore enjoy protection, especially in connection with situations where it may be disrupted or endangered. The validity of this institute stems from the client's need to trust their lawyer, from the interest of the lawyer themself to be as informed as possible in order to build an effective defence, and it is in the public interest to protect the right of defence and a fair trial.[6] On the contrary, its breaking can be perceived at the level of violation of the right not to testify due to the lawyer's connection with the client.

The above concept of lawyer-client confidentiality corresponds to the Constitutional Court's interpretation, which in its settled case law states on its scope that: *'Part of the right of defence according to Art. 40 of the Charter of Fundamental Rights and Basic Freedoms is the right to consult a lawyer under conditions in which information is not provided to law enforcement authorities. In such a case, the communication between the lawyer and the client is subject to the maximum possible protection in the client's interest, but not for the benefit of a lawyer pursuing interests conflicting with the client's interests or unrelated to the client's interests. Therefore, the client is holder of the right of defence, not the lawyer, who in such a case does not exercise their rights, but fulfils obligations imposed on them by law. In the event that the client themself consciously waives this protection and, on the contrary, seeks the assistance of state power against a lawyer who, in their opinion, does not defend their interests, insisting on such absolute protection is a constitutionally non-conforming interpretation of laws. However, if a lawyer is reasonably suspected of a serious criminal offence, the use of operational investigative means which respects the principle of proportionality of the intervention shall not constitute an infringement of the right of defence or the right to legal aid.'*[7]

[4] See BAŇOUCH, Hynek. In *WAGNEROVÁ, Eliška, ŠIMÍČEK, Vojtěch, LANGÁŠEK, Tomáš, POSPÍŠIL, Ivo. Listina základních práv a svobod. Komentář.* 1st ed. Prague: Wolters Kluwer, 2012. ISBN 978-80-7357-750-6, pp. 774–776.

[5] The duty of confidentiality is explicitly enshrined in § 21 of the Act on the Legal Profession (No 85/1996 Coll.).

[6] See KOVÁŘOVÁ, Daniela et al. *Zákon o advokacii a stavovské předpisy. Komentář*. Prague: Wolters Kluwer, 2017. ISBN 978-80-7552-631-1, p. 315, and the Judgement of the Municipal Court in Prague on June 4th, 2014, Case No 11 A 62/2013 - 22.

[7] Constitutional Court judgement on January 3rd, 2017, Case No III. ÚS 2847/14.

3. Constitutional, legal, and international enshrinement of confidentiality of communication with a lawyer

The following part will discuss the national legislation first, followed by the European legislation. It is necessary to mention several articles of the Charter in connection with the national legislation on the confidentiality of communication between a lawyer and a client and the right of defence. As far as substantive rights are concerned, it is Art. 7(1) enshrining the inviolability of a person and his privacy[8] as follows: '*The inviolability of the person and his privacy is guaranteed. It may be limited only in cases provided for by law.*' This right needs to be interpreted in the context of other rights that protect certain specific areas of privacy. The communication itself is generally protected by Art. 13 of the Charter, which enshrines the traditional secrecy of correspondence as follows: '*No one can violate the confidentiality of correspondence or the confidentiality of other papers or records, whether privately kept or sent by post or by other means designated by law. The confidentiality of communications sent by telephone, telegraph, or by other similar devices is guaranteed in the same way.*' In connection with searches in lawyers' offices, it is necessary to mention the previous Art. 12, which provides for the inviolability of dwelling.

From the point of view of procedural rights forming a fair trial, it is definitely necessary to mention Art. 37 of the Charter, in particular Art. 37(2), which states that *'In proceedings before courts, other state bodies, or public administrative authorities, everyone has the right to legal aid from the very beginning of such proceedings.* 'Furthermore, it is not possible to omit Art. 37(3), which enshrines the equality of parties in such proceedings. The right of defence is regulated in Art. 40(3). According to this provision, the accused has *'has the right to be given the time and opportunity to prepare a defence and to be able to defend themself, either pro se or with the assistance of counsel'*. It is also necessary to mention Art. 40(4), which adds the right of the accused to refuse to testify.

Regarding the above-mentioned substantive rights, the Charter presupposes the possibility of their restriction, which must comply with the boundaries defined by Art. 4 of the Charter. At this point, it is suggested to elaborate on the already mentioned proportionality principle, which was interpreted by the Constitutional Court as follows:[9] *'In assessing the possibility of restricting a fundamental right or freedom in favour of another fundamental right or freedom, the following conditions can be set under the fulfilment of which one fundamental right or freedom has priority: The first condition is their mutual comparison, the second is the requirement to investigate the essence and meaning of the restricted fundamental right or freedom [Art. 4(4) of the Charter of Fundamental Rights and Freedoms]. The mutual comparison of fundamental rights and freedoms in conflict consists of the following criteria: The first is*

[8] It is necessary here to look for a connection especially with Art. 8 of the Convention.

[9] Czech Republic Constitutional Court judgement on October 12th, 1994, Case No Pl. ÚS 4/94 (214/1994 Coll.).

the criterion of appropriateness, i.e., the answer to the question of whether an institution restricting a particular fundamental right makes it possible to achieve the objective pursued (protection of another fundamental right). In the given case, it is possible to convince the legislator that the institute of an anonymous witness enables achievement of the objective, i.e., to ensure the protection of the inviolability of their person. The second criterion for comparing fundamental rights and freedoms is the criterion of necessity, consisting in comparing a legislative means restricting a fundamental right or freedom with other measures enabling the same objective to be achieved but without prejudice to fundamental rights and freedoms. The answer to meeting the criterion of necessity in the given case is unclear: in addition to the legislative structure, allowing the anonymity of a witness, the state may use other means to protect him (e.g., using anonymous testimony only as an investigative means for further investigation, witness protection, etc.). The third criterion is a comparison of the gravity of the two conflicting fundamental rights.'

With regard to statutory regulation, it is necessary to mention the duty of confidentiality enshrined in § 21 of the Act on Legal Profession,[10] exemption from the notification obligation [§ 368(3) of the Criminal Code] and the prohibition of interrogation [§ 99(2) and § 158(8) of the Criminal Procedure Code] in connection with the confidential relationship and protection of communication between a lawyer and a client. The means of overcoming the power of these institutes are regulated in the AML Act and in the Criminal Procedure Code (CPC). Specifically, these are § 88 and § 88a regulating the interception and recording of telephone calls and finding data on telecommunications traffic, with the interception and recording of telecommunications traffic between the accused and the lawyer being inadmissible according to § 88(1). If the police authorities discover such a fact, they are obliged to destroy the interception record immediately and not use the learned information in any way. Furthermore, it is necessary to state in particular the permission of the court to monitor persons and things according to § 158d (3) of the CPC (spatial interception, remote computer infiltration, etc.) and a search warrant for premises where advocacy is performed (§ 85b of the CPC).

The above-mentioned AML Act is specifically Act No 253/2008 Coll., on selected measures against legitimising the proceeds of crime and financing terrorism. Lawyers are the obliged entities pursuant to § 2 in the performance of certain activities, especially in the administration of third-party property, including escrow, or in acting in the name or on the client's behalf in certain property matters. In certain cases, they are obliged to identify and control the client (§ 9 et seq.), find out their real owner and the source of their property. In the case of suspicious transactions, they are not only obliged to refuse to execute the client's order, but also to report suspicious transactions through the Czech Bar Association to the Financial Analysis Office (§ 18 and 19). These procedures, taken in order to prevent the abuse

[10] § 21(1) states: '*The lawyer is obliged to maintain confidentiality of all facts which he has learned in connection with the provision of legal services.*'

of lawyer-client confidentiality in legitimising the proceeds of crime, cannot be assessed other than as contrary to this obligation and also to the confidential relationship between a lawyer and a client.

When mapping the institute of confidentiality of communication between a lawyer and a client, the Convention's selected provisions cannot be neglected, especially Art. 8 enshrining the right to respect for family and private life, and Art. 6 regulating the right to a fair trial in connection with the accused and the lawyer, specifically Art. 6(3) concerning the right of defence. Similarly, CFR also guarantees the right to respect for private and family life, home, and communication (Art. 7) and the right to an effective remedy and to a fair trial and right of defence (Art. 47 and Art. 48). In European Union law, it is worth drawing attention to the Directive 2013/48/EU of the European Parliament and of the Council on October 22nd, 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. In particular, paragraph 33 of the grounds for admission states that *'confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the right of defence and is an essential part of the right to a fair trial. Therefore, Member States should respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence.'*

And finally, Art. 4 of the Directive sets down that *'Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law.'*[11]

4. Confidentiality of communication with a lawyer in the concept of ECHR case law

ECHR decisions related to lawyer-client confidentiality should be an important guide, especially for the constitutional courts of each member state of the European Council. For this reason, special attention is paid to its judicial decisions. In

[11] With regard to protecting the right of defence, this progressive legislation must be interpreted in connection with Art. 2 of this Directive, which states that it shall apply to suspected or accused persons in criminal proceedings from the moment the competent authorities of the Member State inform them with official notification or otherwise that they are suspected or accused of having committed a crime, regardless of whether they are deprived of their personal liberty.

general, it should be noted that this institute is most often subordinated to protecting Art. 8, which enshrines the right to respect for family and private life. Only in cases of communication from the moment of the commencement of criminal prosecution (i.e., between the lawyer and the accused), it is also assessed by the dimension of Art. 6, protecting a fair trial. Most narrowly, it is then the right of defence enshrined in Art. 6(3(c). These articles are sporadically associated with freedom of speech, which is protected by Art. 10.

In terms of the applicability of Art. 6 to a narrower number of cases, it should be noted that extending its protection to a group of cases involving suspects and their lawyers would definitely strengthen protecting the right of defence and consequently contribute to guaranteeing the quality of arms and a fair trial principle in its entirety. The 'equality of arms' principle is one aspect of the broader concept of a fair trial, which includes the basic requirement of the adversarial nature of criminal proceedings. The right to an adversarial procedure in criminal proceedings means that both the public prosecution and the defence must have the opportunity to know and comment on the opinions and evidence submitted by the other party.[12] If the public authority breaks the confidentiality of communication between lawyer and client, it can be favoured in the proceedings only because it has obtained information with which the suspect, for example, can be accused.[13]

The above idea can be supported by the ECHR case law, which applied Art. 6 in the past before the moment of formal communication of charges, for example, from the moment of the first interrogation by the police.[14] Here, the beginning would be a situation where the suspect in the specific case first sought a lawyer.

The ECHR ruled that the right of the accused to communicate confidentially with their lawyer implicitly follows from the right of defence guaranteed in Art. 6(3)(c). The ECHR ranks this right among the basic requirements of a fair trial in the democratic rule of law. The lawyer would not be able to provide effective assistance to their client without respecting it. However, due to its derivation, it cannot be understood as absolute. Nevertheless, its breach cannot be justified by the fact that the law enforcement authorities want to prevent the lawyers of co-defendants from agreeing on a common defence strategy.[15]

As already mentioned above, the confidentiality of communication between a lawyer and a client and other related institutes is most often subordinated to protecting Art. 8, guaranteeing the right to private life. There are some pitfalls to interpreting the term 'private life'. When mapping this issue, the scope of the term must

[12] For example, see Zahirović v Croatia, Judgement on April 25th, 2013, Complaint No 58590/11, § 42.

[13] For the violation of equality of arms, see KOUDELKA, Zdeněk. Ohrožení důvěrnosti komunikace obviněného a jeho obhájce. *Bulletin advokacie*. 2019, 5. ISSN 1210-6348, p. 67.

[14] For example, Gerdzhikov v Bulgaria, Judgement on February 4th, 2010, Complaint No 41008/04, § 23.

[15] See KMEC, Jiří, KOSAŘ, David, KRATOCHVÍL, Jan, BOBEK, Michal. *Evropská úmluva o lidských právech. Komentář.* Prague: C. H. Beck, 2012. ISBN 978-80-7400-365-3, p. 809.

be considered, the definition of which is constantly evolving, but also refined in connection with the continuous development of technological possibilities of invasion of privacy. This means that the ECHR cannot create an exhaustive definition.[16] According to the definition, private life includes the physical and moral integrity of man.[17] The main aim of Art. 8 is primarily to protect individuals against arbitrary interference by public authorities, but it is not just a matter of the state refraining from such negative interference as there are also its positive obligations, which include measures to ensure respect for private life even in the area of relations between individuals.[18]

The ECHR has repeatedly emphasised that telephone communication falls within the term 'private life' and 'correspondence' and that its interception is regarded as 'public authority interference' in the exercise of the right guaranteed by Art. 8 of the Convention.[19] It also recalls that the said intervention does not infringe Art. 8 of the Convention if implemented 'pursuant to law', pursues one or more of the legitimate objectives set out in Art. 8(2), and is 'necessary in a democratic society'.[20]

The phrase 'pursuant to law' means that the measure in question must be based on national law. At the same time, a certain quality of the given law is required, which lies in the accessibility to the person concerned, who must also be able to anticipate its consequences. Finally, compatibility with the rule of law is also required.[21]

In these cases, the ECHR notes that the purpose of intervention is usually to enable the truth to be achieved in criminal proceedings, i.e., to monitor the protection of public policy, which is one of the legitimate objectives.[22] As regards the assessment of whether intervention is 'necessary in a democratic society', the Court notes that states enjoy a degree of discretion in assessing the existence and extent of such a necessity.[23] In principle, it is a question of considering whether the means used to achieve a legitimate objective can be considered adequate.[24] The existence of adequate and sufficient safeguards against misuse is essential.[25] If interviews are recorded and used in criminal proceedings, the persons concerned must have the possibility of 'effective control', i.e., that such wiretaps can be challenged in court.[26]

[16] Uzun v Germany, Judgement on September 2nd, 2010, Complaint No 35623/05, § 43.
[17] X and Y v Netherlands, Judgement on March 26th,1985, Complaint No 8978/80, § 22.
[18] Airey v Ireland, Judgement on October 9th,1979, Complaint No 6289/73, § 32 and X and Y v the Netherlands, § 23–24.
[19] See Matheron v France, Judgement on April 29th, 2005, Complaint No 57752/00, § 27 and Pruteanu v Romania, Judgement on February 3rd, 20015, Complaint No 30181/05, § 41.
[20] Lambert v France, Judgement on April 14th, 1998, Complaint No 23618/94, § 22.
[21] Amann v Switzerland, the Grand Chamber judgement on February 16th, 2000, Complaint No 27798/95, § 50.
[22] Pruteanu v Romania, § 46.
[23] Lambert v France, § 30.
[24] Robathin v Austria, Judgement on July 3rd, 2012, Complaint No 30457/06, § 43.
[25] Klass and others v Germany, Judgement on September 6th, 1978, Complaint No 5029/71, § 50
[26] Matheron v France, § 36.

The ECHR further concludes that if Art. 8 protects the confidentiality of all 'correspondence' between individuals, it provides 'enhanced protection' to communication exchanged between lawyers and their clients. It is justified by the fact that lawyers play a crucial role in a democratic society, which in a nutshell, is the defence of the parties to the dispute. Lawyers would be unable to fulfil their role and defend their clients unless they can guarantee that such communication remains protected by professional secrecy and confidentiality. The relationship of confidence that is necessary for a successful defence is at stake. Everyone's right to a fair trial depends on this indirectly, but inevitably.[27]

The ECHR considers the monitoring of legal consultations taking place at a police station by means of spatial interception[28] or search of premises and provision of electronic data to be analogous to intercepting telephone calls.[29]

The Constitutional Court proceeds from the intentions defined by the ECHR case law. Some of its judicial decisions have already been mentioned above. As Gřivna[30] rightly points out, from the human rights point of view, the vague definition of the moment from which protecting the confidentiality of communication between a lawyer and a client should begin, i.e., more precisely from which such communication should be subject to increased protection, seems problematic. In general, it can be said that the case law is dominated by the view that the turning point is only the initiation of criminal proceedings (or the moment of criminal proceedings), and therefore, previous communication between a lawyer and a suspect is not subject to such protection. It relies on the express wording of § 88 and § 158d of the CPC, which prohibits recording communication between the accused and their lawyer, i.e., only from the moment the accusation is communicated. For example, this is Judgement Case No I. ÚS 1638/14: *'It follows from the provisions of § 158d (1) of the CPC that the surveillance of persons and objects means acquiring knowledge about people and objects carried out in a classified manner by technical or other means. If during the surveillance, the police authorities discovers that the accused is communicating with their lawyer, it is obliged to destroy the record with the content of such communication and not use the learned knowledge in this connection. This provision protects undisturbed communication between the accused and their lawyer, including information on the content of the conversation between them and related information (e.g., about the meeting place, the communication method, etc.). However, it should be noted that the cited provision applies only to cases where criminal prosecution has already been initiated by issuing a resolution pursuant to § 160(1) of the CPC.'*

In direct contrast to the above, it is necessary to highlight the Constitutional Court Case Judgement No II. ÚS 889/10, which takes a far less positivist approach

[27] Michaud v France, Judgement on December 6th, 2012, Complaint No 12323/11, § 118.

[28] R. E. v United Kingdom, Judgement on October 27th, 2015, Complaint No 62498/11, § 131.

[29] Robathin v Austria, § 39.

[30] GŘIVNA, Tomáš. Právo na zachování důvěrné komunikace mezi advokátem a jeho klientem. *Bulletin advokacie*. 2017, 6. ISSN 1210-6348, p. 62.

and agrees with the material dimension of the right of defence in the following way: *'In addition, implementation of the fundamental right of legal aid occurring only at the moment when public authority in some formal way (here by submitting a power of attorney to a police authority or a court) learns that someone is exercising this right cannot be considered a constitutionally acceptable view. The period between the moment when someone turns to a lawyer to provide them with legal aid and the moment when this fact becomes apparent to the public authority concerned can hardly be in a constitutional vacuum. Given the basic logic of the situation, it is reasonable to assume that the fundamental right to legal aid in proceedings before public authorities also includes preparation, particularly consisting of the transmission of all known relevant information (which may be followed by terminating legal services), and procedural tactics agreement, which usually precedes negotiations with a state authority in terms of time. After all, lawyer's fees consider taking over and preparing representation as the first act of the legal service, and it does not follow on from the established decision-making activity of general courts that this sometimes means the notification of a power of attorney to a public authority. From this it can be concluded that the lawyer's duty of confidentiality begins when the client asks him for legal services and in connection with this, they begin to acquaint them with their problem.'*

The argument of the first act of legal service can be considered successful. It should be also noted that it has already been mentioned above that it is not possible to include the possible commission of a criminal offence by a lawyer under this term, either to the client's detriment or in complicity with the client to the detriment of other people.[31]

5. Proposals *de lege ferenda*

From the above legislation and selected case law analysis, it clearly follows that intercepting and recording telecommunications traffic between the lawyer and the accused is inadmissible according to § 88(1) of the CPC, similarly to monitoring their communication according to § 158d (1) of the CPC. However, the fact that the confidentiality of communication between a lawyer and a client is not fully secured before the allegations are made, i.e., at the time of legal aid, for example, 'only' to a suspect, seems problematic from the viewpoint of the material security of the right of defence. After all, this is precisely the period when most of the interventions in the lawyer's duty of confidentiality logically take place, as the bodies active in criminal proceedings primarily collect the documents for its communication. Additionally, the sensitivity of interventions is supported by the fact that, in a period of ignorance of criminal prosecution, clients are naturally less vigilant in disclosing confidential information to their lawyers. This information can sometimes

[31] For example, see Resolution on November 12th, 2014, Case No I. ÚS 1638/14, on March 24th, 2014, Case No III. ÚS 3988/13 or from January 3rd, 2017, Case No III. ÚS 2847/14, § 23.

make a significant contribution to the deterioration of their position in later criminal proceedings, as it can be essentially self-incriminating.

Given the purpose of the institution of professional secrecy, it is not very justified for it to be subject to two different protection regimes, the decisive factor being the moment when the allegations are made.[32] It is quite obvious that the relationship of confidence includes everything that the client communicates to their lawyer at the time of initial contact, while the main motivation for both is undoubtedly the best possible advice and the most comprehensive preparation for a possible future defence. If the client only provides the lawyer with sketchy information in view of the fear of a possible breach of professional secrecy, the purpose described above could be endangered or even thwarted. It follows that without absolute confidentiality between a lawyer and a client, the right of defence and therefore a fair trial, which is one of the pillars of the democratic rule of law, and cannot be guaranteed.[33]

It should be added to the above that the current rather restrictive interpretation of the right of defence given in the Constitutional Court's selected case law is quite surprising in view of the persistent demand for a broader interpretation of human rights, that the Constitutional Court uses to resist the formalistic approach of law enforcement authorities in applying sectoral legislation, including the CPC. To support this statement, it is possible to mention, for example, the Constitutional Court Judgement Case No II. ÚS 98/95, in which it accepts this decision: '*The lack of legislation in Act No 283/1991 Coll., concerning representation in submitting explanations due to a clear regulation, contained at the level of standards of the highest legal force, i.e., the Charter and the Constitution, changes nothing in the above-mentioned matter. Furthermore, the objection of lack of express legislation as a reason for refusing the right to legal aid corresponds to a purely positivist view of the law, which also does not correspond to the requirement of the rule of law which the natural-law tendencies are typical of (cf. the preamble to the Charter or Art. 85(2) of the Constitution). In conclusion, the Constitutional Court expressly states out of caution that the right to legal aid in giving explanations does not mean a police obligation to provide a lawyer in every case, but only the obligation to allow such representation.*'

In connection with ensuring the natural-law concept of the right of defence, there is a possibility to replace the words 'accused' and 'attorney' with the words 'client'

[32] Gřivna also draws attention to the differences in the legislation of the so-called posterior protection, i.e., the possibility of using the means which a person can subsequently use for defence against the illegality of the relevant act. Review by the Supreme Court is allowed only in the case of interceptions provided for in Art. 88 of the CPC. See Unie obhájců ČR. *Stanovisko Unie obhájců ČR ze dne 14. 3. 2019, č. 1/2019 k nedostatkům právní úpravy ochrany důvěrného vztahu mezi advokátem a jeho klientem v trestním řízení* [online]. 2019 [cit. 2019-02-14]. Available from: https://www.uocr.cz/stanoviska/stanovisko-unie-obhajcu-cr-c-1-2019-k-nedostatkum-pravni-upravy-ochrany-duverneho-vztahu-mezi-advokatem-a-jeho-klientem-v-trestnim-rizeni/.

[33] See Council of Bars and Law Societies of Europe (CCBE). *CCBE Statement on professional Secrecy/legal professional privilege (LPP)* [online]. 2017 [cit. 2019-02-16]. Available from: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Postion_Papers/EN_DEON_20170915_Statement-on-professional-secrecy_LPP.pdf.

and 'lawyer' in the provisions of § 88(1) of the CPC and § 158d (1) of the CPC. This would ensure that legal aid can be implemented in full even in cases where criminal proceedings have not yet been initiated. Such a wording would rather correspond to the determination of the scope of legal aid enshrined in Art. 37(2), where this right is guaranteed from the beginning of the proceedings, which is a wider period of time than in the case of criminal proceedings according to the interpretation of the term in § 12(10) of the CPC.

The request for this regulation logically raises several counter-arguments to its detriment.[34] It is primarily a reference to the problem of recognising that it is really a conversation between a lawyer and a client. However, this dilemma is also brought about by current legislation, as it is not specified in any way how the police authority should know that it is currently recording a conversation between the accused and his attorney. According to the wording of the law, the police are obliged to destroy an existing record after finding out that it is this type of communication. However, it is almost certain that some police officers have read such record and are aware of sensitive information, which significantly contributes to the deterioration of the accused's position and, as a result, to a possible violation of the equality of arms principle and a fair trial. At this point, it is worth noting that it is not possible to disguise practical cases where police officers abuse the possibilities of Terminal Online software used for comprehensive processing and evaluation of accompanying data and sound recordings obtained by interception and recording of telecommunications traffic under § 88 of the CPC. However, it is more about the awareness and approach of individual police officers to human rights and the rule of law as such in this context.

Inspiration is offered by Dutch legislation to eliminate the above-mentioned pitfall,[35] where protecting professional secrecy is basically governed by the same principles as in the Czech Republic, but with the use more appropriate technical support. Its essence is the possibility for each lawyer to report their telephone number through the Netherlands Bar Association to the relevant police department if they do not want their calls to be recorded. The automatic system ends the interception when it recognises that it is a telephone number registered in such way. However, this function can be unblocked, and communication can be recorded in exceptions provided by law, for example, if the lawyer is also a suspect in criminal activity.[36]

[34] See SOKOL, Tomáš. *Problematika odposlechů komunikace advokáta s klientem* [online]. 2018 [cit. 2019-02-19]. Available from: https://www.epravo.cz/top/clanky/problematika-odposlechu-komunikace-advokata-s-klientem-107528.html.

[35] It should be noted that there are voices pointing to the possible abuse of this system.

[36] The Government of the Netherlands. Confidential telephone conversations of lawyers automatically destroyed [online]. 2010 [cit. 2019-02-27]. Available from: https://www.government.nl/latest/news/2010/08/23/confidential-telephone-conversations-of-lawyers-automatically-destroyed and NOVÁK. Jiří. Rozhodnutí o zákazu odposlechu advokátů v Nizozemí. *Bulletin advokacie*. 2016, 1–2. ISSN 1210-6348, p. 86.

Other counter-arguments are based on the claim that the increased protection provided to communication between lawyers and clients will also protect conversations, for example, on the preparation of a criminal offence, which in principle do not concern legal aid at all. It is possible to point out that conversations of this type can also be made by the accused and the attorney, although they are logically more cautious. At this point, it should be noted again that professional secrecy and its protection are always directed in client's favour, not the lawyer's, and only concern the right of defence provided in accordance with the law. It must not be an imaginary shield for the commission of a lawyer's crime or for conventions on the joint commission of a crime between themselves and a client.

Overall, it can be concluded that the legislation of the possibilities of breaking professional secrecy and confidentiality of communication between a lawyer and a client from the viewpoint of human rights protection and a fair trial directly calls for clarification and time extension of protection of communication from the attorney and the accused to the lawyer and the client. In addition to the above possibility of simple replacement of words in § 88 and §158d(1) of the CPC, there is an even more conceptual approach, the essence of which would be to enshrine a general provision in which precise limits would be set on the use of means constituting a breach of confidentiality between a lawyer and a client. This regulation is one of the essential challenges of the forthcoming recodification of the Criminal Procedure Code.

It is also interesting that the above-mentioned European Union legislation and the related case law of the European Union Court of Justice (formerly the European Court of Justice) appear to be the most advanced in this context. According to them, protecting confidential communication only applies if it occurs for the purpose and in the interest of protecting the client's rights before and after proceedings commence and if it takes place between the client and their lawyer.[37] Therefore, European Union legislation and judicial decision-making trends are outlined in a positive way in terms of a broader interpretation of the right of defence.

6. Conclusion

The issue of confidentiality of the relationship between a lawyer and a client and the institutes of its breaking are clearly not in the forefront of the commentary literature. However, it attracts the attention of the professional public and, naturally, practicing lawyers. However, it is of great importance for the democratic rule of law. One of its typical features is the anxious observance of the boundaries of a fair trial, an essential part of which is the right of defence in criminal proceedings. This right certainly cannot be considered effective if the confidentiality of the communication between the lawyer and the client is broken, that is to say, when the police, the state attorney's office or even the court are acquainted with information intended solely

[37] See AM & S Europe Limited v Commission, Judgement on May 18th, 1982, C 155/79.

for the lawyer's needs to build an effective defence. If this happens, the above-mentioned authorities will gain some insight and advantage in criminal proceedings, which may inevitably lead to a violation of the impartiality and equality of arms principles, i.e., other essentials of a fair trial.

The confidentiality of communication between a lawyer and a client is usually subordinated to the protection of the right to a private life by the case law of the Constitutional Court and the ECHR, while interference with this right is permissible under conditions set out in the Charter and the Convention. Pursuing a legitimate objective is a key consideration here. Far less numerous is the protection of the right to a fair trial, namely the right of defence, which is certainly a stronger guarantee of the inviolability of such confidentiality. In this context, international and national law explicitly provides protection for communication between the attorney and the accused, using the moment of communication of the accusation as a dividing criterion. It may seem surprising that the case law of the above-mentioned courts in relation to the right of defence in majority does not provide a broad interpretation of this human right as is the case in other cases in order to protect natural-law principles and combat legal positivism. EU legislation and the resulting EU Court of Justice (formerly the European Court of Justice) case law provide a certain positive example.

In this situation of a somewhat incomprehensibly ambiguous case law interpretation, often proposed change in the wording of the CPC, which would at least extend the protection of confidentiality of communications to the lawyer and the client, seems to be a suitable solution. However, it is important that this increased protection should only be granted to legal aid provided in accordance with the law. Legal confidentiality must only agree with the client's interests, but its meaning is much deeper. It must be borne in mind that public confidence in justice is very fragile. One of its grounds is the belief that lawyers can effectively carry out their mission to protect the interests of their clients, including building an effective defence in criminal proceedings. They are rightly considered 'assistants' of justice. Justice in society can be seen as a large system, and the direct link between professional secrecy, the confidentiality of a lawyer-client relationship, the right to a fair trial, equality of arms, court impartiality, a fair trial and the above-mentioned justice as such cannot be overlooked.

The smallest, but not insignificant, component of justice consists of the people who participate in its performance. It certainly is not beneficial to it when, in order to achieve the commendable goal of detecting crimes and punishing perpetrators fairly, they may unknowingly disturb it by their actions and by not firmly adhering to the protection of its fundamental principles.

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Limits on the Legitimacy of Invasion of Privacy in Surveillance of Persons and Things[1]

Ingrid Galovcová

Faculty of Law, Charles University

galovcoi@prf.cuni.cz

Surveillance of persons and things is a commonly used means of operative searching aimed at detection and clarification of crime in practice. Legislation allowing to use this institute, which infringes the right to privacy of the person under surveillance, should respect the requirements defined by public authorities for infringement of the right to privacy. The chapter deals with the evaluation of the Czech legislation on surveillance of persons and things in terms of fulfilment of the limits on the legitimacy of violating the private sphere of an individual while using the institute of surveillance of persons and things pursuant to section 158d of the Criminal Procedure Code. In particular, it is critical of the permission regime with regard to the absence of a court decision on surveillance in some cases, but also of surveillance of a person at the execution stage of criminal proceedings, which occurs in practice.

1. Introduction

The effective fight against crimes requires using tools enabling to detect and clarify crimes, among which surveillance of persons and things plays an important role at the early stages of criminal proceedings. Using this institute, however, is inextricably connected with the invasion of privacy of the person under surveillance. On one hand, there is the legitimate interest of the state in detecting and punishing crimes; on the other hand, an individual's right to privacy and the guarantee of its respecting and not allowing groundless invasion of privacy by public authorities. Article 4 (2), in conjunction with Article 7 (1) and Article 10 of the Charter, require that the limits on infringement of the right to respect for private life are defined by law. However, even in a situation where surveillance of persons would be formally implemented in accordance with legal prerequisites for its implementation, some other requirements for its legitimacy cannot be ignored. In this context, it should be noted that, unlike the Convention, the Charter does not further specify the requirements of a possible restriction of the right to privacy. In contrast, the Convention in its Article 8 (2) stipulates that invasion must be permitted by law, must pur-

[1] The chapter is a publication output within the programme of institutional support of science at the Charles University, Progress Q02 *„Publicizace práva v evropském a mezinárodním srovnání" ("Publicization of Law in European and International Comparison").*

sue any of the objectives set out in this provision and must be proportionate to this objective and necessary in a democratic society. It is therefore necessary to apply these criteria also to decision-making on surveillance of persons in Czech criminal proceedings.

2. Right to privacy and guarantees of its respect

The right to privacy in terms of defining the provided protection is subject to the constant development, conditioned by changing conditions for the functioning of the society. The protection dimension and the notions of what is part of the private sphere are changing, and the interpretation is also strongly influenced by economic and cultural traditions and differences in the perception of an individual and his or her personal sphere. In addition to the traditional spatial definition of privacy and the emphasis on family life, the interpretation of privacy as an autonomous freedom of an individual's will comes to the fore. The concept of privacy is variable and the extent of protection must be inferred in each individual case depending on specific circumstances, while it is necessary to assess not only the space in which the protection is to be provided, but also the nature of the object of protection itself, as well as the manifestation of the concerned person's will, manifesting itself also in his or her behaviour, subject to his or her own decision-making on the extent to which his or her privacy is to be respected. Ensuring the autonomy of an individual's will is as *ratio decidendi* also evident in the decision-making practice of the ECHR relating to Article 8 of the European Convention of Human Rights providing the protection of the right to privacy.

Criminal proceedings and their procedures are often linked to the infringement of the rights and freedoms of individuals, and it is precisely the implementation of acts that have the potential to interfere with an individual's privacy that requires thorough consideration when actions of law enforcement authorities intervene in the private sphere and, with respect to the intensity of such intervention, to consider meeting the conditions of its legitimacy. The distinguishing between the public sphere and privacy in its various forms and protected dimensions is not always clear. In any activity of law enforcement authorities having the potential to endanger the right to privacy, it is necessary to assess the reach and impact of such activity with respect to specific circumstances of the case, and – in the event of conclusion of a possible infringement of the right to privacy – to examine whether all conditions enabling infringement of the right to privacy are met.

The right to respect for private life is not guaranteed absolutely; it is of a relative nature; therefore it is possible to intervene in it by using operative searching means in situations where the preconditions enabling this infringement are fulfilled and their fulfilment cannot be reduced to the legality requirement, i.e. only to complying with the procedural procedure of their use as defined in the Criminal Procedure Code. A constitutional-compliant infringement of the right to privacy requires the

application of statutory legal regulation in compliance with the respect for other limits on its legitimacy, which can also be inferred from the decision-making practice of the European Court of Human Rights, or the judicature of the Constitutional Court. Thus, law enforcement authorities must apply the legal conditions for the use of operative searching means in accordance with the guarantees interpreted by the judicature in question.

The European Court of Human Rights (ECRH) set out the general principles for meeting the requirements for legitimacy of infringement of the right to privacy occurring by surveillance of persons in criminal proceedings and assessing its conformity with the right to a fair trial, in the judgement Dragojevic v. Croatia. It referred not only to the general requirements for the national regulation of secret surveillance (legality, legitimacy of the reason and the necessity for achieving an objective),[2] but also to the conditions for using special investigation techniques as defined by Recommendation REC(2005)10 of the Committee of Ministers to the Member States on special investigation techniques in relation to serious crimes, including acts of terrorism of 10 April 2005.[3] The above-mentioned recommendation considers as special investigation techniques the procedures in criminal proceedings aimed at gathering information in such a way that the target persons are not warned, under which it is undoubtedly possible to include surveillance of persons pursuant to section 158d of CPC. The general principles for the use of special investigation techniques, as expressed in Recommendation REC(2005)10, are summarized by Záhora into three requirements to be met by the Member States, namely:

- define in the national legislation the circumstances and conditions for the use of special investigation techniques by the competent authorities;
- take legislative measures enabling the competent authorities to use investigation techniques to the extent necessary in a democratic society for effective prosecution and charges;
- take legislative measures to ensure adequate control of special investigation techniques by judicial authorities or any other independent authorities through prior authorization – supervision during investigation or ex post facto investigation.[4]

Recommendation REC(2005)10 does not foresee the use of special investigation techniques in relation to any crimes, but it should be used for particularly serious crimes.

[2] Decision of the European Court of Human Rights in the case *Dragojevic v. Croatia* of 15 January 2015.

[3] *Recommendation Rec (2005)10* of the Committee of Ministers to Member States on „Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism. [online]. Copyright © UNHCR 2019. [cit. 15 February 2020]. Available from: http://www.refworld.org/docid/43f5c6094.html.

[4] ZÁHORA, Jozef. *Obrazové a zvukové záznamy v trestnom konaní (Video and audio recordings in criminal proceedings).* Bratislava: Wolters Kluwer, 2018.ISBN 978-80-8168-957-4, p. 27.

As already stated, the ECHR judicature provides indisputable importance in formulating the minimum standards for determining the legitimacy of the infringement of an individual's rights by public authorities in surveillance of persons and things. The European Court of Human Rights, while assessing individual actions alleging a breach of Article 8 of the Convention by secret surveillance, does not assess national legislation and its compliance with the Convention, but it focuses on how it is applied in a particular case.[5] It is therefore necessary for the national court, when allowing surveillance of a person, to apply the provisions of the Criminal Procedure Code in the manner consistent with the requirements of guaranteeing the right to privacy and to respect the limits set for infringement of the right to privacy. However, the possibilities of meeting the given requirements in a situation where surveillance is not decided by the court, are questionable.

3. Surveillance of persons and things in the Czech legislation

In addition to the mock transfer and use of an agent, surveillance of persons and things is one of operative searching means usable in criminal proceedings on crimes under Title Nine, Part Two of the Criminal Procedure Code, regulating the procedure before initiating criminal prosecution. The specific definition and basic conditions for the implementation of this operative searching means are defined in the provision of section 158d of CPC. The extensive legal definition of surveillance of persons and things, which pursuant to section 158d (1) of CPC means *"obtaining knowledge of a person and things carried out in a secret way by technical or other means"* is further corrected both by legal conditions for the possibility of surveillance implementation, but also by the general requirements set out for the use of operative searching means in section 158b of CPC.

Pursuant to section 158d of CPC, surveillance of persons and things is focused on obtaining knowledge of such person and things. Such a broad definition of the objective being pursued by the use of the institute in question requires further interpretation. There is no doubt that it will not be any knowledge of persons and things, but only knowledge of relevance to criminal proceedings. This does not mean, however, that any knowledge of relevance to criminal proceedings can be obtained through the surveillance institute. The systematic classification of surveillance as the means of operative searching activities cannot be ignored, i.e. means primarily used in connection with the initial stage of criminal proceedings, which precedes the initiation of criminal prosecution. Operative searching means were incorporated into the Criminal Procedure Code (CPC) by the amendment No. 265/2001 Coll., in connection with the extension of pre-trial proceedings in the Czech criminal process to include the investigation and clarification of crimes. And precisely for this stage of criminal proceedings operative searching means are pri-

[5] Cf. judgment of the European Court of Human Rights in Goranova - Karaeneva v. Bulgaria, judgment of 8 March 2001, paragraph 48.

marily intended. They thus enable an initial examination of the case and gaining knowledge leading to the basic clarification and conclusions on the (un)justification of the criminal prosecution initiation. However, their use is only possible when other facts and indications lead to the suspicion that a particular person or persons have committed specific crime,[6] and they are primarily intended to investigate an existing suspicion.

In terms of time, it is therefore not questionable to determine the moment from which surveillance can be carried out. It is the commencement of criminal proceedings, i.e. commencement of acts of criminal proceedings if there is a danger of delay, carrying out urgent and unrepeatable acts and subsequent drafting of a record (section 158 (3) of CPC). From that moment on, the use of surveillance for obtaining knowledge relevant to criminal proceedings would be procedurally consistent in terms of time. However, it seems to be more problematic to determine until what moment, in the course of criminal proceedings, the use of the institute of surveillance of persons and things is still acceptable. As already mentioned, from the point of view of the systematic classification of surveillance of persons and things among operative searching means, it is possible to deduce its determination primarily for the stage of criminal proceedings preceding the criminal prosecution initiation. However, the Criminal Procedure Code, in its section 158f, extends the possibility to use operative searning means to include some other stages of criminal proceedings when it stipulates that *"if the reason for the use of operative searning means appears only after the criminal prosecution has been initiated, the procedure shall be in accordance with sections 158b to 158e; after criminal charges have been filed, the President of the Chamber of the Court of First Instance shall decide on their application even without the petition of the public prosecutor"*. The use of surveillance of persons and things is therefore also enabled at the stage of investigation, i.e. after the criminal prosecution has been initiated, and even in proceedings before a court, i.e. after criminal chrages have been filed. The question remains whether the mentioned extension of the possibility to use operative searching acts in proceedings before a court applies only to proceedings before a court of first instance, or also to appellate proceedings, or as late as to enforcement procedure. The answer needs to be sought in the purpose pursued by their use, taking into account the limits enabling the invasion of privacy that will be assessed differently at these stages of criminal proceedings (especially in terms of subsidiarity and proportionality requirements), than at previous stages of criminal proceedings. It is hard to imagine that, following a guilty decision, even it it legally ineffective, observations should be made to identify findings of decisive importance for the decision of the Court of Appeal on the prosecuted crimes. As regards enforcement procedure, I am of the opinion that the use of surveillance of persons and things at this stage of the criminal proceedings is out of the question at all. The possibility to decide on sur-

[6] Cf. resolution of the Constitutional Court of 12 November 2014, File No. I. ÚS 1638/14; paragraph 22.

veillance of persons and things at the stage of the enforcement procedure cannot be inferred either by an extensive interpretation of section 158f of CPC or by analogy. In such case, it would be an analogy encroaching on the fundamental rights and freedoms to the detriment of the convicted person, which is unacceptable in the rule of law. There is no doubt that the enforcement procedure is part of the criminal proceedings, but it is its final stage following the final termination of the prosecution. Consequently, there is no need in the enforcement procedure to ascertain the facts which would relate to the criminal activity of a person on whom it has already been finally decided.

The material prerequisite for the possibility to use the institute of surveillance of persons and things can also be inferred from the provisions of section 158b (1) of CPC, as the general regulation of the conditions for the use of operative searching means, which explicitly stipulates that operative searching means can be used exclusively in proceedings on intentional crimes, i.e. for the purpose of deciding on intentional crimes. The purpose of the enforcement procedure and the means for achieving it are different from the purpose of the criminal prosecution itself, therefore the use of operative searching means at the stage of the proceedings following a final decision on guilt and punishment was taken cannot be a legitimate measure in terms of meeting the conditions of subsidiarity of their use and proportionate to the purpose pursued at this stage of proceedings when a final decision on guilt and punishment already exists. It is therefore not possible to fulfil one of the material requirements of surveillance, which is also reflected in the definition of formal requirements for the application for surveillance permission, namely that this *"must be justified by suspicion of a specific crime and, if known, also data on persons or things to be under surveillance"* (section 158d (4) of CPC). Although it is no longer necessary, at the stage of proceedings before a court, so that the permission for surveillance of persons and things is decided at the request of the public prosecutor, the basic material presumption of surveillance permission cannot be ignored and it is not possible to order surveillance in the situation when the suspicion of crime of the person under surveillance does not exist.

Thus, the need to use the institute of surveillance of persons and things can only be associated with the verification and clarification of information indicating the suspicion of a specific crime of a certain person or its proving, using the findings as evidence in criminal proceedings if they are obtained in a procedurally consistent manner (section 158b (3) of CPC). It is essential that criminal proceedings are conducted for a deliberate crime. Regarding the type seriousness, the law does not define in any exhaustive list the crimes for which the use of surveillance would be feasible, i.e. in principle it can be stated that the institute of surveillance can be used in proceedings on any intentional crime. Correction of this statement, however, is found in the principle of proportionality, generally laid down in section 2 (4) of CPC, which is specified in relation to operative searching means in section 158b (2) of CPC, together with the principle of subsidiarity and proportionality of

the infringement of the fundamental rights of persons at whom the deployment of operative searching means is directed.

In every particular case, it will be necessary to examine, on the basis of the facts and the resulting conclusions of the nature and gravity of the crime, before the decision on surveillance is taken, whether interference with an individual's rights is not disproportionate to the purpose to be pursued by surveillance, and whether this purpose could not be achieved by other, less invasive means. The above mentioned prerequisites for the use of operative searching means are also followed by the legal regulation laying down formal procedural conditions for the implementation of surveillance of persons and things, contained in section 158d of the Criminal Procedure Code and the procedural regime for its authorization.

Decision on surveillance of persons and things, or its permission, is dependent on the intensity of the expected infringement of an individual's fundamental rights that is expected during its implementation. From the point of view of the permission regime, Gřivna distinguishes three forms of surveillance of persons and things regulated in section 158d of CPC, namely *"(1) mere surveillance; (2) surveillance in which audio, video or other recordings are made; (3) surveillance in which the integrity of the dwelling and the secrecy of letters are infringed or the content of other documents and records kept in private by technical means is ascertained"*, while at the same time criticizing the legislation in force, which may not always correspond with the embodied permission regime to the intensity of invasion of privacy with a certain form of surveillance (typically spatial eavesdropping).[7]

Surveillance of persons and things referred to above as *"mere surveillance"* is possible without prior authorization. Thus, the police authority performs its activities in a secret manner without being subject to any permission regime. The only restriction is the obligation not to use the findings obtained from communication of the person under surveillance with his or her defence lawyer [section 158d (1) of CPC].[8] I believe that the very nature of surveillance of persons (its defining characteristics), i.e. the fact that it is a matter of obtaining knowledge in a secret manner using technical or other means is associated with an infringement of the right to privacy of the person under surveillance and the constitutional conformity of this infringement by the public authority requires the prior consent of the court. The mere fact that surveillance is carried out in a public space does not mean that the privacy of the person under surveillance cannot be affected by it. It is precisely the use of technical means enabling remote surveillance which can cause the infringement of

[7] GŘIVNA, Tomáš. *Zákonnost důkazů získaných sledováním osob a věcí (Legality of evidence obtained by surveillance of persons and things),* p. 320. In JELÍNEK, Jiří et al. Dokazování v trestním řízení v kontextu práva na spravedlivý proces (Taking of evidence in criminal proceedings in the context of the right to a fair trial). Praha: Leges, 2018, p. 536.

[8] For the issue of the inapplicability of evidence, see GALOVCOVÁ, I. Využiteľnosť informácii z neúčinných dôkazov (Utilization of information from ineffective evidence). In: Ústavněprávní limity trestního práva: k odkazu Jiřího Herczega (Constitutional-law Limits of Criminal Law: on the Legacy of Jiří Herczeg) – Praha: Leges, 2019, p. 104–115.

the right to privacy in a particular case, even without the production of video or audio recordings from surveillance.

Respect for the right to privacy cannot generally be defined from a spatial perspective. The relevance of surveillance to the privacy of the person under surveillance and the intensity of the intervention, if any, must be assessed in each individual case with regard to its specific circumstances. In the connection of the definition of an area where infringement of the right to respect for private life may occur, Repík inferred from the ECHR judicature that these can be implemented not only in the privacy of a person, i.e. in particular at the place of residence of the person under surveillance, but the privacy is also infringed by surveillance of persons in places accessible only to a limited number of people (such as schools, hotels, restaurants, prisons, etc.), but also in places accessible to the public.[9] When carrying out surveillance in a public space, the invasion of privacy and its intensity will depend on several factors, while the systematic surveillance and recording of an individual's movement outside his or her place of residence, i.e. in publicly accessible areas, will undoubtedly interfere with private life,[10] even if no visual, audio or other recordings would be made. The very systematic nature of surveillance enabling to obtain knowledge of the person under surveillance is, in the ECHR's view, the collection and processing of personal data affecting the person's privacy, and it is capable of infringing the right to private life protected by Article 8 (1) of the ECHR.[11]

The court's consent is not required ether for surveillance in which audio, video or other recordings are made [section 158d (2) of the CPC]. The public prosecutor's permission is required only to carry out surveillance using audio, video or other recordings, whereas in urgent cases only an additional authorization is sufficient. The implementation of such surveillance, which represents one of the forms of the so-called spatial eavesdropping, has been criticized in the legal theory for a long time.[12] Jelinek commented aptly on this issue when he referred to the legislative vacuum of spatial eavesdropping and formulated the requirements for its new

[9] REPÍK, Bohumil. *Audiovizuální sledování osob mimo soukromé prostory ve světle judikatury Evropského soudu pro lidská práva (Audiovisual surveillance of persons away from private premises in the light of the judicature of the European Court of Human Rights)*. Criminal Law Revue, Year 2003, Vol. 12, p. 349.

[10] Cf. judgment of the European Court of Human Rights in the case *Uzun v Germany* of 2 September 2010, item Nos. 45, 46.

[11] Cf. judgment of the European Court of Human Rights in the case Uzun v Germany of 2 September 2010, item No. 52.

[12] See e.g. JELÍNEK, J. K chybějící právní úpravě tzv. prostorového odposlechu v trestním řádu (The lack of legislation of the so-called spatial eavesdropping in the Criminal Procedure Code). Advocacy Bulletin, 2018, (7–8), p. 13–19. ISSN 1210-6348; GŘIVNA, Tomáš. Zákonnost důkazů získaných sledováním osob a věcí (Legality of evidence obtained by surveillnace of persons and things), p. 320. In JELÍNEK, Jiří et al. Dokazování v trestním řízení v kontextu práva na spravedlivý proces (Taking of evidence in criminal proceedings in the context of the right to a fair trial). Praha: Leges, 2018, p. 536.

legislation.[13] His conclusions on the necessity of quick adoption of the legislation on so-called spatial eavesdropping can only be supported. However, there are sporadic opposite opinions appearing in professional periodicals. For example, according to Ščerbová, *"in these cases, the authorization of surveillance by a public prosecutor is an adequate standard of the protection for the rights of the persons under surveillance*".[14] From the reasoning on which her conclusion is based, it is possible to deduce misunderstanding of the basic principles of criminal proceedings and the requirements for the interpretation and application of standards of the Criminal Procedure Code in a constitutionally conforming manner, as they also follow from the judicature of the European Court of Human Rights in relation to the methods of secret surveillance.

The court's consent with surveillance of persons and things is required by law only if surveillance is intended to infringe the integrity of the dwelling and the secrecy of letters or the content of other documents and records kept in private is to be ascertained by technical means pursuant to section 158d (3) of CPC. It is the most intensive form of invasion of privacy, where the necessity of its implementation and fulfilment of all legal conditions and constitutional-law prerequisites of implementation is to be assessed by a court that should guarantee the legitimacy of the invasion of privacy.

4. Case interpretation

The problematic application of the institute of surveillance of persons and things in the application practice can be demonstrated in the case (published in media) of the convicted person R. J. The convicted person, who was suspended from imprisonment pursuant to section 325 (1) of the Criminal Procedure Code (due to his severe illness), applied for the waiving of the remainder of imprisonment under section 327 (3) of the Criminal Code, while proving the incurability of his illness by expert opinions on his health condition. The court of first instance did not comply with his motion and the case was decided, on the convicted person's complaint, by the High Court in Prague. In the course of the complaint proceedings, the High Court in Prague decided to carry out surveillance of the convicted person under section 158d (2) and (4) of CPC with the justification that information should be obtained as to whether the named person is observing the necessary therapeutic measures, which can only be ascertained by surveillance, since it is necessary to act conspiratorially and to avoid any evidence of ongoing surveillance at all costs.

[13] JELÍNEK, J. K chybějící právní úpravě tzv. prostorového odposlechu v trestním řádu (The lack of legislation of the so-called spatial eavesdropping in the Criminal Procedure Code). Advocacy Bulletin, 2018, (7–8), p. 13–19. ISSN 1210-6348.

[14] ŠČERBOVÁ, V. Zamyšlení nad skutečně aktuálními problémy právní úpravy tzv. prostorových odposlechů (Reflection on truly problems of legal regulation of the so-called spatial eavesdropping). Public Procecutor's Office, 2019 (4), p. 19–25. ISSN 1214-3758.

While doing that, it is possible to make audio, visual or other records documenting the convicted person's movement outside his or her residence.

The reason for ordering surveillance of the person was thus obtaining knowledge of the convicted person's behaviour at the time of interruption of the sentence of imprisonment for health reasons, i.e. if he adheres to medical measures relating to his state of health, but this cannot be considered to be a legal reason. Even if the convicted person fails to comply with the treatment measures, it may have an impact at the most on his health, but certainly this conduct does not constitute his delinquent responsibility, i.e. the suspicion of a specific criminal activity of the person under surveillance cannot be inferred. And it is precisely the purpose of gaining knowledge of specific crime for what the institute of surveillance is intended. Absence of this purpose results in the non-existence of one of the basic material conditions for the surveillance implementation, or the invasion of privacy of the person under surveillance.

If the court decides in the enforcement procedure on the convicted person's request to waive the remainder of imprisonment pursuant to section 327 (3) of CPC, it is not possible to ascertain by surveillance a circumstance relevant to its decision-making on the postponement. It is hard to imagine that the meeting of the legal presumption for this decision, i.e. that the convicted person became ill with an incurable, life-threatening illness or an incurable mental illness, would be ascertained by the court by surveillance of the person convicted. In any way, an individual's conduct in public cannot influence the objectively supported (by medical findings) existence of an incurable, life-threatening illness or incurable mental illness. Compliance with the treatment regime with the diagnosis of such a disease is not a fact that would be a legal condition affecting the court's decision to waive the remainder of imprisonment.

In the case in question, the High Court in Prague ruled on the convicted person's complaint with reference to surveillance course reports, which, according to its findings, significantly support the accuracy and justification of the contested decision of the first instance court that failed to comply with the request for waiving the remainder of imprisonment, even in spite of the fact that it believed it was proven that the convicted person is incurably ill and that his illness can endanger his life at any time and anywhere.

5. Conclusion

Surveillance of persons and things is operative searching means which may result in infringement of the right to privacy of the person under surveillance, while the intensity of such infringement varies and depends on specific circumstances. It is essential that law enforcement authorities in the application of the institute of surveillance do not act purely formalistic, but examine in each individual case both the existence of material conditions for the surveillance implementation, but at the

same time do not neglect to respect the preconditions under which the invasion of privacy implemented can be considered to be constitutionally conforming. At the same time, the legal regulation of surveillance of persons and things does not correspond to the constitutional-law standards of infringement of the fundamental rights of an individual. Current practice, where, despite the infringement of the right to privacy as a result of surveillance without the permission of the court, the findings obtained by surveillance are used in criminal proceedings not only as operative searching information, but also as evidence in criminal proceedings, should not be tolerated.

It is also clear from the described case interpretation that the problem is not only the insufficient regulation of surveillance permission regime, but also the inconsistent application of the institute concerned without taking into account the purpose to be achieved by its use. Surveillance of a person at the enforcement stage of criminal proceedings is focused on a purpose other than the investigation of crimes and the prosecution of their perpetrators, and it does not constitute a means necessary in a democratic society for achieving a legitimate objective. Termination of criminal prosecution is a circumstance which may have an impact on the measuring of the presumed infringement of the right to privacy of the person under surveillance with the interest of the state in the effective fight against crimes. The limits enabling the infringement of the right to privacy must be respected in any situation where it is considered to use the institute of surveillance of persons in criminal proceedings, and the stage at which surveillance is to be implemented may also be significant in terms of their fulfilment.

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Limits on the Accused's Obligation to Appear for the Acts of Criminal Proceedings on the Basis of a Summons

Peter Polák

Abstract: *One of the basic obligations of the accused in criminal proceedings is the obligation to appear on a summons. This obligation of the accused is based on legal regulation, which also implies limits on itsfulfilment. These limits arise mainly from legal regulation from which the obligation is issued, but also from its content and scope, as well as from the legislation on the consequences of failure to comply with that obligation. The limits of the accused's obligation to appear on a summons are also affected by the case law of the national courts and the European Court of Human Rights. The content of this contribution is focused on the examination of the above-mentioned facts.*

Keywords: *accused in criminal proceedings, summons of the accused, obligation of the accused to appear on a summons*

1. Introduction

The status of the accused[1] in criminal proceedings is perceived by both the lay and the expert public, rather through the accused's rights that are primarily conferred upon the accused by the Code of Criminal Procedure, as a basic legal regulation for criminal proceedings with the force of the law. In the Slovak Republic, it is Act No. 301/2005 Coll., Code of Criminal Procedure, as amended (the "Criminal Procedure Code" or the "CPC"). But the accused's rights also arise from the international treaties on human rights and fundamental freedoms, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"),[2] the Constitution of the Slovak Republic[3] or from other legislation having the force of law. However, less is spoken and written about the accused's obligations in the case of criminal proceedings. This stems from the fact that criminal proceedings, as a procedure provided for by law, that are mainly conducted by prosecuting authorities[4] and courts, during which criminal offences are intended to be properly identified and their perpetrators fairly punished by law, must meet, both formally and

[1] The accused means a person who is being prosecuted for a specific criminal offence.

[2] The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by the Additional Protocols published by the Communication from the Federal Ministry of Foreign Affairs No. 209/1992 Coll.

[3] Organic Law No. 460/Coll. – the Constitution of the Slovak Republic, as subsequently amended by the organic laws.

[4] Prosecuting authorities mean the police officers with procedural powers to act in criminal proceedings as well as public prosecutors.

materially, the international and constitutional standards of a fair trial in a democratic and legal state. Still, it should be remembered that a fair trial consists of a complex set of procedural relations among the state authorities, the accused and other parties to the criminal proceedings, which does not only include the rights of the accused. The requirement for a fair trial is a means which, in the rule of law, is intended not only to guard against the arbitrariness of state authorities in the pursuit of the objectives of the criminal proceedings. The requirement for a fair trial also constitutes protection against an obstruction of the purpose of the criminal proceedings by the parties thereto, including an obstruction of the same by the accused.

Therefore, it does not contradict the concept of a fair criminal trial if, in order to fulfil the purpose of the criminal proceedings by an individual, legitimate obligations which the obliged entities are expected and required to meet are imposed upon them directly by law, or by the prosecuting authorities and courts under a law. In the event of a failure to do so, it is also legal and legitimate that those authorities should have available effective and appropriate means to legally enforce the fulfilment of such obligations.

One of the basic obligations of the accused in the case of criminal proceedings is the accused's obligation to appear before a prosecuting authority or court after he/she has been summoned to do so. The purpose of the said obligation is to ensure that the accused is present at a procedural act performed by a prosecuting authority or a court, even at the cost of a reasonable restriction on the accused's freedom of movement. But in this respect, it should be pointed out that, as a rule, the accused's presence at a procedural act is one of the accused's rights in the criminal proceedings from the perspective of his/her right to a fair trial. Also, in many cases, the accused's personal presence at a procedural act is a prerequisite for exercising the other procedural rights of the accused, which are included in his/her right to a fair trial. The exercising of the accused's rights, such as the right to a personal defence or the right to personally ask the witnesses questions, serves as an example. In the exercising of these rights, the accused's presence is expressly expected and in his/her absence, exercising such a right is even excluded.[5] The European Court of Human Rights ("ECtHR") normally holds the opinion that the accused's presence in proceedings should be a necessity in regard to criminal cases.[6] Although the ECtHR has admitted the possibility of hearing a case in the accused's absence under certain circumstances, such a possibility is not always in line with the interests of justice, especially where the accused's presence is necessary in order to establish the facts of the case.

There are a wide range of open questions about the accused's obligation to appear for a procedural act that is performed in criminal proceedings after being served with a summons. This particularly involves the establishment of clear pre-

[5] *Colozzav. Italy,* ECtHR's judgement of 12 February 1985, Application No. 9024/80.
[6] *Ekbataniv. Sweden,* ECtHR's judgement of 26 May 1988, Application No. 10563/83.

conditions for the commencement of the accused's obligation to appear for a procedural act on the basis of a summons, and the determination of the contents of such an obligation, including its scope and the limits thereon. However, such a question may also concern the determination of legal consequences for a failure to fulfil the said obligation of the accused, or legal consequences for the obstruction of its fulfilment.

2. General Part on the Accused's Obligation to Appear on the Basis of a Summons

The purpose of the accused's obligation to appear on the basis of a summons is to ensure that the accused is present at a procedural act during the criminal proceedings carried out by a prosecuting authority or court, at a predetermined place and time. The said obligation means that for the accused, his/her right to decide where he/she will be at a particular time is restricted.

Given that personal freedom and freedom of movement are guaranteed as a constitutional principle, any restriction on those freedoms is an exception to the application of such a principle. That is why the reasoning of the prosecuting authorities and courts for the need to restrict an individual's freedom in a particular case must always reflect this relationship between the principle and its exception.[7]

The same also applies to the obligation to appear on the basis of a summons. Obviously, summoning a person is always inevitably linked to interference with the personal freedom of the summoned individual who is to be detained.The accused's obligation to appear on the basis of a summons is the most moderate means of restricting his/her freedom, since it transiently interferes with the part of the accused's personal freedom which is the freedom of movement guaranteed by Article 23(1) of the Constitution of the Slovak Republic. The freedom of movement is also guaranteed by the Convention, namely by Art. 2 of Additional Protocol No. 4 to the Convention. The ECtHR's case-law stipulates that, if interference with personal freedom does not reach the intensity of the deprivation of freedom, but it merely concerns, for example, the obligation to report to the police at a certain time,[8] the application of Art. 5 of the Convention is excluded and only the application of Art. 2 of Additional Protocol No. 4 to the Convention comes under consideration.[9] Art. 5 of the Convention guarantees the right to liberty (personal freedom) and security. By contrast, Art. 2 of Protocol No. 4 to the Convention guarantees the right to liberty of movement and the freedom to choose one's residence. These said rights may

[7] Decision of the Constitutional Court of the Slovak Republic, I. ÚS 165/02, dated 18 February 2004.

[8] *Cipriani v. Italy,* judgement of 30 March 2010, Application No. 22142/07 or *Villa v. Italy*, judgement of 20 April 2010, Application No. 19675/06.

[9] *Guzzardi v. Italy,* judgement of 6 November 1980, Application No. 7367/76 or *Trijonisv. Lithuania,* judgement of 15 March 2006, Application No. 2333/02.

only be restricted by law if such a restriction is necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order (*ordre public*), for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others [Article 2(3) of Protocol No. 4 to the Convention].

A person's obligation to appear for a procedural act in criminal proceedings to which that person has been summoned is his/her fundamental procedural duty. However, the said obligation is not directly imposed upon the person by law (*ex lege*). In order for such an obligation to commence, the competent authorities must undertake an action in the form of their own procedural act. This procedural act involves **due and timely service of a summons** upon a person to be summoned. If the aforementioned conditions for summoning are not met, including instructing the summoned person on the possibility of being brought in and on the possibility of imposing a disciplinary fine on the person in the event of his/her failure to appear for a procedural act without justification, the summoned person's obligation to appear for a procedural act shall not commence based on such a summons, or it shall commence in an altered form (e.g. it will not be possible to bring in, or impose a disciplinary fine on a person who has not fulfilled his/her obligation arising from the summons).

The foregoing implies that the obligation to appear for a procedural act on the basis of a summons applies not only to the accused. In addition to the accused, it is possible to summon other persons, for example, a witness [Section 127(1) of the CPC], an agent [Section 117(11) of the CPC] or a person who needs to be heard concerning circumstances suggesting that he/she could have committed a crime [Section 196(2) of the CPC]. In relation to the criminal proceedings conducted against a legal entity, it is necessary to add that due to the nature of a legal entity, the obligation to appear for a procedural act on the basis of a summons shall apply to the persons who are authorised to act on behalf of the accused legal entity [Section 27(4) of Act No. 91/2015 Coll. on Criminal Liability of Legal Entities – hereinafter referred to as the "Legal Entities' Criminal Liability Act"], where it is mostly the statutory body of the accused legal entity [Section 27(1) of the Legal Entities' Criminal Liability Act]. But it has not been excluded that other persons, such as a representative of the accused legal entity [Section 27(2) of the Legal Entities' Criminal Liability Act] or a guardian appointed by a court [Section 27(7) of the Legal Entities' Criminal Liability Act], will also be obliged to do so.

A summoned person's obligation to appear for a procedural act on the basis of a summons may commence at virtually any stage of the criminal proceedings, whether at a procedural stage prior to the institution of the prosecution, in a preparatory procedure or at the individual stages of the proceedings before a court. A summoned person's obligation to appear shall commence in relation to a procedural act for which he/she has been summoned to appear. In respect to the place and time at which the obligation to appear on the basis of a summons is to be fulfilled, the general provisions of the Criminal Procedure Code on acts of crimi-

nal proceedings are primarily applicable. Section 55(2) of the CPC stipulates that the acts of criminal proceedings are performed by the prosecuting authorities and a court, in principle, between 7:00 a.m. and 8:00 p.m. and in official rooms. In justified cases, the acts of criminal proceedings may also be carried out outside the official rooms and the specified time.

3. Conditions for Commencement of the Accused's Obligation to Appear on the Basis of a Summons

It should be emphasised that the sole precondition for the commencement of the accused's obligation to appear for a procedural act in criminal proceedings before a prosecuting authority or a court, upon being summoned to do so, is **the due and timely service of a summons upon the accused to appear for the procedural act**. The foregoing arises from the provision of Section 120(1) of the CPC, which stipulates that "if the accused, who has been duly and timely summoned to an interrogation or other act, fails to appear there without sufficient justification, he/she may be brought in for the purposes of such an act". By the said provision, the legislator has also laid down a condition for the possibility of bringing in the accused so that "the accused needs to be notified of the possibility of being brought in, or other consequences of the accused's failure to appear for a procedural act, in the summons served upon him/her".

The service of a summons upon the accused is also a procedural act carried out by a prosecuting authority or a court, which is aimed at ensuring that the accused appears for another act in the criminal proceedings. In practice, this is the most common and the most moderate means of ensuring the accused's presence at the criminal proceedings. Some experts are of the opinion that "the summons itself is not associated with coercion, and when coercion is used it is assumed that a person will voluntarily appear before an authority that has served the summons upon that person."[10] This conclusion cannot be fully accepted. Serving a summons upon the accused or another person is the result of a procedural activity carried out by a public authority and the exercising of its power. A served summons gives rise to a procedural obligation imposed upon a specifically designated summoned person (e.g. an accused person or a witness) by a public authority that expects the summoned person to duly fulfil such an obligation. The summons is not originally of a coercive nature, but can be considered coercive by means of its derivation. Therefore, in the event of a failure to fulfil the obligation imposed upon the accused in the summons to appear for a procedural act, the accused may be forced to do so by using coercive measures under the Criminal Procedure Code.

A summons served to the accused is inherently a request made by a competent authority to the accused, which, in principle, obliges the accused to appear in per-

[10] OLEJ, J. – ROMŽA, S. – ČOPKO, P. – PUCHALLA, M.: Trestné právo procesné. Košice: UPJŠ, 2012, s. 73.

son before the competent summoning authority at the place and time specified in the summons, in order to ensure that the accused is present for the procedural act.[11] Until the adoption of the Legal Entities' Criminal Liability Act, it was excluded that a person other than the accused, acting for the accused or on his/her behalf, could appear before a prosecuting authority or court instead of the accused after the accused had been served with a summons. Since the Legal Entities' Criminal Liability Act came into effect, it is no longer true that the obligation to appear on the basis of a summons can be fulfilled solely by the accused in person, because a legal entity's personal presence at a procedural act is inherently excluded [Section 1(2) of the Legal Entities' Criminal Liability Act]. Only the persons authorised to act on behalf of the accused, as a legal entity, may fulfil the said obligation for that legal entity [Section 27 of the Legal Entities' Criminal Liability Act].

With respect to the form of a decision, a summons can be classified into a group of measures implemented by the prosecuting authorities and courts,[12] which are accepted in both the theory of criminal procedure[13] and in the practice of forensic applications.[14]

One of the requirements for the commencement of the accused's obligation to appear before a competent authority on the basis of a summons, pursuant to Section 120(1) of the Criminal Procedure Code, is that the accused is summoned **"duly"**. The Criminal Procedure Code does not specify this relatively vague legal concept in more detail, which has also been highlighted by the Constitutional Court of the Slovak Republic in practice.[15] Nor does it contain **a list of formal or content requirements for summoning the accused**, upon the fulfilment of which the act of summoning the accused could be regarded as a due summons in terms of its form and contents. The only content requirement for a due summons referred to in Section 120(1) of the Criminal Procedure Code is instructing the accused on the possibility of being brought in, and on the other consequences of his/her failure to appear on the basis of a summons. It was precisely the lack of a legal text, consisting of the absence of a detailed list of content requirements for a summons, that brought into both the practical and theoretical perspectives on procedural law, a considerable inconsistency in what a proper summons to be served upon the accused can be deemed to comprise.

[11] IVOR, J., ZÁHORA, J.: Repetitórium trestného práva. 4. vydanie. Bratislava:Wolters Kluwer, 2019, s. 143.

[12] Pursuant to Section 10(19) of the CPC, a measure means an informal oral or written decision of a technical and organisational or an operational nature.

[13] IVOR, J. – POLÁK, P. – ZÁHORA, J.: Trestné právo procesné I. Bratislava: Wolters Kluwer, 2017, s. 299, or ČENTÉŠ, J. a kol.: Trestný poriadok. Veľký komentár. Bratislava: EUROKÓDEX, 2014, s. 333.

[14] Ruling of the Constitutional Court of the Slovak Republic, Ref. No. II. ÚS 254/2017, dated 12 April 2017.

[15] Ibidem.

However, based on the conclusions of judicial practice and the published opinions of the expert public,[16] it can be stated that **a proper summons to be served upon the accused under Section 120(1) of the CPC shall contain the following particulars**:

- a clear indication that the given document constitutes a summons;
- designation of the competent prosecuting authority or court that is summoning the accused;
- the procedural status of the accused;
- the type of an act to which the accused is being summoned (e.g. an interrogation of the accused, a main hearing, a public session, etc.);
- the summons must clearly indicate that the person being summoned is the one obliged to appear in person;[17]
- a designation of the criminal case with a file reference or an investigation file number under which the summoning authority is hearing the case, including a brief description of the criminal case [e.g. that it is a criminal case of suspected human trafficking under Section 179(1) of the Criminal Code, etc.];
- the accused's identification data, such as his/her name and surname, date and place of birth, his/her place of residence or other data necessary to prevent the accused from being confused with another person;
- the place, date and time of the procedural act to which the accused is being summoned. If the summons to be served upon the accused states an incorrect date or time at which the summoned person is to appear for the procedural act, such a summons shall not be deemed proper pursuant to Section 120(1) of the CPC;[18]
- comprehensible instructions indicating whether the accused's presence at the act is necessary, the possibilities of and reasons for justifying the accused's absence from the act, the (im)possibility of carrying out the act in the accused's absence, the possibility of the accused being brought in, as well as other consequences of his/her failure to appear on the basis of the summons;
- in the case of an accused person who declares that he/she does not speak the language employed in the criminal proceedings, or if there are reasonable doubts as to whether the accused has a command of the language employed in the criminal proceedings, a translation of the summons should be annexed to the summons, and such a translation must be made in a language which

[16] IVOR, J. – POLÁK, P. – ZÁHORA, J.: Trestné právo procesné I. Bratislava: Wolters Kluwer, 2017, s. 299 a nasl., or ČENTÉŠ, J. a kol.: Trestné právo procesné. Všeobecná časť. Šamorín: HEURÉKA, 2016, s. 217.

[17] ŠÁMAL, P. a kol.: Trestní řád. Komentář. 7. vyd. Praha: C. H. Beck, 2013, dostupné na: https://www.beck-online.cz/bo/document-wiew.seam?documentId=nnptembrgnpwk5tlge3c443cl4ytsnrrl4ytimk-7obtdsma. [cit. 20-10-2019] ,s odkazom na český judikát uverejnený pod č. R 29/1997.

[18] Rozhodnutie Najvyššieho súdu ČSR, sp. zn. 11 Tz 9/77, zo dňa 10.3.1977. Pozri tiež napr. uznesenie NS SR, sp. zn. 4 Tost 41/2012, zo dňa 13.11.2012.

the summoning authority knows that the accused undoubtedly understands, or which it can be reasonably assumed that the accused understands.

A possible error in a summons served upon the accused, which could consist solely of stating a wrong date for the issuing of the summons or in not specifying the date of the issuing of the summons, is not an error that would disqualify the summons from being deemed "proper".[19]

With regard to the construction of Section 120(1) of the CPC, it does not deal with a **question of the form of the summons to be served upon the accused.** Some of the experts on the law of criminal procedures assume that a summons is usually made in writing, whether in general terms or specifically in relation to the accused. But they do not exclude the possibility that a summons may also be made in a form other than in writing.[20] However, there is another expert opinion based on the fact that the only admissible form for a summons is a written form.[21]

The conclusion that the only admissible and due form for a summons is a written form can be reached by the construction of the relevant provisions of the Criminal Procedure Code concerning the service of process. These are, specifically, Section 65(1) of the CPC and Section 66(1) of the CPC. Both Sections above govern the procedure for the service of process in criminal proceedings. While Section 65(1) of the CPC is a general legal norm (*lex generalis*), a legal norm contained in Section 66(1) of the CPC is, in relation to Section 65(1) of the CPC, a special norm (*lex specialis*). Section 65(1) of the CPC creates a general legal basis for the service of process in criminal proceedings. Section 66(1) of the CPC establishes a legal framework for the service of process in criminal proceedings, specifically in regards to a personal service (delivery into one's own hands). Section 66(1) of the CPC *expresisverbis*states that a summons is also served upon the accused by a delivery into his/her own hands. It follows logically that for such a summons to be served upon the accused it shall be made in writing, otherwise it would be undeliverable as mail.[22]

The said opinion is not contrary to the conclusion of Section 65(1) of the CPC, which stipulates that "If it is necessary to repeat a procedural act or adjourn a main hearing or a public session, it is sufficient to notify the persons present who are to reappear for the procedural act of its new date. The content of such a notification and the fact that these persons have acknowledged such a new date shall be recorded in the minutes." In this case, the legislator has provided for a procedure distinct

[19] Uznesenie Ústavného súdu SR, II. ÚS 254/2017, 12.04.2017.

[20] ČENTÉŠ, J. a kol.: Trestné právo procesné. Všeobecná časť. Šamorín: HEURÉKA, 2016, s. 217., ČENTÉŠ, J. a kol.: Trestný poriadok. Veľkýkomentár. Bratislava: EUROKÓDEX, 2014, s. 333., IVOR, J. – POLÁK, P. – ZÁHORA, J.: Trestné právo procesné I. Bratislava: WoltersKluwer, 2017, s. 300.

[21] OLEJ, J. – ROMŽA, S. – ČOPKO, P. – PUCHALLA, M.: Trestné právo procesné. Košice: UPJŠ, 2012, s. 73.

[22] ČOPÁK, K.: Povinnosťobvineného dostaviťsa na predvolanie. IN: Paneurópske právnické listy č. 02/2019. ISSN 2644-450X, https://www.paneuropskepravnickelisty.sk/wpcontent/uploads /2019 12/PPL_2019.

from the service of a summons, which is referred to as a "notification". The said notification is announced by a prosecuting authority or court solely to the persons who are present at such an announcement and are to reappear for the procedural act. The opinion that a summons to be served upon the accused may only be made in writing does not contradict the text of the Decree of the Ministry of Justice of the Slovak Republic No. 543/2005 Coll. on the Administration and Office Rules for District Courts, Regional Courts, the Special Court and Military Courts (the "Administration and Office Rules Act"). Section 46(2) of the Administration and Office Rules Act implies that a summons shall usually be made in writing. However, a summons in a form other than in writing is permissible in urgent cases, only if it is so provided for by law. But the Criminal Procedure Code does not expressly provide for any form of a summons other than a written form. Therefore, any form of a summons other than a written form is inadmissible.

On the other hand, Section 65(8) of the CPC allows the prosecuting authorities and courts to also make the service of process (i.e. to deliver judicial documents) upon an accused person, a defence counsel, an aggrieved party and his/her representative, an informant, a legal guardian, a party interested and his/her representative, a custodial institution and a prison establishment by electronic means, provided that such documents bear a qualified electronic signature. This said possibility, however, does not obviously apply to a personal service (delivery into one's own hands) under Section 66 of the CPC. In terms of its systematic inclusion in the Criminal Procedure Code, Section 65(8) of the CPC is contained in the general provisions on a service of process. The provisions on a personal service (delivery into one's own hands) contained in Section 66 of the CPC constitute the so-called "*lexspecialis*" in relation to the "general" provision in question. Neither the general legal provision on the service of process, nor the provisions concerning personal service, makes explicit reference to the fact that the service of process by electronic means can also be applied in cases of personal service. Therefore, the application of the general provision on the service of process by electronic means is precluded in the case of a personal service.

The legal conditions for summoning the accused also include conditions associated **with the service of a summons**. In relation to the accused, the service of process is the obligation of the prosecuting authorities and courts. By doing so, they are actually helping the accused to fully exercise his/her right to a fair trial. This also clearly follows from the Decision of the Constitutional Court of the Slovak Republic II. ÚS 52/98, dated 26 January 1999, which states that "The obligation to serve the parties to criminal proceedings with the documents containing information on the acts carried out in the case and to enable such parties to respond to them must be deemed to be included in the right of defence, just as in the case of the other legal procedures overlapping throughout the criminal proceedings (presence at the interrogation of the accused persons, witnesses, aggrieved parties, confrontations, etc.)." The said obligation of the state to the accused is also fulfilled when a summons is served upon the accused into his/her own hands [Section 66(1)(a) of the

CPC]. A failure by the competent authorities to follow this procedure is an obstacle to the commencement of the accused's obligation to appear for the procedural act on the basis of a summons.

Based on Section 120(1) of the CPC, as well as on Section 66(1)a) of the CPC, it can be stated that the Criminal Procedure Code requires that two cumulative conditions be observed when serving a summons upon the accused, as a prerequisite for the commencement of his/her obligation to appear before the summoning authority upon being summoned to do so. This is a condition for the due and timely service of a summons to the accused.

The condition for the timely service of a summons to the accused is to ensure sufficient time for the accused, between the service of the summons and the performance of the procedural act. This time is to be used by the accused to prepare for the procedural act, including for the consideration of the defence tactics by the accused. The condition for the timeliness of the service of the summons thus guarantees the accused's right to a reasonable time to prepare the defence. The issue, however, is how to interpret the term "timely", since such a term is vague. It can only be assumed that the term "timely" can be understood to mean a space of time providing the accused with a reasonable time to prepare for the procedural act, including creating opportunities for how to appear at the specified time and place. The "reasonable time" shall depend on the circumstances of each individual case (e.g. on the complexity of the case, the assessment of the stage of the criminal proceedings, etc.). The assessment of the "reasonableness of time" must also include a space of time necessary to access the documents and other evidence that the accused needs to prepare for the defence, as well as the opportunity to contact and consult with his/her lawyer, or to find a lawyer who will undertake his/her defence, etc.[23] The question of what a "reasonable time" for such preparation means cannot be answered unequivocally. This is also apparent from the relevant ECtHR case-law that takes a casuistic approach to the definition of a "reasonable time". For example, with regards to the acts of a pre-trial or an appellate procedure, the ECtHR allows a shorter period of time as a reasonable time for preparation, as opposed to the preparation for a main hearing where it requires a longer period of time.[24]

In this respect, some inspiration can be drawn from the provisions of the Criminal Procedure Code which, for example, in relation to a time limit for serving the accused with a summons to attend a main hearing or a public session, states that such a time limit must be "no less than five working days" [Section 247(1) of the CPC, Section 292(4) of the CPC]. The said time limit should also be accepted *"per analogiam"* by the competent authorities when serving a summons upon the accused in a pre-trial. It can therefore be concluded that, under the current legislation, a summons served upon the accused in a timely manner can generally mean a summons that has been served upon the accused within five working days pri-

[23] MOLEK, P.: Právo na spravedlivý proces. Praha: WoltersKluwer, 2012, s. 363.
[24] Ibidem, s. 363 a nasl.

or to the performance of the act. However, the possibility should not be excluded that this period will be shorter in the case of a pre-trial. On the other hand, there is nothing to prevent the prosecuting authorities or courts from serving a summons upon the accused within a time limit of more than five working days. However, it should be stressed that, even in the case of the service of a summons upon the accused within a longer time limit, the requirement for a reasonable time should be complied with. Such a procedure could be regarded as being inconsistent with the right to a reasonable length of criminal proceedings if a prosecuting authority or court has summoned the accused to a procedural act with a disproportionately long time between the service of the summons and the planned date of the procedural act.

Another condition associated with the service of the summons upon the accused is the requirement that the accused should be served with the summons in a proper manner. The said requirement is fulfilled through a special method of service, i.e. delivery into the accused's own hands. A personal service of process (i.e. delivery of judicial documents into one's own hands) is based on the fact that a serving authority (usually a postman, but a member of the Police Force, a process-server, etc. shall not be excluded either) surrenders the mail to be served only:

- into the hands of its addressee; or
- into the hands of a person who has been authorised by the addressee specifically for this purpose, either by virtue of a written authorisation at the time of the surrender of the mail items not older than six months, containing the addressee's authenticated signature, or by virtue of an authorisation issued by a post office;[25] or
- to a person authorised to act on the addressee's behalf by law (as a rule, this will be the legal representative of a natural person or the statutory body of a legal entity).

The service of a document intended for delivery into such a person's own hands cannot be replaced only by acquainting that person with the contents of the document to be served. Even in this case, the addressee shall personally acknowledge the receipt of the served document (R 59/1967) by stating the date of receipt and applying his/her signature thereto (mostly on a so-called return receipt, pre-printed on the face of a postal envelope, from which it can be physically separated). It is solely the date of receipt of the mail and the signature of the addressee (or the other person authorised to receive the mail) which are deemed to be the proof of delivery. It is not possible to prove the service of a document intended for delivery into one's own hands in any other manner – e.g. by the testimony of other persons that the addressee has received the mail intended for delivery into his/her own hands (R 52/1975).

[25] In this case, the power of attorney can only be effectiv elyexercis edif the delivereris the post office. Conversely, a written power of attorney with a certified signature of the addressee can always be effectiv elyexercised, regard less the fact which institution delivers the consignment – author's note.

However, it may be the case that the addressee of a mail items to be delivered into his/her own hands has not been reached at the time of the service. Then, the procedure specified in Section 66(3) of the CPC comes under consideration, according to which the mail can be deposited with the institution that serves it. In such a case, the addressee shall be notified in an appropriate manner that the serving authority will redeliver the mail at a specific date and time. If, despite such a notification, the new attempt to deliver the mail remains ineffective, the mail shall be deposited with a post office or a municipal authority. The addressee shall be notified in an appropriate manner where and when he/she can collect the mail. If the addressee fails to collect the mail within three working days of the deposition thereof, the last day of that period shall be deemed to be the day of the receipt, even if the addressee has not learnt about the deposition.

As a rule, the mail is delivered into the addressee's own hands to the address reported by the addressee to the prosecuting authority or the court as the address of his/her whereabouts. However, the law does not provide for a case where the mail is to be delivered if the addressee has not yet had the option to report such an address to the competent authority. In that case, the competent authorities should principally attempt to deliver the mail to the address which is recorded as the addressee's permanent residence, temporary residence or residence abroad in the relevant citizens' residence register.[26]

Personal service may also be made if the addressee has a reserved delivery to a post-office box or, upon an agreement with the post office, collects their mail at the post office without having a reserved post-office box. Then, the procedure specified in Section 66(4) of the CPC shall apply.

Where the accused is a legal entity, any mail items shall be served upon its statutory body, elected representative or guardian to the address they have indicated as the address for personal service during the first interrogation. If such persons change their address or method of service, they shall notify the competent authority or court of such a change without delay [Section 27(5) of Legal Entities' Criminal Liability Act]. In the period prior to the first interrogation, the procedure set forth in Section 68(1) and (3) of the CPC shall apply to the personal service of process upon a legal entity. Under the said section, the documents intended for bodies or legal entities are to be served upon the employees authorised to receive such documents, or upon a person who is entitled to act on behalf of that body or legal entity.

Delivery of a mail intended for receipt by one's own hands may also be effected if the addressee refuses to receive such mail, of which the addressee shall be advised by the postman. In that case, the refusal to receive the mail, including the date and reason for such a refusal, shall be recorded on the mail, which shall be returned to the sender. The sender will then assess whether or not the addressee's refusal to

[26] Cf. Act No. 253/1998 Coll. on Reporting the Residence of Slovak Nationals and on the Register of the Inhabitants of the Slovak Republic, as amended.

receive the mail was reasonable. If the competent authority concludes that the refusal to receive the mail was unreasonable, the mail shall be deemed to have been received as of the date of the addressee's refusal to receive the mail [Section 67(2) of the CPC].

In addition to the aforementioned procedure, the personal service of process is specifically provided for by the CPC chapter concerning the proceedings against a fugitive. In that case, the effective delivery of a document intended for receipt by the accused's own hands requires that such a document be delivered into the own hands of the accused's defence counsel (Section 359 of the CPC). A summons to a main hearing and a public session in the proceedings against a fugitive shall also be published in an appropriate manner [Section 361(2) of the CPC].

The obligation of the prosecuting authorities and a court to serve documents in a person's own hands is maintained, even if a summons is to be served upon the accused who is abroad. The personal service of process is then effected by using the institution of letters rogatory (i.e. a request for legal aid), in accordance with Section 536(1) of the CPC or a bilateral or multilateral international treaty. If a foreign state where a summons is to be served upon the accused is a Member State of the European Union, then a legal act of the European Union which comes under consideration in that specific situation shall apply (e.g. the European Investigation Order).

4. Facts Conditioning a Termination of the Accused's Obligation to Appear on the Basis of a Summons

If the accused has been duly and timely served with a summons, he/she is obliged to appear for the procedural act and at the time and place specified in the summons. It is evident that this obligation is limited in time and, in conjunction with other legal facts, will terminate at some point. A list of these legal facts is not provided for in a coherent form, but can be deduced by a logical interpretation from the individual related provisions of the Criminal Procedure Code.

As a rule, the accused's obligation to appear for a procedural act on the basis of a summons shall terminate on the occurrence of the following legal facts:[27]

- the fulfilment of this obligation by the accused, as the most common reason for the termination of such an accused's obligation;
- the accused's death in the case of a natural person, if the death has occurred after the service of the summons and before the performance of the procedural act of the criminal proceedings specified in the summons;
- a timely and sufficient justification for the accused's absence under Section 120(2) of the CPC or Section 293(8) of the CPC, because the accused's

[27] ČOPÁK, K.: Povinnosť obvineného dostaviť sa na predvolanie. IN: Paneurópske právnickél isty č. 02/2019. ISSN 2644-450X, https://www.paneuropskepravnickelisty.sk/wpcontent/uploads /2019 12/PPL_2019.

obligation to appear for the procedural act on the basis of a summons also entails the obligation to duly and timely justify the accused's absence to the competent authority, if it is impossible for the accused to appear for the procedural act that has been ordered.[28] The accused's justification for his/her absence from the procedural act ordered by the competent authority solely through a defence counsel is insufficient if, by means of a summons, the competent prosecuting authority wishes to ensure that the accused is present at that act in person (e.g. if the act cannot be performed in the accused's absence). This fact must always be particularly emphasised in the summons intended for the accused, e.g. by using the wording "Your presence is necessary". For this reason, it is also the accused's personal duty to notify the competent authority of the existence of any obstacles to his/her presence at the act.[29] The sufficiency of such a justification also requires an urgent notification once the accused has become aware of the reason that prevents him/her from being present at the act.[30] Where the accused justifies his/her absence from the ordered act due to medical reasons, he/she is also obliged to accompany such a justification by a qualified attending physician's statement. If the accused fails to accompany the justification by such a statement, or accompanies the justification only by an unqualified physician's statement, his/her obligation to appear for the procedural act in the criminal proceedings shall remain valid. The qualified attending physician's statement means only a statement which clearly shows that the accused's medical condition does not allow him/her to be present at the procedural act to which he/she has been summoned, without endangering the accused's life or seriously deteriorating the accused's medical condition or if, in the event of the accused's presence at the ordered procedural act, there is a risk of spreading a dangerous infectious human disease [Section 120(2) of the CPC];

– The accused's refusal to attend the main hearing [252(3) of the CPC] and the accused's refusal to attend the public session [Section 293(7) of the CPC], or at the accused's express request to hold the main hearing in his/her absence [Section 252(3) of the CPC] or at the accused's express request to hold the public session in his/her absence [Section 293(7) of the CPC].

The accused may not, in a legally effective manner, waive his/her right to attend the main hearing or public session, or refuse to attend the main hearing or public session in advance, i.e. prior to the service of a due summons to attend the former

[28] A summoned person's sufficient justification shall contain the relevant reason that prevents him/her from attending a public session (e.g. temporary incapacity for work or another serious comparable reason), which is substantiated in a credible manner and involves communicating those reasons to the summoning authority in good time, i.e. sufficiently in advance, so that the summoning authority can manage to take measures to avoid incurring unnecessary costs in the proceedings (R 83/2001).

[29] Ruling of the District Court of Žilina, File Ref. 34T/146/2009, dated 27 November 2009.

[30] Ruling of the Supreme Court of the Slovak Republic, File Ref. 3Tdo/32/2015, dated 9 September 2015.

or the latter form of proceedings before a court. If, upon the commencement of the accused's obligation to attend the main hearing or public session, the accused waives his/her right to attend the main hearing or public session, or refuses to attend the same, his/her obligation to appear for such a procedural act (i.e. to attend such proceedings) on the basis of the summons shall terminate. The accused has the possibility of formulating his/her express consent to carrying out the procedural act in his/her absence, or his/her express refusal to appear for such an act either specifically (in relation to a specific date of the act) or generally in relation to the entire act, should it be carried out during several days (e.g. if the main hearing is adjourned for another date). If the accused formulates the declaration of his/her will generally, such a declaration of his/her will also extend to the adjourned dates of the main hearing or public session, since this is the only, as interrupted, act of the criminal proceedings.[31] If the accused is deprived of his/her legal capacity or his/her legal capacity is limited, it is the accused's legal representative who shall, on the accused's behalf, be entitled to refuse to appear for the act or expressly request to carry out the act in the accused's absence, even against the accused's will if this is in the accused's favour [Section 35(1) of the CPC]. A special situation may arise should a juvenile accused express his/her will not to attend the main hearing or public session in the case of a guilt and punishment agreement. Pursuant to Section 343(1) of the CPC, the main hearing and public session in the case of a guilt and punishment agreement cannot be held in the absence of the juvenile who is accused. Should the juvenile who is accused deliver to the court a request to hold the main hearing and public session on the guilt and punishment agreement in his/her absence, or expressly refuse to appear for such acts (i.e. to attend such proceedings), sucha juvenile accused's declaration of will shall not become legally effective. The foregoing implies that his/her obligation to appear for the act on the basis of a summons will not terminate and will remain valid. Should the juvenile accused fail to appear for the acts referred to in Section 343(1) of the CPC, the competent court will be obliged to adjourn such an act until a new date and to apply, in the next procedure, one of the means to ensure that the juvenile accused will be present at such an act on the new date;

– Acceptance by the competent court of a declaration made by a defence counsel of the accused who is deprived of his/her legal capacity or whose legal capacity is limited, so that he/she does not insist on a personal interrogation of the accused at the main hearing or public session;[32]

[31] Ruling of the Supreme Court of the Slovak Republic, File Ref. 2 Tdo 53/2015, dated 22 September 2015.

[32] Section 252(2)(d) of the CPC and Section 294 of the CPC stipulate that: "If, in the court's opinion, the case can be reliably decided and the purpose of the criminal proceedings can also be achieved in the absence of the accused who is deprived of his/her legal capacity or whose legal capacity is limited, and the accused's defence counsel declares that he/she does not insist on an interrogation of the accused, the court shall rule that such an act be carried out in the accused's absence".

– The decision of a prosecuting authority or court which clearly shows that the accused's obligation to appear for the act on the basis of a summons has terminated (e.g. a court's decision to hold the main hearing in the accused's absence; cancellation of the date of the act by the authority that decided to serve the summons; a decision has been reached on issuing a new summons; a court's decision has been made to adjourn the main hearing or public session, which the accused has failed to attend without sufficient justification, although his/her presence at this act had been necessary, to a new date, etc.).

Failure to comply with the obligation to appear for the act on the basis of a summons may have various procedural consequences for the accused. Even in this case, these consequences can be enumerated on the basis of a logical interpretation of the related provisions of the Criminal Procedure Code. Such consequences may, for example, include the re-summoning of the accused for the proper performance of a procedural act under Section 120(1) of the CPC; an order to bring the accused in under Section 120(1) of the CPC; the imposition of a disciplinary fine under Section 70 of the CPC; forfeiture of a cash bail bond received by the court in favour of the state, under Section 81(3) of the CPC; taking the accused who was released (left at large) on the basis of bail received by the court into custody, under Section 81(4) of the CPC; the imposition of an obligation upon the accused to provide compensation for the costs of the procedural act which, due to his/her failure to comply with the obligation to appear for such an act on the basis of summons, could not have been carried out, or for the costs of the procedural act that needed to be adjourned for the same reason under Section 554(1) of the CPC.[33]

It is even possible to contemplate a potential criminal liability against the accused for committing the criminal offence of contempt of court, pursuant to Section 343(c) of the Criminal Code. This comes under consideration in the case of a clearly unjustified and repeated intentional failure by the accused to comply with his/her obligation to attend the main hearing or public session of the court on the basis of a summons.

5. Brief Evaluation of the Issue under Examination

In light of the foregoing, it can be concluded that the legal provisions in the institution of summoning the accused in the Slovak Republic are currently in full compliance with the requirements of the relevant international legislation, mainly with regard to the respect for human rights and fundamental freedoms. If there are any problems with the application of the institution of summoning the accused, then these relate to the overly general provisions of the Criminal Procedure Code that concern this institution and that raise problems in terms of its interpretation and

[33] ČOPÁK, K.: Povinnosť obvineného dostaviť sa na predvolanie. IN: Paneurópske právnické listy č. 02/2019. ISSN 2644-450X, https://www.paneuropskepravnickelisty.sk/wpcontent/uploads /2019 12/PPL.

construction. Specifically, the issue is the content and interpretation of the vague provision of the phrase "duly and timely summoned" in Section 120(1) of the CPC. These problems are also transferred to the application in practice, where they are mostly associated with the actual effectuation of the service of the summons upon the accused. Nonetheless, the said situation seems to be sufficiently compensated for by the judicial practice and the case-law arising therefrom. Given that the Czech Republic has similarly ambiguous legislation on summoning the accused, the aforementioned knowledge and conclusions on the issue under examination could also apply in the legal environment of this country.

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Privilege against self-incrimination in the case law of the Constitutional Court[1]

Jana Odehnalová

Metropolitan University Prague, Czech Republic

jana.odehnalova@mup.cz

Abstract: *The paper deals with selected aspects of the traditional principle of nemo tenetur, which may conflict with the legitimate interest of society in detecting and punishing the offender and with the effectiveness of the processes towards this. After a brief historical and general introduction, the author selects several specific areas in which the boundaries of the relationship of both social interests are long-term unstable, indistinct, and evolving. This concerns the possibility and intensity of coercion of a suspected or accused person to cooperate in criminal proceedings or administrative punishment, the scope of application of the nemo tenetur principle in the case of legal persons or in the case of the motor vehicle keeper's liability for the offence. The constitutional limits of the nemo tenetur principle are completed by the application practice and the case law of the courts of all types, and it is always necessary to carefully weigh whether the chosen solution meets the conditions of rational balance and proportionality.*

Key words: *nemo tenetur, effectiveness of processes, constitutional limits, case law, proportionality*

1. Introduction

The right to a fair trial is a constitutional institution which, in general, is intended to guarantee the justice of procedural law by public authorities as one of the basic functions of a democratic state governed by the rule of law. To this end, legal standards, usually of a constitutional nature, set out a range of diverse legal privileges and principles on which the doctrine of fair trial is built. However, individual legal privileges and principles cannot be understood and interpreted in isolation, but always in the context of other principles, which may sometimes seem contradictory, and it is necessary to seek their mutually reasonable balance and proportionality.

The specific boundaries between the various principles of a fair trial are determined by application practice, they are often indistinct and moving. This is also the case with the traditional legal privilege against self-incrimination, i.e., *nemo te-*

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netur se ipsum accusare.[2] This privilege is of particular importance in criminal and tort administrative law, where the public authority, as a de facto counterparty, must not obtain a procedural advantage by having a monopoly on enforcing its will, and must provide evidence other than by forcing a person to testify leading to proving responsibility or guilt for the prosecution.[3] On the other hand, the *nemo tenetur* principle should be interpreted in the light of society's fundamental interest (public interest) in detecting and punishing the offender, which is the primary mission of those proceedings in which the principle particularly applies. However, public interest cannot justify interventions that suppress the very essence of the right to a fair trial, including the privilege against self-incrimination.

Therefore, the intention of this chapter is to specify the current approach of case law and legal theory to some aspects of the fine line between *nemo tenetur* principle on the one hand and public interest in the effective conduct of criminal (or other) proceedings on the other hand.

2. Historical basis and legislation

The *nemo tenetur* principle is not an achievement of modern society, its roots go deep into history. For example, the Jewish *Talmud* (dating from 300 BC to 600 AD) expressed this principle by saying that 'no man stands closer to man than himself, and no man makes himself a criminal' (Talmud, Sanhedrin 9, 1). The Old Testament judge not only unable to force the defendant's confession but could not even use a voluntary confession to convict them. In European terms, this principle was recognised by early canon law; for example, it is proclaimed in their writings by the Church Fathers Aurelius Augustinus and Johannes Chrysostomus.[4]

The defendant turned into a mere object of criminal proceedings during the medieval inquisitorial criminal proceedings, the *nemo tenetur* principle was completely forgotten for several centuries. Coercing the defendant into testifying took many forms, for example, the defendant was forced to swear to tell the truth and breaking this oath was a felony. *Torture* was the standard means of brutally enforcing the defendant's testimony. The defendant's confession was declared the queen of evidence (*regina probationum*). The gradual renaissance of the privilege against self-incrimination did not occur until after the great bourgeois revolutions with gradual reform steps in the 19th century. The privilege, which at first was only part of the criminal

[2] No man has to accuse himself, sometimes also as *nemo tenetur se ipsum prodere* – no man is to be compelled to incriminate himself or *nemo tenetur edere instrumenta contra se*, i.e., no man is bound to produce instruments against himself *(hereinafter the 'nemo tenetur' principle)*.

[3] BAŇOUCH, Hynek. *Komentář k čl. 37.* In: WAGNEROVÁ, Eliška, ŠIMÍČEK, Vojtěch, LANGAŠEK, Tomáš, POSPÍŠIL, Ivo et al. *Listina základních práv a svobod*, *Komentář.* Prague: Wolters Kluwer, 2012, p. 771. ISBN 978-80-7357-750-6.

[4] MUSIL, Jan. Zákaz donucování k sebeobviňování (nemo tenetur se ipsum accusare). *Kriminalistika.* 2009, 42 (4), pp. 252–263. ISSN 1210-9150.

law, is gradually entering the constitutional legislations of European countries and international human rights conventions.[5]

The rule appeared in countries with a continental system of law in the second half of the 20th century, which is generally later than in the countries of common law, and its expressive protection is standard in most democracies (France, Canada, Germany, Spain, Denmark, etc.).[6] At the same time, the essence of this principle implies an obligation to exclude evidence if it was obtained by violating it, otherwise the existence of such a rule would be meaningless.[7]

The right not to contribute to one's own accusation is derived in the constitutional order of the Czech Republic from Article 37(1) of the Charter, which establishes the right of everyone to '*refuse to testify if it would cause a risk of criminal prosecution to themself or a close person*', and further from Article 40(4) of the Charter (which is in relation to the first provision in the ratio of speciality) stipulating that '*the accused has the right to refuse to testify; he may not be deprived of this right in any way*.' In the first case, it is a general procedural right of *'everyone'* applicable to any type of judicial or administrative proceedings, without distinction to whom and in what procedural position someone should testify – therefore it not only applies in criminal law, but also in civil proceedings[8] or in other proceedings.[9] The second provision only concerns the *'accused'* and does not stipulate the obligation to justify exercising the right to refuse to testify. At the same time, the defendant is not only allowed not to testify, but to testify untruthfully or to testify in any way he deems appropriate.[10] This defendant's right must not only be fully respected in criminal proceedings, but also in the administrative punishment field, which also follows from the interpretation of Article 6(1) of the Convention.[11]

The legal regulations of sub-constitutional law further elaborate these provisions, i.e., they regulate a person's obligation to testify and, as a rule, the reasons

[5] For more details on the historical development of this principle, see ibid. or similarly MUSIL, Jan. *Princip nemo tenetur*. In: FENYK, Jaroslav et al. *Pocta D. Císařové k 75. narozeninám*. Prague: Lexis Nexis, 2008, p. 76 et seq. ISBN 80-86920-25-9.

[6] PRADEL, Jean. *Droit penal compare.* 2e ed. Paris: Dalloz, 2002, p. 501. ISBN 2-247-04110-8.

[7] For more details see ZAORALOVÁ, Petra. *Procesní použitelnost důkazů v trestním řízení a její meze.* Prague: Leges, 2018, p. 140 et seq. ISBN 978-80-7502-310-0.

[8] Cf. Article 126(1) of CPR *'Every natural person who is not a party to the proceedings is obliged to appear at the summons of the court and testify as a witness. He must tell the truth and keep nothing secret. He may only refuse to testify if there is a danger of criminal prosecution for themselves or close persons; the court shall decide on the justification for refusing to testify.'*

[9] Cf. Article 14(1) of the Act on State Control, according to which natural persons are not obliged according to Article 11(d) to – provide true and complete information – in cases where its fulfilment would cause a danger of criminal prosecution to oneself or close persons. For more information on the application of this principle in the control process, see PRÁŠKOVÁ, Helena. Princip nemo tenetur v kontrolním procesu. *Správní právo.* 2012, 5–6, pp. 283–290. ISSN 0139-6005.

[10] KLÍMOVÁ, Hana. *Komentář k čl. 40 odst. 4 LZPS*. In: KLÍMA, Karel et al. *Komentář k Ústavě a Listině. Part 2.* 2nd extended edition. Plzeň: A. Čeněk, 2009, p. 1393 et seq. ISBN 978-80-7380-140-3.

[11] Cf. Judgment of the Czech Republic Constitutional Court, case No I. ÚS 1849/08.

for refusing to testify, while the essence and meaning of constitutional principles always being preserved and investigated. However, the Charter's direct applicability is also possible, especially if the procedural standard does not give the person who is obliged to testify the right to refuse to testify or if it is disputed whether it gives the person the right, and if there is no such procedural standard.[12]

The *nemo tenetur* principle is not explicitly included in the European Convention on Human Rights either, but the privilege against self-incrimination is derived primarily from the general right to a fair trial in Article 6 of the Convention and also from Article 3 of the Convention prohibiting anyone from being subjected to inhuman or degrading treatment or punishment, which implies that the evidence obtained by threat or even the use of such treatment (coercion) cannot be used. According to ECHR case law, the right to refuse to testify and the right against self-incrimination are a generally accepted international standard which is part of the right to a fair trial.[13] The ECHR emphasises in its case law that these rights constitute recognised international standards at the heart of the concept of a fair trial within the meaning of Article 6 of the Convention, whereby the purpose is, inter alia, to protect the defendant against undue coercion by public authorities.[14]

A similar right is provided in Article 14(3)(g) of the ICCPR according to which anyone charged with a criminal offence may not be forced to testify against themself or confess guilt.

3. Application of the *nemo tenetur* principle in application practice

3.1 General background and trends

The *nemo tenetur* principle is a general principle which can be defined as a fundamental principle in any proceedings in which a party to proceedings is confronted by a public authority and may be penalised. The principle is not applied in private-law relations whereby the parties to such relation are equal.[15] The *nemo tenetur*

[12] KNAPP, Viktor, SOVÁK, Zdeněk. *Komentář k čl. 37.* In: PAVLÍČEK, Václav et al.: *Ústava a ústavní řád České republiky. Komentář*. Part 2. Práva a svobody. Praha: Linde Praha, 2002, p. 294 et seq. ISBN 80-7201-391-2.

[13] ECHR judgment on December 21st, 2000 in Heaney and McGuinness v Ireland.

[14] ECHR judgment on June 1st, 2010 in Gäfgen v Germany.

[15] In this context, the Czech Republic Constitutional Court in its Judgment case No III.ÚS 3162/12 on January 24th, 2013 concerning the obligation to provide information to the vehicle insurer concluded that the provision of information to the insurer cannot be considered testimony that could cause a danger of criminal prosecution to a close person as the insurer is not a state body. However, it is possible to argue with a generalising statement in the same judgement that '*… exercising the right to refuse to testify with reference to a close person in accordance with Article 37(1) of the Charter is appropriate only in the context of criminal or administrative (offence) proceedings, but not in the context of civil proceedings in which entities with equal status appear in a mutual relationship*.' The CPR explicitly mention this possibility for the participants in the proceedings and witnesses when testifying in the provisions of Article 126.

principle can be implemented through its three components, which are: the right to remain silent, the right not to incriminate oneself, and the right not to be forced to testify or to engage in other active actions.

Therefore, it is clear that the right to refuse to testify, as protected by the Charter of Fundamental Rights and Freedoms, is not entirely identical in content to the right not to incriminate oneself, and the two rights only partially overlap. On the one hand it is possible to contribute to one's own accusation other than just by testimony (especially by providing evidence, cooperation, etc.), on the other hand, the defendant's motivation to refuse to testify may be different than fear of contributing to self-incrimination or incrimination of a close person (e.g., refusal to cooperate with public authorities).

These Charter provisions are interpreted more broadly in the context of the more general *nemo tenetur* principle and the ECHR case law and not only include the right to refuse to testify, but also the right to refuse certain other forms of active action (cooperation) potentially leading to the detection or confirmation of the offender, including the right not to be forced to engage in such active action.

Although it is not clear from constitutional legislation what the position of a close person[16] (or the application of a reference to a close person) is in situations where it is not testimony (or possibly in certain circumstances even an explanation[17]), but another form of cooperation with public authorities (for example, typically the provision of factual or documentary evidence against a close person), it is clear that it must also be interpreted broadly by analogy. This is also confirmed by the amendment to the Criminal Procedure Code,[18] which, in connection with the evolving case law in the area of the *nemo tenetur* principle, supplemented the current provisions of Article 78(3) of the CRC, according to which no person can be compelled to submit or deliver an item which, at the time when it is requested to be

[16] On the concept of a close person, cf. Judgement of the Constitutional Court of the Czech Republic case No II. ÚS 955/18, where the court addresses the necessary degree of intensity of the relationship between close but not related persons in the context of the *nemo tenetur* principle.

[17] Determining when it is possible, or still possible to justifiably reject the explanation turns out to be a rather complicated matter. This seems to be the extreme option of the Constitutional Court's statement, which concluded that if the person in question was identified by the police as the only possible perpetrator of the offence, he could not be fined for failing to appear to give an explanation, because he could, perhaps only potentially and theoretically, contribute to their punishment regarding the offence, which has been referred to several times by administrative courts. However, if the condition of a single offender is not met, i.e., it does not follow from the summons that the one from whom an explanation is requested must necessarily be the sole offender, or even no potential offender is identified at all (e.g., in case of motor vehicle keeper's offences), mere summons does not represent violation of the privilege against self-incrimination. (Judgement of the Constitutional Court of the Czech Republic case No I. ÚS 1849/08; also see the judgment of the Regional Court in Hradec Králové No 30 A 38/2010-25, the judgment of the Regional Court in Plzeň No 30 A 12/2015-34 and the judgment of the Regional Court in Brno No 22 A 66/2014 -2), for example. Cf. MATES Pavel, PÚRY, František. Zákaz nucení k sebeobviňování. *Bulletin advokacie.* 2019, 3, p. 7–13. ISSN 1210-6348.

[18] Implemented by Act No 55/2017 Coll.

submitted or delivered, may serve as evidence against them or their close relative; this is without prejudice to the provisions on taking such an item, house search, searching other premises and lands, and searching a person. Therefore, the right of the person concerned not to expose themself or a close person to the risk of criminal prosecution is now explicitly emphasised for editorial obligation; however, it does not prevent the item from being taken away from the person.[19]

The case law interpreting the *nemo tenetur* principle is multi-layered and relatively numerous, both at the national level (general courts, and the Constitutional Court) and at supranational level, mainly from the production of the European Court of Human Rights and can be found in the CJEU case law.[20] Application practice addresses a number of problems related to various specific issues, such as the range of entities to which these principle applies, the scope and manner of the principle's implementation in different types or stages of proceedings, the legitimacy of various investigative methods, in relation to the possibility of imposing procedural fines or physical coercion or overcoming of resistance, questions of proportionality, etc., also with regard to the consequences of the (in)applicability of the evidence obtained.

3.2 Constitutionally legitimate scope of coercion

Significant development has been noted in the Constitutional Court case law in terms of whether the accused (or suspect) can be forced to issue evidence that objectively exists (i.e., forced to act actively) or whether he can only be forced to tolerate removing such evidence (i.e., passive conduct). It is the attitude of the person concerned (activity or passivity) required by coercion that is decisive in terms of whether the *nemo tenetur* principle has been violated.

A very important Constitutional Court decision in this matter was the decision of the Constitutional Court Plenum No Pl. ÚS-st. 30/10,[21] according to which acts pursuant to Article 114 of the CPC consisting in taking scent, hair samples and a buccal swab, whereby the is to obtain objectively existing evidence for forensic examination and which do not require active action of the accused or suspect, but only toleration of their performance, cannot be seen as acts whereby the accused or suspect would be forced to constitutionally inadmissible self-incrimination. In this case, these are procedures the performance of which the accused (suspect) only tolerates, most often they are only obliged to tolerate securing an objectively existing

[19] See the explanatory memorandum to Act No 55/2017 Coll.

[20] For example, the ECJ judgement on January 20th, 2001 in Mannesmannröhren-Werke AG v EC Commission, which dealt with the question of the applicability of the *nemo tenetur* principle to legal persons.

[21] Judgement of the Constitutional Court of the Czech Republic No Pl. ÚS-st. 30/10 on November 30th, 2010. On the previous development of case law, cf. e.g. FRANĚK, Jan *Zákaz nucení k sebeobviňování v trestním řízení a jeho pojetí v judikatuře Ústavního soudu* [online] 2010. [cit. 20-02-2020] Available from: https://www.bcak.cz/publikace/zakaz-nuceni-k-sebeovinovani-v-trestnim-rizeni/.

sample of matter. The body of the accused (suspect) is a passive object of search, no active cooperation is required. The accused or suspect is obliged to attend the collection of biological material, for which they can be coerced by means of a procedural fine or by overcoming resistance. However, the way in which the resistance of the person concerned can be overcome must be proportionate to the intensity of the resistance. It is therefore possible to use legal coercive measures to ensure the cooperation of the accused or suspect in obtaining this evidence.

The Constitutional Court also relied on the ECHR case law in resolving the issue of setting the limits of state coercion. In its case law, the European Court declared inadmissible the aforementioned enforcement of a person's active contribution to self-incrimination, and assesses whether the nature and degree of coercion exceeded the admissible scope in individual cases where the accused (suspect) refused to cooperate in obtaining evidence, that is, whether the degree of coercion used exceeds the intensity of coercion usually required to obtain evidence of this type. The threat and the imposition of sanctions for failure to provide information to law enforcement authorities are, in its view, incompatible with the right to a fair trial if they destroy the very essence of the right against self-incrimination. In assessing whether the use of coercion by law enforcement authorities to obtain evidence violated the right against self-incrimination, the European Court takes four criteria into account: the nature and intensity of the coercion, the existence of relevant procedural guarantees, the seriousness of public interest in investigating and punishing the offence, and the manner and purpose of using the obtained evidence.[22]

The need for the aspect of proportionality between protected interests and the intensity of intervention in assessing the constitutional aspects of the use of coercive means was previously pointed out by Musil, who also defined specific aspects of proportionality: '*The nature or the means used to intervene in the personal sphere of the accused (in their bodily integrity in the case given) is important, particularly the intensity of the intervention, the value of the target pursued by the means, as well as the intensity of coercion.*'[23]

Although the above-mentioned Constitutional Court decision set the boundary in relation to the required activity/passivity of the accused or suspect, it also assesses the intensity of coercive means in relation to their purpose but, as pointed out by a different opinion of Wagnerová, it does not assess the intervention of public authorities in terms of its adequacy in relation to the right to privacy of the person concerned, and does not describe the specific circumstances of the case and gives the impression that this information is irrelevant. Yet the degree of suspicion may

[22] See, for example, ECHR judgment on July 11th, 2006, No 54810/00, in Jalloh v Germany. (It involved inducing vomiting to obtain a drug ampoule, which was subsequently used as evidence against them.)

[23] MUSIL, Jan. Zákaz donucování k sebeobviňování (nemo tenetur se ipsum accusare). *Kriminalistika*. 2009, 42 (4), pp. 252–263. ISSN 1210-9150, similarly in a different opinion on Judgement III. ÚS 655/06.

be different in a person, regardless of the different procedural position of the suspect and the accused.[24]

However, in this sense, the obligation to appear for the performed act is not considered an active act (see, e.g., CPC Article 90). The accused (or witness) may be forced to appear for questioning by means of a procedural fine and even being taken to such act. Recognition of when a person is obliged to participate, but not to speak during the act can be an example.[25]

Obtaining and securing evidence for the purposes of criminal proceedings against the will of the accused cannot be considered as illegal and unconstitutional coercion of the accused to provide evidence against themselves. This would be the case if the active cooperation of the accused were observed by coercion or the threat of coercion; forcing the accused to tolerate something does not violate the *nemo tenetur* principle.[26]

3.3 Legal persons and the *nemo tenetur* principle

The situation regarding legal persons is somewhat unclear and more complicated. Whether the protection against coercion to self-incrimination also applies to legal persons, or to what extent, has long been questionable. Although different opinions can still be found today (see below), most doctrine and case law not only grant legal persons this right in criminal proceedings, but also in administrative proceedings. It particularly argues that if a natural person accused of a criminal offence or administrative offence is granted the right against self-incrimination, it is not possible to deny this right to the accused legal person, because in principle legal per-

[24] Cf. the different opinion of Wagnerová to Judgement Pl. ÚS-st. 30/10 '*It is certain that the acts in question infringe the person's personal private sphere (at least to the extent of the right to informational self-determination) which is to subjected to them, i.e., they infringe a certain and important aspect of their right to privacy. Therefore, from the point of view of the assessment of proportionality(specifically from a necessity viewpoint) regarding restriction or interference with the privacy of such a person, a fundamental answer to the question of what their position is in criminal proceedings at the moment when the act under Article 114 of the Penal Procedure Code is to implemented. The degree of justification for the suspicion of the person concerned of committing criminal offence is, in my opinion, the quantity that can make an interference with the fundamental right to personal privacy (information self-determination) justified or vice versa. The seriousness of the crime under investigation also plays an important role.*'

[25] Judgment of the Constitutional Court of the Czech Republic case No III. ÚS 528/06 on October 11th, 2007. The Constitutional Court acknowledged that recognition finds itself on the very border in terms of the *nemo tenetur* principle, as it is a borderline act between active and passive action. It stated that '*the requirements that are placed on the accused during recognition are not of such a nature that they can be described as coercion to accuse oneself or self-incrimination*'. In its decision-making practice, the Constitutional Court proceeded on the principle of proportionality between individual values and rights protected by the constitutional order. It saw recognition as '*a highly effective means of proof, and therefore an institute enabling the achievement of public good consisting in the proper clarification of crimes and fair punishment for their perpetrators.*'

[26] Judgement of the Constitutional Court of the Czech Republic on February 5th, 2013, case No III. ÚS 1675/12.

sons must have equal procedural status; legal persons are also subject to the right to a fair trial.[27]

Czech criminal law states quite unequivocally that *'with regard to that, the basic principles of criminal procedural law and those procedural institutes and procedures regulated in the Criminal Procedure Code that are not directly linked to the accused – natural persons (to whom the exclusion condition "unless it is excluded by nature" referred to in Article 1(2) applies concerning the application of the Criminal Procedure Code), are also undoubtedly applicable in criminal proceedings against a legal person. This, of course, also applies to such rights and principles as (…) the privilege against self-incrimination, etc., which also apply in proceedings against legal persons.*'[28] The Constitutional Court case law can be interpreted in a similar way,[29] where the Constitutional Court admits that the right not to testify not only applies to natural persons, but also to legal persons or their statutory bodies and employees, pointing out the fact that otherwise the right not to testify enshrined in Article 40 of the Charter. Accordingly, the High Court in Prague subsequently stated that '*a member of a statutory body of a legal person may refuse to testify as a witness, but not with reference to being close to the legal person, but with reference to the right against self-incrimination, i.e., to the traditional "nemo tenetur" principle of criminal proceedings.*'[30]

The *nemo tenetur* principle applies to legal persons, but only to a limited extent according to European case law. While legal persons may be compelled to provide certain evidence which already exists or which they are intended to have by nature of their business activity, they cannot be compelled to openly admit to an illegal activity in the form of incriminating answers to questions formulated by the investigating authorities. Therefore, under the threat of sanctions, Legal persons are obliged to cooperate with public authorities in the scope of providing existing documents, records, data, and possibly to provide administrative authorities with aggregated data – i.e., data created from original data (e.g., lists of clients, etc.). In this connection, reference may be made to the ECJ case law,[31] in which the court stated, for example, that a party to proceedings is obliged to issue a copy of a cartel agreement at the request of an administrative authority, but is not obliged to answer the question regarding how individual provisions of the cartel agreement were

[27] PRÁŠKOVÁ, Helena. *Op. cit*., p. 284.

[28] ŠÁMAL, Pavel, DĚDIČ, Jan, GŘIVNA, Tomáš. *Trestní odpovědnost právnických osob: komentář.* Prague: C. H. Beck, 2012, p. 74. ISBN 978-80-7400-116-1.

[29] Judgement of the Constitutional Court of the Czech Republic on March 23rd, 2006, case No III ÚS 451/04.

[30] Judgement of the High Court in Prague of 10 February 2016, case No 5 To 96/2015. For details on this judgement, cf. also MATOCHA, Jakub, SMEJKAL Ladislav *K právu svědka v trestním řízení odmítnout výpověď proti právnické osobě* [online] Available from: https://tablet.epravo.cz/10-2016/tema-vydani-k-pravu-svedka-v-trestnim-rizeni-odmitnout-vypoved-proti-obvinene-pravnicke-osobe/.

[31] Judgments of the ECJ case No T-374/87 on March 8th, 1995 or case No T-112/98 on February 20th, 2001.

reflected in its production process and describe this mechanism, as it is an explicit admission of guilt.[32]

Following the case law of the European Court in Luxembourg, the opinion of Švásta should be pointed out, who came to a different conclusion from the national courts concerning the application of the *nemo tenetur* principle to legal persons, namely that *'legal persons cannot be granted the right against self-incrimination whether it is a criminal proceeding or a proceeding on another administrative offence.'*[33] The author based this conclusion on three reasons. Firstly, in its original form, the origin of the *nemo tenetur* principle since the application of this principle was intended to protect the physical integrity, dignity and health of the accused in criminal proceedings. Therefore it aims to protect human life, and not to protect the economic interests of legal persons. Secondly, the origin of the criminal liability institute for legal persons, which was taken from the Anglo-Saxon legal field recognising that the *nemo tenetur* principle does not apply to a legal person. Thirdly, is to consider the meaning of legislation regulating the criminal liability of legal persons or liability for other administrative offences in the event that legal persons cannot be forced to provide data and information that is available to them by their nature.[34]

On the other hand, both legal theory and application practice quite agree that a natural person may never be a person close to a legal person, because the relationship between close persons can only arise between natural persons. For example, an employer of persons interviewed may not invoke infringement of their procedural rights. Nor is it conceivable that employees could aid their employer's prosecution as a close person, because a legal person cannot be a close person.[35]

Provisions of Article 20(2) of the New Civil Code state that the special conditions of restrictions on protecting third parties laid down by law for close persons also apply to similar legal proceedings between a legal person and a member of its statutory body or a person who significantly influences a legal person as its mem-

[32] For more details on the application of the *nemo tenetur* principle to legal persons in administrative proceedings, cf. ŠVÁSTA, Pavel. *Zákaz sebeobvinění právnické osoby v řízení o správním deliktu.* [online] Dissertation thesis. 2018. [cit. 20-02-2020] Available from: https://dspace.cuni.cz/bitstream/handle/20.500.11956/105339/140068056.pdf?sequence=1&isAllowed=y or more concisely ŠVÁSTA, Pavel. *Několik krátkých úvah k problematice aplikace zásady nemo tenetur na právnické osoby* [online] Available from: https://www.pravniprostor.cz/clanky/trestni-pravo/nekolik-kratkych-uvah-k-problematice-aplikace-zasady-nemo-tenetur-na-pravnicke-osoby.

[33] ŠVÁSTA, Pavel. *Několik krátkých úvah k problematice aplikace zásady nemo tenetur na právnické osoby* [online] Available from: https://www.pravniprostor.cz/clanky/trestni-pravo/nekolik-kratkych-uvah-k-problematice-aplikace-zasady-nemo-tenetur-na-pravnicke-osoby.

[34] *Ibid.*

[35] For example, see the Judgement of the Supreme Administrative Court Case No 8 Afs 17/2012 on January 17th, 2013 or Judgement of High Court in Prague case No 5 To 96/2015 on February 10th, 2016.

ber or under an agreement or other fact, but this applies only to the area of private law.[36]

3.4 Objective liability for the offence of a vehicle keeper and the *nemo tenetur* principle

The fragility of the boundary between the accused person's right to the *nemo tenetur* principle on the one hand and society's interest in reducing infringements, namely road safety and traffic flow, on the other hand can be presented on the basis of the current often mentioned objective liability for motor vehicle keeper's offence.

In order for the vehicle keeper to be objectively liable, the law requires the cumulative fulfilment of three conditions: a breach in the rules must be detected by automated technical means used without an operator or by unauthorised stopping or standing; violation regarding the driver's duties or traffic rules shows signs of an offence and simultaneously, violating the rules does not result in an accident. [37] The offence will only be discussed if the municipal authority of the municipality with extended powers does not initiate administrative offence proceedings and postpones the case because it found no facts to justify commencing proceedings against a person, or stops the administrative offence proceedings because there was no proof that the accused committed the act.[38]

The Constitutional Court reviewed the constitutionality of this legislation from several standpoints, including the *nemo tenetur* principle. It came to the conclusion that the very possibility of the vehicle keeper avoiding prosecution for an administrative offence under Article 125f(1) of the Road Traffic Act by identifying the vehicle driver, which is a consequence of the subsidiarity of this administrative offence to the driver's offence, does not constitute a legal or factual obstacle for exercising the right to refuse to testify due to the danger of criminal prosecution against them or their close person in accordance with Article 37(1) of the Charter. Each of these administrative offences pursues a different purpose. While the driver's subjective liability for an offence is a consequence of their infringement, the vehicle keeper's objective liability for an administrative offence is an expression of their wider responsibility as the vehicle owner or the person operating the vehicle with the owner's consent.[39]

Although the Constitutional Court emphasised the legitimate aim of the legislation in question (i.e., eliminating the situation where certain offences under the Road Traffic Act could not be effectively prosecuted in large numbers precisely be-

[36] For details on the status of a legal person as a close person in private law, cf. also Judgement of the National Council of the Czech Republic on January 27th, 2010 No 29 Cdo 4822/2008 and Judgement of the National Council of the Czech Republic on November 26th, 2013 No 29 Cdo 1212/2012.

[37] Provisions of Article 125f of Act No 361/2000 Coll., on road traffic, as amended.

[38] See MATES, Pavel. Přestupek provozovatele motorového vozidla. *Bulletin advokacie*. 2018, 7–8. pp. 24–27. ISSN 1210-6348.

[39] Judgement of the Constitutional Court of the Czech Republic, Pl. ÚS 15/16 on May 16th, 2018.

cause the vehicle keeper who was aware of who was driving exercised his right and refused to testify on the grounds that it could cause a risk regarding their own prosecution or a close person), it deviated significantly from its previous case law with this conclusion, in which the *nemo tenetur* principle was interpreted rather extensively[40] and was not accepted by the professional public unequivocally.

Particularly, the court's statement that a breach of such an obligation is not sanctioned if the keeper fails to disclose the data concerning the driver's identity at the time of the offence which would affect them or their close persons because they are liable to a fine is criticised. The statement that the possibility of avoiding prosecution for an administrative offence under Article 125f(1) of the Road Traffic Act by identifying the vehicle driver, which is a consequence of the subsidiarity of this administrative offence against the driver's offence, does not yet constitute a legal or factual obstacle to exercising the right to refuse to testify seems feeble.[41]

Perhaps most surprising is the conclusion that the restriction of the right to refuse to testify is given by comparing the consequences of both offences, i.e., according to Article 125c of the Road Traffic Act and the motor vehicle keeper. The Constitutional Court chose a quantitative criterion in this case when it concluded that an offence under Article 125f was subject to a lower fine and no points were recorded, and that the keeper could claim compensation from the person who had actually caused the illegal situation. Although the vehicle operator is indeed at risk of a fine lower than that which could be imposed on the person who actually committed the infringement for an unproven offence, points will not be deducted and no prohibition of activities can be imposed, this does not change their exposure to pressure to identify oneself or a close person, which he can get rid of only by being punished, which is certainly not in line with the privilege against self-incrimination.[42]

4. Conclusion

Law is not an exact science; it does not contain components that could be measured and evaluated by instruments. The evaluation of the role and effect of law within specific legal institutes in society depends primarily on the persuasiveness of argumentation, the strength of the arguments used often arising from subjective values and opinions, and the degree of ability to influence the subjective values and opinions of others.

[40] Cf. Judgment of the Constitutional Court of the Czech Republic case No I. ÚS 1849/08. The Constitutional Court concludes that it is not possible to fine a person who refuses to provide an explanation to an administrative body in the event that it is clear that he could, even in theory, contribute to their sanction for the offence.

[41] See MATES, Pavel. *Op. cit.*, p. 26.

[42] MATES Pavel, PÚRY, František. Zákaz nucení k sebeobviňování. *Bulletin advokacie.* 2019, 3, pp. 7–13. ISSN 1210-6348.

The intention of the chapter was not to pretend to be the only 'correct' solution to the *nemo tenetur* principle's sometimes conflicting relationship as a traditional principle of a fair trial on the one hand and on the other hand, the legitimate interest of society in combating crime in effectively conducted trials. The relationship between the two social values is complex and is reflected in several different situations, not just in the criminal law field. The chapter selectively chooses and only points out some of these situations, in which the mutual limits of both social interests are unenshrined or debatable in the long term in the current legal doctrine and application practice.

Although the mutual relations of the two public interests will undoubtedly be further defined, either directly by legislation or by interpretation in legal doctrine or judicial activities, it must always be carefully considered whether the solution chosen in a particular case meets the condition of rational balance and proportionality. It must be examined and not only sought in the interaction of the two social values mentioned, but also with regard to other fair trial principles, the dignity and natural rights of man and the values and functions of the rule of law.

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Conditions and limits regarding the civil apprehension of a suspect

Pavel Vetešník

Metropolitan University Prague, Czech Republic

pavel.vetesnik@mup.cz

Abstract: *The subject of the present paper is to define the conditions and limits regarding the civil apprehension of a suspect, i.e. a person who was caught when committing a criminal offence or immediately thereafter, and whose personal liberty may be restricted by anyone. The article will assess who may use this concept and for what purpose, and what are the prerequisites, conditions and grounds for using thereof. As the legal regulation fails to contain the manner by which a person's personal liberty may be restricted, in this article, the author will also focus in this direction. The article will also focus on whether this concept can also be used in the case of administrative infractions and civil wrongs. Further in my article I will also deal with the assessment of human rights and freedoms which are protected, but also affected, by this concept.*

Key words: *civil apprehension, personal liberty, legal regulation, administrative infractions, civil wrongs, human rights and freedoms*

1. Introduction

As follows from § 76 (2) of the Criminal Procedure Code, the personal liberty of a person who was caught when committing a criminal offence or immediately thereafter may be restricted by anyone, if it is necessary to establish his or her identity, to prevent an attack or securing evidence. However, they are obliged to immediately refer this person to the police authority, a member of the armed forces may also be referred to the closest unit of the armed forces or corps manager. If it is not possible to refer the person immediately, the restriction imposed on personal liberty must be reported to one of the mentioned authorities without undue delay. The concept of restricting personal liberty is one of the remains of a general principle of civil self-help contained in § 14 of the New Civil Code[1] in the field of criminal proceedings.[2] Self-help under § 14 of the New Civil Code which is a classic example of an exception from the state monopoly of violence,[3] may be implemented by the

[1] The previous regulation was contained in § 6 of Act no. 40/1964 Sb., the Civil Code, as amended.

[2] ŠÁMAL, Pavel, Jan MUSIL, Josef KUCHTA et al. *Trestní právo procesní. (Criminal procedure law.)* 4th revised edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-496-4. p. 273.

[3] MELZER, Filip, Petr TÉGL et al. *Občanský zákoník: velký komentář. (Civil Code: Large Commentary.)* Praha: Leges, 2013. ISBN 978-80-87576-73-1. p. 243.

provision of § 76 (2) of the Criminal Procedure Code. However, it is possible that a person who uses self-help may use other circumstances excluding criminal liability, such as self-defence under § 29 of the Criminal Code.[4] With regard to the definition of the self-help concept as such, I refer to the academic literature.[5]

The concept of restricting a person's personal liberty constitutes a circumstance excluding criminal liability.[6] If the prerequisites for restricting personal liberty are met, the person who restricts another person with regard to their personal liberty shall not commit a criminal offence pursuant to § 171 of the Criminal Code,[7] because they are entitled to restrain from enjoying a person's personal liberty.[8] No other circumstance excluding criminal liability is admissible against a person who, in accordance with § 76 (2) of the Criminal Code, restricts another person regarding personal liberty. Therefore, it is possible to concur with the conclusion that: *"If the security agency personnel's actions were perfect, the self-defence against them is not admissible, as it is the exercise of a right or obligation (cf. decision No. 55/1977 Sb.rozh.tr)."*[9]

However, the use of this concept interferes with the civil rights and freedoms guaranteed primarily by the Charter, namely by Article 7 (1), which guarantees the inviolability of a person and their privacy, and may only be limited only in cases prescribed by the law, and also by Article 8 (1) and (2), whereby personal liberty is guaranteed and no one shall be deprived of their liberty except on the grounds and in the manner specified by the law.[10] However, the mentioned rights not only apply to a person who is restricted on their personal liberty, but also to a person who restricts the personal liberty of a person caught when committing the criminal offence or immediately thereafter, because that person may be affected by the criminal offence. In such a case, Article 11 (1) of the Charter shall also be applied, which states that everyone has the right to own property.

In view of the fact that the personal liberty of a person caught when committing the criminal offence or immediately thereafter may be restricted by anyone, including a person unaffected by that criminal offence, there is no doubt that the purpose of such a personal liberty restriction is to prevent the frustration of the purpose of

[4] Czech Republic Supreme Court Resolution on September 17th, 2015, file no. 8 Tdo 1008/2015.

[5] MELZER, Filip, Petr TÉGL et al. *Občanský zákoník: velký komentář. (Civil Code: Large Commentary.)* Praha: Leges, 2013. ISBN 978-80-87576-73-1. pp. 241–252.

[6] ŠÁMAL, Pavel et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* 7th edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-465-0. p. 973.

[7] Whoever restrains someone from enjoying personal liberty, shall be sentenced to imprisonment for up to two years.

[8] NOVOTNÝ, František a kol. *Trestní právo procesní. (Criminal procedure law.)* 2nd updated edition. Plzeň: Publishing and editorship Aleš Čeněk, 2017. ISBN 978-80-7380-677-4. p. 195.

[9] Czech Republic Supreme Court Resolution on May 17th, 2006, file no. 8 Tdo 572/2006.

[10] JELÍNEK, Jiří et al. *Trestní právo procesní. (Criminal procedure law.)* 4th updated and supplemented edition. Praha: Leges, 2016. ISBN 978-80-7502-160-1. p. 302.

criminal proceedings where there is a risk of delay,[11] or the right of everyone to help achieve the purpose of criminal proceedings.[12] However, the purpose of restricting personal liberty may also be the protection of the subjective rights of the person affected by this criminal offence, who may be affected by this offence, usually the property and personal rights.

2. Prerequisites for restricting personal liberty

2.1. Who may restrict personal liberty

It clearly follows from the provision of § 76 (2) of the Criminal Procedure Code that anyone may restrict the personal liberty of a person caught when committing the criminal offence or immediately thereafter, with the exception of a police authority, for whom § 76 (1) of the Criminal Procedure Code shall apply.[13] The academic literature adds to the definition of the subject entitled to restrict the personal liberty of a person referred to in § 76 (2) of the Criminal Procedure Code that it is not excluded that a police officer who is not a member of a police authority under § 12 (2) of the Criminal Procedure Code may proceed according to this provision.[14] This person can be, for example, a municipal police officer.[15] The case law has concluded that if the conditions under § 76 (2) of the Criminal Procedure Code are fulfilled, i.e. if it concerns a person who was caught when committing the criminal offence or immediately thereafter, their personal liberty may be restricted by, for example, a security agency employee.[16] Restriction of the personal liberty of a person caught when committing a criminal offence or immediately thereafter is a right and not an obligation, unless otherwise provided by other law. Such is the case concerning Act No. 553/1991 Sb., on the Municipal Police, as amended, which in the § 7 stipulates that if a criminal offence is being committed, the municipal police officer has an obligation, regardless whether during the working hours or non-working hours, to carry out an intervention within the limits of the law, where this intervention means also restricting a person's personal liberty.[17]

[11] ŠÁMAL, Pavel, Jan MUSIL, Josef KUCHTA et al. *Trestní právo procesní.* (*Criminal procedure.)* 4th revised edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-496-4. p. 273.

[12] RŮŽEK, Antonín et al. *Trestní právo procesní. (Criminal procedure law.)* 3rd revised edition. Praha: Karolinum, 1996. ISBN 80-7184-207-9. p. 48.

[13] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[14] ŠÁMAL, Pavel et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* 7th edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-465-0. p. 973.

[15] VETEŠNÍK, Pavel and Luboš JEMELKA. *Zákon o obecní policii: komentář. (Act on Municipal Police: Commentary.)* 7th edition. Praha: C. H. Beck, 2019. ISBN 978-80-7400-729-3. p. 309.

[16] Czech Republic Supreme Court Resolution on July 21st, 2006, file no. 8 Tdo 838/2006.

[17] VETEŠNÍK, Pavel et al. *Obecní policie*. *(Municipal police.)* Plzeň: Publishing and editorship Aleš Čeněk, 2013. ISBN 978-80-7380-463-3. p. 120.

2.2. Being caught when committing a criminal offence or immediately thereafter

The prerequisite for restriction of personal liberty of a person is being caught when committing a criminal offence or immediately thereafter. The personal liberty of such a person may be restricted both when actually caught personally when committing the criminal offence, as well as, with regard to the notion "immediately thereafter", after termination of the criminal offence,[18] within a reasonable time limit after the commission of such criminal offence. A criminal offence is an unlawful act which the Criminal Code determines as criminal and which has the elements prescribed by such a Code.[19] As is clear from the case-law, it is not for a person who restricts another person's personal liberty to make a qualified and irrefutable assessment that a criminal offence has in fact been committed in that way, since law enforcement authorities are otherwise authorised to do so. Therefore it is important that the person deprived of their liberty must then be referred to the police authority immediately, and a member of the armed forces may be referred over to the closest armed forces unit or corps manager or at least the restriction of personal liberty must be reported to one of these authorities. It is then up to such authority to consider whether the suspicion has been revoked or not.[20]

Consequently, a justified belief that a person has committed a criminal offence will suffice to restrict personal liberty. The Supreme Court added to this justified suspicion that: *"At the same time, (…) the named injured parties were in principle entitled to apprehend the accused pursuant to § 76 (2) of the Criminal Code, as at the time of the theft of goods in the Tesco supermarket they could reasonably assume that the accused had committed the criminal offence of theft within the meaning of § 205 of the Criminal Code, especially when in the alternatives according to § 205 (1) (b) to (e), (2) of the Criminal Code, this criminal offence is committed regardless of the stolen item's value and regardless of the amount of damage caused thereby. At the time the injured parties began to apprehend the accused after their provable theft, they did not yet know and could not know the exact type or value of the goods stolen by the accused, so their justified suspicion of committing the criminal offence of theft, whereby the offender could have been the accused, could not be dispelled. After all, it was the accused who, by escaping, thwarted the possibility that the injured parties, as employees authorized to protect Tesco supermarket's property from theft, could verify what goods the accused had stolen and their value. This did not happen until later, when the accused had already committed the prosecuted act. In view of the above, there is no doubt that the injured parties were subjectively convinced that the criminal offence of theft had been committed by the accused, and therefore they reasonably tried to ap-*

[18] Czech Republic Supreme Court Judgement on October 31st, 2000, file no. 30 Cdo 1683/2000.

[19] § 13 (1) of Act no. 40/2009, the Criminal Code, as amended.

[20] Czech Republic Supreme Court Judgement on October 31st, 2000, file no. 30 Cdo 1683/2000, Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003, or Czech Republic Supreme Court Resolution on July 15th, 2005, file no. 30 Cdo 2382/2004.

prehend him and the accused unjustifiably prevented them from doing so with violence and threats of violence, which took place using weapons".[21] In another case, the Supreme Court stated with reasonable justified suspicion that: *"City police officers themselves conceived the restriction of the driver's personal liberty as detention pursuant to § 76 (2) of the Criminal Code on the grounds that his escape raised suspicion on them, according to which the driver had committed a criminal offence in connection with driving a motor vehicle, namely, for example, obstructing the enforcement of an official decision or menace under the influence of an addictive substance. Given the circumstances of the escape, this suspicion may already be considered as real, notwithstanding the fact that in the subsequent course its justification was fully confirmed. The apprehension of the accused as a person identical with the driver who escaped from the roadside inspection location took place in a situation meeting the conditions of the provisions of § 76 (2) of the Criminal Code, even if the accused was a person 'caught when committing a criminal offence or immediately thereafter'. The accused was already objectively caught when committing the criminal offence of obstructing the enforcement of an official decision and expulsion pursuant to § 337 (1)(a) of the Criminal Code just by carrying out the roadside inspection, although at the time of the inspection it was not yet clear to the city police officers*".[22]

The Criminal Procedure Code fails to define the notion of "immediately thereafter", or fails to stipulate any reasonable period of time for how long from commissioning the criminal offence that a person's personal liberty can still be restricted. In a specific case, the Supreme Court held that a period of 30 minutes may still be accepted as such period and added that: *"After almost 30 minutes had expired, the accused was restricted on personal liberty in a situation where he was first unsuccessfully pursued by a city police officer and subsequently he was also immediately sought by other police officers around the area where he escaped, and where he was hiding from police officers in vegetation in a location 300–400 metres away from the place of escape. Immediately after the accused escaped, the activity of city police officers was constantly and continuously aimed at his capture and completed by the accused's apprehension in a shelter located in the area, which police monitored. In this situation, there is no convincing reason to consider the objected period of 30 minutes between the accused's escape and restriction of his personal liberty as a circumstance precluding the fulfilment of the conditions of detention pursuant to § 76 (2) of the Criminal Procedure Code*".[23]

2.3. Grounds for restricting personal liberty

For personal liberty restriction, the Criminal Procedure Code prescribes fulfilling at least one of three grounds. The first ground is the identification of the person who was caught when committing a criminal offence or immediately thereafter.

[21] Czech Republic Supreme Court Resolution on August 29th, 2012, file no. 5 Tdo 809/2012.
[22] Czech Republic Supreme Court Resolution on November 26th, 2014, file no. 7 Tdo 1499/2014.
[23] Czech Republic Supreme Court Resolution on November 26th, 2014, file no. 7 Tdo 1499/2014.

However, this ground would not be fulfilled if these people knew each other.[24] The academic literature added thereto that the restriction of personal liberty to establish an identity is only restricting the personal liberty of a person actually caught when committing and if it is necessary to establish the identity of the person being searched (e.g. because they were seen at the crime scene, is reasonably suspected, but managed to escape), the police authorities have the right to bring this person before them for up to 24 hours in order to establish their identity under other laws.[25] This first reason for restricting a person's personal liberty shall not, by its nature, apply to a municipal police officer, who is, pursuant to § 12 (2)(b) of Act No. 553/1991 Sb., on the Municipal Police, as amended, entitled to request a person to prove their identity if they are a person suspected of committing a criminal offence.[26]

The second ground is to prevent the escape of a person who was caught when committing a criminal offence or immediately thereafter. Case law has concluded that, depending on the circumstances of the case, a possible departure from the crime scene (from the place of attack or conflict, etc.) may also be qualified as an escape, without the person who is subsequently restricted on personal liberty intending to wait for the police authority who had been sent for.[27] The third ground is to secure evidence. Here, it is necessary to proceed with regard to the provision of § 89 of the Criminal Procedure Code, which defines in a demonstrative manner what needs to be proved in criminal prosecution to the necessary extent and what can serve as evidence. Case law added to that: *"The significance of securing such evidence in the immediate aftermath of an event which may be considered as a criminal offence is then undisputed. Here too, therefore, the Court of Appeal failed to logically explain why it considered that there was no reason to secure the relevant evidence"*.[28]

With regard to the failure to meet these grounds, the Supreme Court held that: *"The intervention of a security agency employee against a person who is not suspected of committing a criminal offence, consisting in restricting their personal liberty, may not be considered justified, even if the employee performs it at the request of the Czech Republic Police to apprehend this person for the purposes of fulfilling its other tasks. The fact that the security agency employee acted in this way at the request of the Czech Republic Police is not relevant for the assessment of the legitimacy of his intervention (…)".*[29] Regarding the failure to meet the grounds for restricting personal liberty by police officers who allegedly requested a bribe from a person who wanted to apply § 76 (2) of the Criminal Procedure Code, the Supreme Court held that the grounds were not met, because the person could have connected with the op-

[24] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[25] ŠÁMAL, Pavel et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* 7th edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-465-0. p. 973.

[26] VETEŠNÍK, Pavel and Luboš JEMELKA. *Zákon o obecní policii: komentář. (Act on Municipal Police: Commentary.)* 2nd edition Praha: C. H. Beck, 2019. ISBN 978-80-7400-729-3. p. 309.

[27] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[28] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[29] Czech Republic Supreme Court Resolution on 21 July 21st, 2006, file no. 8 Tdo 838/2006.

erational officers of the Czech Republic Police without any difficulties through the emergency telephone number, reported what actions the police officers committed against them, identified their vehicle, the place where they were located and where they were heading, and could have stated that they had their documents, and if applicable, with how much money. Thereby, they would enable the Czech Republic Police both to identify the police officers in terms of their identity and to detain them while driving, excluding the possibility of their escape, and simultaneously create a favourable situation for securing real evidence, which should especially be the personal documents held by the police officers. If such a person decided to take action against the police officers by conduct in which the courts saw a criminal offence, it was a conduct which in the given circumstances was unnecessary either to establish the identity of police officers or to prevent their escape and ultimately secure evidence. Whether this person decided to provide or refuse the objected bribe, they had a real opportunity to identify the police officers, for example, according to their vehicle registration plate, when the matter was subsequently reported to the Czech Republic Police. The escape of the police officers in the sense that they would be completely out of reach of the relevant measures of the Czech Republic Police did not pose a real threat and cannot be confused with the possible departure of police officers from the crime scene. With regard to the evidence, which was supposed to be as real evidence, particularly, the personal documents of that person held by the police officers, the person, just to the contrary, precluded by their conduct their securing, because they created the conditions for the police officers to get rid of them. In additional, it must have been clear to this person that in the final stage they could not solve the matter other than by establishing contact with the Czech Republic Police.[30]

2.4. Conditions for restricting personal liberty

The basic condition is the principle of proportionality (restraint),[31] which is emphasised in § 76 (2) of the Criminal Procedure Code by the words "if it is necessary". If this were not necessary, i.e. if one of the grounds for restricting a person's personal liberty was not fulfilled, it would be a deviation from this circumstance excluding criminal liability. The academic literature supplemented thereto: *"If the purpose of restricting personal liberty (establishing the identity, preventing escape or securing evidence) may be achieved by other means less restricting the liberty of the person caught committing the criminal offence, then such other means must be used (arguments 'if necessary')."*[32] Another condition is the obligation to refer the person whose personal liberty was restricted immediately to the police authority, a member of the armed

[30] Czech Republic Supreme Court Resolution on 25 January 25th, 2005, file no. 7 Tdo 4/2005.

[31] JELÍNEK, Jiří et al. *Trestní právo procesní*. (*Criminal procedure law.)* 4th updated and supplemented edition. Praha: Leges, 2016. ISBN 978-80-7502-160-1. p. 303.

[32] DRAŠTÍK, Antonín, Jaroslav FENYK et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* I. volume. Praha: Wolters Kluwer ČR, 2017. ISBN 978-80-7552-600-7. p. 613.

forces may also be referred to the closest unit of the armed forces or corps manager. However, this police authority is not a municipal or city police. The law no longer stipulates whether referral should take place at the place where the person's personal liberty was restricted or at one of authorities. Therefore, it is not excluded that a person with personal liberty restrictions, for example by being locked in a vehicle's cargo area, is handed over to one of these authorities at their place. However, if such a person cannot be referred immediately, restriction of personal liberty must be reported to one of these authorities without delay. The reason is that such a restriction shall last only for as long as is strictly necessary.[33] However, the condition for the implementing personal liberty restrictions, as opposed to self-help, is not the fact that the intervention of public power is not accessible, although this will usually be the case.[34] For restricting a person's personal liberty, grounds for detention are not needed that pursuant to § 67 of the Criminal Procedure Code.[35] Nor is there a condition that a person caught when committing a criminal offence or immediately thereafter subsequently physically resists.[36]

2.5. Manner of restricting personal liberty

Unfortunately, the Criminal Procedure Code fails to stipulate how a person's personal liberty may be restricted. As follows from the case law, restricting personal liberty may be implemented for a person caught when committing a criminal offence or immediately thereafter in various ways, including, for example, by locking them in an apartment or other suitable place, etc.,[37] or by handcuffing them.[38] The right to use handcuffs in the event of restriction of a person's personal liberty pursuant to § 76 (2) of Criminal Procedure Code is stipulated for the municipal police officer in § 18a (1)(a) of Act No. 553/1991 Sb., on the Municipal Police, as amended. However, a person who has restricted another person regarding personal liberty pursuant to § 76 (2) of the Criminal Procedure Code may not restrict such a person on any other rights, i.e. search them, prohibit them from calling or prevent them from engaging in any other activities that do not aim at frustrating the restriction of personal liberty. The main purpose of restricting a person's personal liberty is therefore to prevent their free movement.[39] With regard to the purpose of restricting personal liberty, academic literature regarding § 171 of the Criminal Code

[33] JELÍNEK, Jiří et al. *Trestní právo procesní. (Criminal procedure law.)* 4th updated and supplemented edition. Praha: Leges, 2016. Student. ISBN 978-80-7502-160-1. p. 312.

[34] ŠÁMAL, Pavel, Jan MUSIL, Josef KUCHTA et al. *Trestní právo procesní.* (*Criminal procedure law.)* 4th revised edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-496-4. p. 273.

[35] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[36] Czech Republic Supreme Court Resolution on December 21st, 2016, file no. 3 Tdo 1629/2016.

[37] Czech Republic Supreme Court Judgement on January 29th, 2004, file no. 30 Cdo 203/2003.

[38] ŠÁMAL, Pavel et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* 7th edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-465-0. p. 974.

[39] VETEŠNÍK, Pavel et al. *Obecní policie. (Municipal police.)* Plzeň: Publishing and editorship Aleš Čeněk, 2013. ISBN 978-80-7380-463-3. p. 264.

states: *"Restraint from enjoying personal liberty is an interference with personal liberty, which prevents or restricts a person's free movement and simultaneously prevents them from making free decisions about their movement. Restraint from enjoying personal liberty will be difficult to overcome (cf. R 1/1980, p. 20)"*.[40] When a person's personal liberty is restricted, it is not excluded that this person is continuing to commit the criminal offence and therefore the person who restricts the personal liberty of such a person may actively intervene through self-defence pursuant to § 29 of the Criminal Code. The Supreme Court held thereto: *"(…) Intervened against the accused with the intention of apprehending them, and therefore acted in self-defence, the limits of which they did not exceed, and reacted immediately and proportionately to the imminent danger of theft that threatened from the accused at that moment. As a result, it is at the same time excluded that the physical attack of the accused, in which the injured party suffered an injury as a result of the altercation between them, is precluded from being regarded as a necessary defence, since that is inadmissible in that context (see Decision No 9/1980). Sb. Rozh. Tr.)*[41]". However, if the attack on an interest protected by criminal law does not directly threaten or persist, necessary defence cannot be used.

3. Failure to meet the prerequisites for restricting personal liberty

If the prerequisites for restricting personal liberty are not met, it is a deviation from the limits set out in § 76 (2) of the Criminal Procedure Code, i.e. an excess from the circumstances excluding criminal liability. Regarding the failure to meet these prerequisites, the Supreme Court held: *"(…) It is quite obvious that the conditions specified in § 76 (2) of Criminal Procedure Code in the assessed case were not met, the attack of the injured parties by the appellant happened in a time interval which was not insignificant after the theft of the military belt buckle in their shop, and their conduct towards the injured parties was not aimed and necessary to establish their identity, prevent their escape or secure evidence. It is also undisputed from the factual findings of the court that the conditions pursuant to § 76 (2), second and third sentences of the Criminal Procedure Code were not met either"*.[42] Regarding the person who has not fulfilled the prerequisites for restricting personal liberty: *"(…) therefore the conditions of self-defence within the meaning of § 13 of the Criminal Code may be met, if the person whom this employee unjustifiably restrains from enjoying personal liberty uses violence to overcome the resistance of the person who restricts his personal liberty. In such a case, the legitimacy of self-defence is based on the fact that the person in*

[40] ŠÁMAL, Pavel et al. *Trestní zákoník, komentář. (Criminal Code. Commentary.)* 2nd edition. Praha: C. H. Beck, 2012. ISBN 978-80-7400-428-5. p. 1713.

[41] Czech Republic Supreme Court Resolution on December 17th, 2014, file no. 8 Tdo 1417/2014.

[42] Czech Republic Supreme Court Resolution on June 25th, 2012, file no. 4 Tdo 656/2012.

question deters the attack on an interest protected by the Criminal Code, in particular in the interest of society in protecting personal liberty."[43]

With regard to the fact that the restriction of personal liberty pursuant to § 76 (2) of the Criminal Procedure Code is considered as the circumstance excluding criminal liability, in case of error in fact it shall be proceeded pursuant to § 18 of the Criminal Code, in particular § 18 (4) of the Criminal Code. The Supreme Court added thereto: *"A negative error in fact which would exclude the accused's criminal liability could therefore only be involved if he mistakenly considered the injured party to be the offender of the criminal offence committed immediately. A person caught committing a criminal offence may only be a person caught at the time of committing the criminal offence. It is already clear from this fact that such a person cannot be a person who so far acts only in the form of preparing for a crime, or, in this given case, a tipster looking for persons or flats suitable for committing subsequent property criminal offence. Preparation, as the lowest development stage of criminal activity, poses only a distant danger that a consequence will occur sometime in the future, which is an element of criminal offence. Preparation as the intentional creation of conditions for commissioning a criminal offence (§ 7 of the Criminal Code), whether in the form of so-called tipping or inspecting a future crime scene, may not lead to the conclusion that such a person is an offender of a criminal offence, but only to a suspicion that this person is preparing to commit the criminal offence in the future. These facts were known to the accused when they defended themself by saying that the injured appeared to them to be highly suspicious and considered them to be a person who is identifying objects suitable for subsequent theft. This precludes the existence of a negative error in fact, where the offender, just to the contrary, considers that the facts conditioning criminality are not given. Therefore, if the accused considered that the injured party is the so-called tipster, he could not consider them to be the offender of a criminal offence whom he was entitled to apprehend them (restrict their personal liberty) pursuant to § 76 (2) of the Criminal Procedure Code when committing the criminal offence or immediately thereafter. It is not necessary for the accused to know exactly the wording of this provision of the Criminal Code. It is sufficient that they knew the decisive facts which precluded the possibility of intervening against the injured party in the manner provided for in § 76 (2) of the Criminal Code. The accused therefore mistakenly thought that they were acting in accordance with the law and their conduct was not criminal. Therefore they acted in the so-called negative error in law, where, however, the principle is applied that ignorance of the criminal law and what is a criminal offence is no excuse. In the event of a negative error in fact, the accused could act only if he mistakenly believed that the injured party had committed a criminal offence in the house at the given time and therefore considered them, contrary to the facts, to be caught when committing the criminal offence or immediately thereafter. However, this was not the case of such a situation, in which the criminal li-*

[43] Czech Republic Supreme Court Resolution on July 21st, 2006, file no. 8 Tdo 838/2006.

ability of the accused of an intentional criminal offence would be excluded as a result of an error".[44]

4. Procedure after the referral of a person restricted on personal liberty

The procedure after the referral of a person with personal liberty restrictions to a police authority is the same as if the person is detained by the police authority.[45] As follows from § 76 (4) of the Criminal Procedure Code, the police authority to whom the person caught when committing the criminal offence was referred shall release them without delay in the event that the suspicion is revoked. If the detained person is not released from custody, they shall pass the transcript on their interrogation along with the prepared resolution to initiate criminal prosecution and other material evidence to the public prosecutor so they can file a petition for remand in custody. The police authority must submit the petition without undue delay so that the person detained under the Criminal Procedure Code can be referred to the court within 48 hours of detention, otherwise they must be released. The academic literature agrees that the period of 48 hours is calculated from the moment the suspect is taken over by the police authority (in case of a member of the armed forces since the takeover by the armed forces unit or the corps manager).[46] To this end, it is necessary to add a conclusion that the procedure under § 76 (2) of the Criminal Procedure Code is not a detention within the meaning of Article 8 (3) of the Charter,[47] and *"therefore it does not refer to it as a detention but as a 'personal liberty restriction'), but it is an expression of self-help and the basis for impunity for such conduct, which would otherwise accomplish the elements of a criminal offence of illegal*

[44] Czech Republic Supreme Court Resolution on January 18th, 2007, file no. 7 Tdo 1429/2006.

[45] FENYK, Jaroslav, Dagmar CÍSAŘOVÁ a Tomáš GŘIVNA et al. *Trestní právo procesní. (Criminal procedure law.)* 6th edition. Praha: Wolters Kluwer ČR, 2015. ISBN 978-80-7478-750-8. p. 274.

[46] JELÍNEK, Jiří et al. *Trestní právo procesní. (Criminal procedure law.)* 4th updated and supplemented edition. Praha: Leges, 2016. ISBN 978-80-7502-160-1. p. 312; ŠÁMAL, Pavel, Jan MUSIL, Josef KUCHTA et al. *Trestní právo procesní.* (*Criminal procedure law.)* 4th revised edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-496-4. s. 273; CÍSAŘOVÁ, Dagmar, Jaroslav FENYK, Světlana KLOUČKOVÁ, Václav MANDÁK, František PÚRY, Bohumil REPÍK, Antonín RŮŽEK a Tomáš GŘIVNA. *Trestní právo procesní.* (*Criminal procedure law.)* 4th updated version. Praha: Linde, 2006. ISBN 80-7201-594-X; FENYK, Jaroslav, Dagmar CÍSAŘOVÁ a Tomáš GŘIVNA et al. *Trestní právo procesní. (Criminal procedure law.)* 6th edition. Praha: Wolters Kluwer ČR, 2015. ISBN 978-80-7478-750-8. p. 274; ŠÁMAL, Pavel et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* 7th edition. Praha: C. H. Beck, 2013. ISBN 978-80-7400-465-0. p. 973; DRAŠTÍK, Antonín, Jaroslav FENYK et al. *Trestní řád: komentář. (Criminal Procedure Code: Commentary.)* I. volume. Praha: Wolters Kluwer CZ, 2017. ISBN 978-80-7552-600-7. p. 613.

[47] The accused or suspect of criminal offence may only be detained in cases provided by the law. The detained person must be informed immediately of the reasons for the detention, heard and released within 48 hours or referred to the court. The judge must hear the detainee within 24 hours of their referral and decide whether to remand them in custody or release them.

restraint (§ 171 of the Criminal Code). (…) Only as of the referral of the apprehended person to the police authority the detention of a suspect of a criminal offence pursuant to Article 8 (3) of the Charter shall begin."[48]

However, an opposite view can also be encountered where: *"(…) provisions of § 76 (2) of the Criminal Procedure Code also poses a problem of a constitutional nature. According to Article 8 (3) of the Charter of Fundamental Rights and Freedoms a detained person shall immediately be informed of the grounds for detention, questioned and, within 48 hours at the latest, either released or turned over to a court. At the time when the Charter came into force, the Criminal Procedure Code did not know the so-called 'restriction of personal liberty', but deprivation of personal liberty under § 76 (2) of the Criminal Procedure Code was denoted as detention. The guarantees of Article 8 (3) of the Charter therefore also applied to this provision. The period laid down in Article 8 (3) of the Charter therefore had to also include the apprehension period pursuant to § 76 (2) of the Criminal Procedure Code. If the law stipulated the beginning of the detention only after the person was referred to the police authority, it was in conflict with the Charter. If then another amendment to the Criminal Procedure Code denoted the apprehension of a suspect under § 76 (2) of the Criminal Procedure Code as a 'restriction of personal liberty', the deprivation of liberty under § 76(2) of the Criminal Procedure Code was in fact excluded from the protection of Article 8 (3) of the Charter and the scope of the guarantees set out in this provision of the Charter was materially limited. However, the rights guaranteed by Article 8 (3) of the Charter may not be restricted by the law (see Article 4 (2) of the Charter). The legislator's procedure may be qualified as an indirect amendment of the Charter made by an ordinary law. The term infraudem constitutionis strongly arises in this context. By the legislator's procedure, it was possible to circumvent the Charter, but not the Convention, in which the terms arrestation or arrest have an autonomous meaning and are understood to mean any deprivation of personal liberty for the purposes of criminal proceedings, regardless of its name in national law and regardless of the fact who is authorized to carry it out. The period of 'promptly' in Article 5 (3) of the Convention for the release of a person or their turning over to the court shall be calculated from the moment of de facto deprivation of liberty, regardless of who is authorised to do so under national law, in our case as of the moment of deprivation of liberty under § 76 (2) of the Criminal Procedure Code and not as of the moment the person has been referred to the police authority."*[49]

Personally, I am of the opinion that the period of restricting personal liberty of a person caught when committing a criminal offence or immediately thereafter is included within 48 hours under § 76 (4) of the Criminal Code only if the restrict-

[48] WAGNEROVÁ, Eliška, Vojtěch ŠIMÍČEK, Tomáš LANGÁŠEK, Ivo POSPÍŠIL et al. *Listina základních práv a svobod: komentář. (Charter of Fundamental Rights and Freedoms: Commentary.)* Praha: Wolters Kluwer CZ, 2012. ISBN 978-80-7357-750-6. p. 236.

[49] REPÍK, Bohumil. Zbavení svobody za účelem zjištění totožnosti ve světle štrasburské judikatury. (Deprivation of liberty for the purpose of establishing the identity in the light of the Strasbourg case law.) *Bulletin advokacie*. 2004, 4/2004, 27–31. ISSN 1210-6348. p. 30.

ing person is a municipal police officer, who does not act as a private person but as an official person, to whom the Act No. 553/1991 Sb., on the Municipal Police, as amended, stipulates additional authorisations in connection with personal liberty restriction.[50] I am also of the same opinion in cases where a police officer who is not a member of a police authority under § 12 (2) of the Criminal Procedure Code proceeds according to § 76(2) of the Criminal Procedure Code. I consider the acts of the municipal police officer and such police officer as criminal procedural, not only administrative according to the police laws.

5. Restricting personal liberty for an administrative infraction or civil wrong

It is a question whether the personal liberty of a person caught when committing an administrative infraction or a civil wrong, or immediately thereafter, may be restricted. Regarding the definition of the administrative infraction as such, I refer to academic literature.[51] Part of the professional public[52] and the case law[53] admit the application of § 76 (2) of the Criminal Procedure Code only when committing a criminal offence. Other part of the professional public states that: *"The fact that the administrative infraction law fails to recognise a concept analogous to civil apprehension pursuant to § 76 (2) of the Criminal Procedure Code does not mean that the personal liberty of a person suspected of committing an administrative infraction cannot be interfered with under any circumstances. It is possible in a limited number of cases. This is the case if there is such interference with personal liberty in a situation that allows self-defence"*.[54] The case law has admitted the restriction of personal liberty of a person caught committing an administrative infraction, or immediately thereafter, tacitly and with reference to the exercise of self-help under the Civil Code.[55] With reference to the Judgment of the Supreme Administrative Court,[56] the Supreme Court added that: *"Basically in agreement with the Supreme Administrative Court, it is necessary to ask whether and under what conditions the intervention of the*

[50] VETEŠNÍK, Pavel et al. *Obecní policie*. (*Municipal police)* Plzeň: Publishing and editorship Aleš Čeněk, 2013. ISBN 978-80-7380-463-3. p. 264.

[51] JEMELKA, Luboš and Pavel VETEŠNÍK. *Zákon o odpovědnosti za přestupky a řízení o nich. Zákon o některých přestupcích. Komentář. (Act on Administrative Infractions Liability and the proceedings thereon. Act on certain Administrative Infractions. Commentary.)* 2nd edition. Praha: C. H. Beck, 2020. ISBN 978-80-7400-772-9. pp. 43–63.

[52] JELÍNEK, Jiří et al. *Trestní právo procesní. (Criminal procedure law.)* 4th updated and supplemented edition. Praha: Leges, 2016. ISBN 978-80-7502-160-1. p. 311.

[53] Czech Republic Supreme Court Resolution of 21 July 2006, file no. 8 Tdo 838/2006.

[54] KLAPAL, Vít. Možnosti omezení osobní svobody podezřelé ze spáchání přestupku. (Possibilities of restricting personal liberty of person suspected of committing an administrative infraction) *Trestněprávní revue*. 2006, 6/2006, pp. 173–176. ISSN 1213-5313.

[55] Czech Republic Supreme Court Resolution on May 17th, 2006, file no. 8 Tdo 572/2006.

[56] Czech Republic Supreme Administrative Court Judgement on September 9th, 2010, file no. 1 As 34/2010, č. 2208/2011 Sb. NSS.

ticket inspector against a free rider may establish the inspector's criminal (or administrative infraction) liability. Only an unlawful act [§ 13 (1) of the Criminal Code] may be a criminal offence (as well as an administrative infraction). The self-defence (§ 29 of the Criminal Code) and necessity (§ 28 of the Criminal Code) are circumstances excluding criminal liability. In this context, the self-defence comes into consideration, which is based on the fact that an otherwise criminal act by which someone averts a danger directly threatening an interest protected by criminal law is not a criminal offence. However, it is not a self-defence if the defence was clearly disproportionate to the manner of attack. The reasoning of the cited decision of the Supreme Administrative Court indicates that in a situation where the passenger fails to present a valid ticket and subsequently fails to even fulfil the secondary obligation pursuant to § 37 (5)(d) of Act No. 266/1994 Sb., on Rail Systems, that is the obligation according to the request of the authorised person either to follow him to a suitable public administration workplace to establish the identity, or to remain in a suitable place until the arrival of a person authorised to identify the passenger, an interest protected by the law which is the operator's property protection rights, is being attacked. In such a case, the self-defence of the ticket inspector or other authorised person is permissible, using the possibility to avert this attack by apprehending the passenger who is trying to escape, therefore escaping the consequences of riding without a valid ticket [§ 2 (a) of Act No. 200/1990 Sb., on Administrative Infractions, as amended]".[57] However, it should be added that if the attack on an interest protected by the law no longer directly threatens or persists, self-defence may no longer be used. From the above-mentioned case law of the Supreme Courts admitting restrictions on personal liberty of a person caught also when committing an administrative infraction or immediately thereafter part of the professional public concludes that a person caught when committing a civil wrong or immediately thereafter may also be restricted on personal liberty, adding that: *"Private apprehension under § 14 (2), second sentence, is based on the condition of proportionality. (…) It should be noted that even this type of self-help may not be used even if the wrongdoer has already established peaceful conditions."*[58] In conclusion, I would like to add when using self-defence, a person caught committing an administrative infraction or immediately thereafter may be restricted on personal liberty, but in case of a purely civil wrong, I have reasonable doubts about this.

6. Conclusion

The concept of restricting personal liberty, the purpose of which is to prevent the purpose of criminal proceedings from being frustrated where there is a risk of delay and whereby the person affected by the criminal offence may protect their subjective rights, has, in my view, its place in the legal system. Using this concept inter-

[57] Czech Republic Supreme Court Resolution on September 17th, 2015, file no. 8 Tdo 1008/2015.

[58] MELZER, Filip, Petr TÉGL et al. *Občanský zákoník: velký komentář. (Civil Code: Large Commentary.)* Praha: Leges, 2013. ISBN 978-80-87576-73-1. pp. 248–251.

feres with the personal rights of a person restricted on personal liberty, but within the limits set by the law. However, using this concept also protects the personal and property rights of the person affected by the criminal offence. I believe that everyone should have the possibility not only to avert the directly imminent or ongoing attack of a criminal offender on an interest protected by criminal law, but also to apprehend such an offender. Therefore, I consider the grounds for restricting personal liberty as sufficient. Although the provision of § 76 (2) of the Criminal Procedure Code is relatively brief, the case law has already defined the limits of using this concept. Nevertheless, it would be appropriate to explicitly determine whether the period of restricting the personal liberty of a person caught when committing a criminal offence or immediately thereafter is included within a period of 48 hours pursuant to § 76 (4) of the Criminal Procedure Code or not. Due to legal certainty, it would also be appropriate to explicitly determine whether a person caught when committing an administrative infraction or a civil wrong, or immediately thereafter, may also be restricted on personal liberty. In the case of an administrative infraction, where I have no doubt that, when using the self-defence, even a person caught committing an administrative infraction may be restricted on personal liberty, it may be *de lege ferenda* recommended that the reasons and conditions for restricting personal liberty be defined in the Act on Administrative Infractions Liability and the proceedings thereon.

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Providing information from criminal proceedings in the Czechoslovak context[1]

Marcela Tittlová

Providing information from criminal proceedings represents one of the means by which individuals – the public can learn about the nature and state of ongoing criminal prosecutions. It is necessary to distinguish between the right to information, which must necessarily be limited by the nature and purpose of the criminal proceedings and the individual procedural acts. In our conditions, the legislator sets down several limits, restrictions on providing information from criminal proceedings. These are concrete rules that law enforcement authorities and courts should be consistent with respect. In comparison, the Czech legal regulation is considerably more consistent, which necessarily associates significantly more restrictions, but also higher guarantees for the protection of the rights of persons concerned.

1. Providing information from criminal proceedings under Slovak legislation

The Right to Information is one of the constitutionally and supranational guaranteed rights. In the constitutional context, its starting point is Article 26 of the Constitution of the Slovak Republic, which contains the rights of individuals to obtain information for purpose of their use for various purposes, but usually for their own personal needs. The law enforcement authorities are obliged to provide information from their activities to the public in an appropriate manner. What is meant by the „appropriate way" must be interpreted in the context of individual cases. On the other hand, the legislator lays down in detail how information from criminal proceedings is provided, and also formulates limits that characterize the content and scope of information provided by law enforcement authorities and courts.

It can be stated that information from criminal proceedings is undoubtedly an area of general public interest by its nature and character. Thus, the right to provide information is derived by individuals from a constitutional basis and from some legal acts. Typically, the legal regulation of the Act No. 211/2000 on access to information and amending certain other acts (the Freedom of Information Act), as amended, is often used in this respect. It is natural that interests in the proper and effective detection of criminal activity, detection of offenders and conviction of offeders or criminals must be given priority over the interests of individuals to provide specific information. It is also natural that, in the alternative, it would necessarily

[1] Táto štúdia bola podporovaná Agentúrou na podporu výskumu a vývoja na základe zmluvy č. APVV-15-0272.

be expected and assumed that individuals would be disproportionately interfered with the effectiveness of procedural acts – acts of criminal proceeding, obstruction of the purpose of criminal proceedings, and failing to fulfill the essential tasks on which criminal law is based (especially protection of society, fair sanction of offenders). In practice, there are cases where information from criminal proceedings is demanded by persons who are not directly involved in criminal proceedings and who are bound by specific motives and reasons to obtain information.[2] On the other hand, the applicants for information from criminal proceedings are also participants themselves, who use the provisions of the Freedom of Information Act to ensure their rights in order to circumvent the restrictive provisions of the Code of Criminal Procedure.[3]

Without prejudice to the fact that the Code of Criminal Procedure sets out precisely the rules, conditions and limits within which law enforcement authorities may operate in providing information to the public. The purpose of criminal proceeding and individual procedural acts within it is necessarily beyond the right of individuals to obtain freely information of any nature from ongoing criminal proceedings and on the content of procedural acts, mainly for their own private purposes. The rights of parties and subjects of criminal proceedings to information directly related to their procedural position in criminal proceedings are regulated in detail in their provisions by the Code of Criminal Procedure.

While, in accordance with the requirements of a fair trial, the main hearing is public, the public is not, in principle, allowed to pre-trial proceedings according to the Slovak procedural rules. This legislation enables the law enforcement authorities to carry out the individual procedures for the examination of criminal complaints, to carry out the pre-trial actions so that at the end of this procedure the judgement in that case can givem in one of the legal ways. That non-interference in the conduct and exercise of procedural acts is justified by the requirements for the attainment of the purpose of criminal proceedings, which are undoubtedly the most legitimate requirements. To this end, the right of individuals to freedom of information can undoubtedly be restricted to the extent necessary required.

It is evident that allowing the public to pre-trial proceedings could have a negative impact on the purpose of criminal proceedings and individual procedural acts. The dissemination of information of the procedural acts taken, on the planned procedural acts could lead to the real offender adapting his activities so his identity is not acertained, he will not commit them at all, postpone them and so on. Providing them without respecting legal limits and restrictions could lead to a frustration of the purpose of procedural acts and the purpose of the whole criminal proceedings.

[2] Pagáč M.: Právo na informácie z trestného konania. Analýza postupov správnych orgánov v pôsobnosti MV SR v kontexte aktuálnych rozhodnutí NS SR. In Magister Officiorum č. 1/2015, s. 1–2.

[3] Wilfling, P.: Zákon o slobodnom prístupe k informáciám – komentár, problémy z praxe, rozhodnutia súdov. Bratislava: VIA JURIS, 2012, s. 91 a nasl.

Having regard to the purpose of the pre-trial proceedings, in principle they are non-public. Information is provided to the public in accordance with a number of rules and principles set by the Criminal Procedure Code of the Slovak Republic. On the one hand, this provides for some public scrutiny in relation to the conduct of realized criminal proceedings, satisfying the potential requirements of individuals for information from criminal proceedings, while respecting the purpose of the procedural steps taken and maintaining the possibility of achieving the purpose of criminal proceedings.

Sometimes providing information in this concept is confused with the free access to information, where it is possible to obtain information from the public authorities upon request. There are two diametrically different areas of legal regulations that have common spill-overs. In the case of providing information from criminal proceedings, it is a regulation contained directly in the provisions of the Criminal Procedure Code of the Slovak Republic, while in the case of free access to information it is a regulation set out in a separate law. There is extensive but not uniform decision-making practice of the Slovak courts in relation to their mutual relationship. However, it can be concluded that the right to information and its provision under the right to freely request information from state authorities must be limited in the context of criminal proceedings by specific rules, conditions, limits within which information can be realized.

The procedural legislation, which is expressed through a single paragraph – Section 6 of the Criminal Procedure Code of the Slovak Republic, contains specific rules and principles for providing information on criminal proceedings, as well as specifies entities involved in this information to the public. Providing information is ensured by official state authorities through their spokemen to media varied in nature, which aims to inform the public that does not jeopardize the purpose of criminal proceedings or procedural acts, while respecting the requirements and rules stated by the Criminal Code of the Slovak Republic.

Law enforcement authorities are not allowed to provide persons other than those determined by law with depreciations of pre-trial decisions, respectively providing information of criminal proceedings is strictly regulated by Section 6 of the Criminal Code of the Slovak Republic. This regulation, due to the nature of criminal proceedings and the principle of the presumption of innocence, which is one of the basic principles of criminal proceedings in a democratic society, does not allow law enforcement authorities to provide others than legally determined persons depreciations of pre-trial decisions, respectively make these decisions public. Neither law nor the Constitution of the Slovak Republic, nor the right of the public to know the detailed reasons for the decision in order to know whether the prosecution was justified because the restriction of the right to information contained in Article 4 of the Constitution of the Slovak Republic clearly refers to the law, which in this case is the Code of Criminal Procedure.[4]

[4] NS SR 10 Sži 3/2016.

Information from the pre-trial proceedings to the public is provided by the law enforcement authorities, from the proceedings before the court in accordance with the formulated rules by the courts. Article 6 of the Code of Criminal Procedure puts in place the obligation for both law enforcement authorities and courts to respect the rules of providing information to the public. The limits, constraints or barriers within which courts and law enforcement authorities can move and must respect, are therefore common to all parts of the criminal proceedings. The providing the information is realized through various types of communication media, respectively means such as television, newspapers, radio, etc. There are several rules linked to the protection of information, as well as the protection of persons involved in criminal proceedings in various procedural positions, as well as the purpose of procedural acts. The constraints and limits, within which the law enforcement authorities (and courts) have to move when providing information from criminal proceedings, are formulated in general terms and therefore independently of the part of the criminal proceedings. In accordance with it, law enforcement authorities are obliged to inform the public (to provide pre-trial information), and these rules and limits are also obliged to be respected by the courts in providing information to the public in part of the prosecution that is pending before the courts. These limits are regulated by the Slovak procedural regulation as follows: (Section 6 of the Code of Criminal Procedure):[5]

- when providing information it has to be taken into account the protection of classified information, legally protected secrets such as banking, tax, business, postal and telecommunications secrets;
- it not provided, respecivetly not informed about facts whose communication (to the public, unauthorized persons) could lead to the frustration or difficulty of clarifying and investigating the main case and achieving the purpose of criminal proceedings;
- the principle of the presumption of innocence must be strictly respected and, in accordance with it, informed of ongoing acts, persons involved in criminal proceedings in connection with formal qualification;
- personal data and information of a private nature (relating to a dwelling, family, correspondence, if not directly related to the present case or proceeding) are strictly protected in such a way that they are not published, respecitively as a rule, they should not be published;
- in particular, the interests of minors, juvenils and injured persons are protected in criminal proceedings by not disclosing information and data about them at all.

Ad a.) For providing information on criminal proceedings, it is necessary to ensure the protection of legally protected secrets (banking, tax, business, postal and telecommunications secrets) so that their content cannot be divulged. The law en-

[5] Ivor, J., Polák, P., Záhora, J.: Trestné právo procesné. I. Bratislava: Wolters Kluwer, 2017, s. 68 a nasl.

forcement authorities as well as the courts are obliged when providing information to the public on criminal proceedings, to make such textual arrangements so that the content of these secrets protected by law cannot be divulged.

With regard to classified information at different levels of classification[6] as well as individual types of legally protected secrets (such as banking, tax, telecommunications, etc.), the possibilities of providing the information contained therein, as well as the conditions of disclosure, the group of persons authorized to acquaint themselves with the content of these facts and secrets, provides a special legal regulation. Although law enforcement authorities and courts have the possibility to obtain such information for their activities, their applicability is limited by the purpose of the criminal proceedings. Beyond criminal proceedings, they are not authorized to use them and, ultimately, are not authorized to make their content available to third parties, the public. When providing information from criminal proceedings, law enforcement authorities and courts are obliged to proceed in such a way that the contents of the above facts and legally protected secrets are not disclosed to the public and they are also obliged to take all measures to prevent the disclosure of such information. In the case of a request for providing information of this kind, they are obliged to refuse to provide it with reference to this legislation.

Ad b) In the framework of the provision of information, it is not possible to provide the public with information that could be directed to the purpose of the procedural acts and the specific stages of the criminal proceedings and the criminal proceedings as such. Nor providing any information capable of making difficult for achieve that purpose, preventing the present case from being properly and comprehensively examined, clarified and investigated. It is evident that in advance are not announced interceptions that are otherwise themselves under way intelligencelly,[7] nor prvoding information of house searches which are planned. Communication of such information to the general public could lead to the purpose of these procedural acts being frustrated and their implementation would not provide evidence relevant to the law enforcement authorities. Lessons learned could be distorted as a result of the announcement of such intentions, altered by the deliberate action of the perpetrators and third parties. Information on such procedural acts shall be provided to the public only when they are not capable of jeopardizing or frustrating the proper clarification and investigation of the case, the attainment of the purpose of the procedural acts and the stages of criminal proceedings. By official information means, as a rule the public is informed of their carrying out at the time when their execution has already begun or such procedures have already been completed. In particular, at this time, individuals no longer have the possibility to negatively influence the course of the procedural acts, to thwart their purpose, or they can no

[6] Polák, P., Brvnišťan, M.: Bezpečnostný štandard v systéme utajovaných skutočností. In Zborník príspevkov z medzinárodnej vedeckej konferencie „Riešenie krízových situácií v špecifickom prostredí", Fakulta špeciálneho inžinierstva, Žilina, 2012.

[7] Záhora, J. a kol.: Obrazové, zvukové a obrazovo-zvukové záznamy v trestnom konaní. Bratislava: Wolters Kluwer, 2018, s. 61 a nasl.

longer influence them in any way as they have already been done.[8] It is obvious that this is a rule aimed at protecting the purpose of criminal proceedings as formulated in Section 1 of the Code of Criminal Procedure, and so does to protect the effectiveness of individual procedural acts.

Ad c.) Providing information to public must be conducted strictly in accordance with the principle of the presumption of innocence. Apart from the importance of this principle and the systematic integration into the system of criminal procedural principles, this principle is implemented and often infringed in the context of public information. The content of the presumption of innocence is that everyone is considered innocent in criminal proceedings until proven otherwise by a final conviction (by criminal order or court judgment).

The law enforcement authorities, as well as courts, are obliged to treat the accused of a crime respecting and applying this rule. This means, inter alia, that the accused of a crime must be treated as if he were innocent, that he must be treated and that how people must behave to him. Neither the speeches, nor the manner in which the law enforcement authorities or the courts behave or perform, the indictment of the accused in the criminal proceedings can be perceived to be a perpetrator. This does not exclude the possibility of law enforcement authorities or courts to provide information on the accused person in the form of his full name. In accordance with data protection rules, it is not possible to provide public information which is of a personal data nature and which aim or may be aimed at identifying a person or making it identifiable.

It is not excluded that the public should be provided with data on the accused in the form of his full name and surname. The only limit in this respect is that it is always necessary to state with full name and surname the actual procedural status of the person being prosecuted. It is excluded that the accused of crime be informed as the perpetrator, and that persons suspected or accused of ordering crimes be designated directly as ordering party (the decision as to which the party is actually ordering party is linked to the decision of the criminal court and the validity of the conviction).[9] It is also excluded that, in the context of information provided to the public, it should be noted that they were aware of facts that should be confirmed, determined or proven at a later date, in the future, with respect to the accused.

The problems of informing the public and at the same time infringement of the principle of the presumption of innocence in the context of public information are very common for our media. Is it possible to ask where this problem arises, which can ultimately be referred to as a breach of the rules of providing information to the public? This may be a problem that arises directly when providing information from criminal proceedings by government officials, or a problem arising from subsequent interpretation by means of mass communication. With regard to cases of

[8] Šimovček, I. a kol.: Trestné právo procesné. Druhé rozšírené vydanie. Plzeň: Aleš Čeněk, 2016, s. 78 a nasl.

[9] Ivor, J., Polák, P., Záhora, J.: Trestné právo procesné. I. Bratislava: Wolters Kluwer, 2017, s. 68 a nasl.

infringement of the principle of the presumption of innocence, instruments of civil law for the protection of individuals may be brought to the attention, as well as any claims for damages which may be caused to the person concerned by infringement of the principle of the presumption of innocence.

Moreover, the media presentation itself often negatively affects the right to a fair trial by imposing on the public a certain idea of the persons and their guilt, innocence, and their involvement in the crime. It is, inter alia, capable of causing serious harm to the person concerned in respect of his or her gravity, rights, social life, employment, etc., if the person concerned is showed in a manner not respecting the principle of the presumption of innocence. Although some criminal proceedings are still pending or may have resulted in a cessation or acquittal of the accused, as a result of a media presentation, public may consider individuals at this time, or despite the cessation of criminal prosecution or acquittal of the accused, as perpetrators, although the legal reality is fundamentally different. Naturally, it is possible to ask whether they also interfere with the impartiality and independence of judicial decision-making, as court decision-making will necessarily be influenced by society's mood, a social order of conviction based on media presentation of facts that media often cannot work with or should not work with in terms of respecting procedural principles. As the media are an important tool for crime prevention, they are capable of creating opinions and social opinions in our environment as well as shaping and influencing them both in a positive and negative sense.

It is possible to examine which article in the process of public information fails to respect the principle of the presumption of innocence. At the level of law enforcement authorities or courts, it is at the same time a violation of criminal procedural rules and rules of providing information to public, so that any disciplinary and personal sanctions may be considered. At the media level, there is a demand for improved controls and the formulation of tools (including fines) to eliminate this problem. It is always a question of who is the originator of the violation of these rules, resp. who incorrectly and in contravention of legal rules provides information from criminal proceedings.

Ad d.) The provision of Section 1 of the Criminal Procedure Code of the Slovak Republic clearly defines the subject of criminal proceedings and consequently the provisions of the Criminal Procedure Code of the Slovak Republic also define the rights and obligations of law enforcement authorities and courts during criminal proceedings. It is unnecessary to detect information going beyond the subject of evidence in the course of criminal proceedings and, at the same time, it is unnecessary for the public to be provided with information on criminal proceedings that interferes in a disproportionate manner with the guaranteed rights of individuals. Interrogations shall also seek only information which is relevant to the present case and which does not interfere in disproportionate manner with the privacy of persons, except detecting the reason or motive of the offense.

If law enforcement authorities or courts have information of a private nature, information about privacy, family, correspondence, etc., that information may be

relevant to their own activities from its view but is not provided to the public. Undoubtedly, a lot of this information is inevitably needed for their own activities, procedural steps and decision-making in criminal proceedings. Nor personal data, which is protected under the provisions of the new personal data protection legislation, are not made public or disclosed.[10] The law enforcement authorities and courts are required not to disclose personal data, and are required to refuse to provide personal data when required to do so under the right of free access to information.

Ad e.) In the provision of information from criminal proceedings, the interests of injured persones and victims of crime, minor and juvenile interests are significantly protected. This rule is implemented in the prohibition of providing information about such persons. Information about them is not published at all in order to protect and prevent further victimization. This is also a rule that is often infringed by the media, and information on minors and juveniles is often published with minimal protection. Infrequently, we are witnessing the publication of wider information about injured minors or juveniles (presentation of places where they go to school, what activities they do in their free time, data about home and siblings), which in their summary are able to directly identify such a person. Here too, naturally, the question is where these rules are infringed, consequently, whether that directly at the level of information provided by law enforcement authorities (most often through spokemen) or at the level of media presentation. In any case, these are serious interventions in the guaranteed rights of protected persons, which we witness almost on a day-to-day basis.

2. The fundamental principles of providing information in criminal proceedings under Czech legislation

The Czech procedural regulation of providing information from criminal proceedings on the basis of the Code of Criminal Procedure of Czech Republic is much stricter, but at the same time more extensive. We meet with opinions that this regulation is considerably stricter in terms of what information can be provided from criminal proceedings. On the other hand, also with opinions that it is a regulation that is more effective in protecting the interests of criminal proceedings and specific individuals in various procedural positions. In any case, it is necessary to ask what led the legislator to adopt such strict conditions for providing public information from criminal proceedings and undoubtedly, one important argument will be that media presentation often does not respect basic procedural procedures, principles of criminal proceedings, negatively affects the course and purpose of criminal proceedings. It is noted that these are rules designed to fulfill the principles of criminal procedure and to protect the purpose of procedural acts. They are based

[10] Čentéš, J. a kol.: Trestné právo procesné. Všeobecná a osobitná časť. Šamorín: HEURÉKA, 2016, s. 57 a nasl.

on a number of prohibitions – prohibitions on providing information from criminal proceedings.[11]

Specifically, there is a relatively wide range of prohibitions, which were incorporated into the provisions of the Code of Criminal Procedure of Czech Republic by the amendment to this Act No. 52/2009 Coll., often referred to as „the Muzzle Act". In particular, from the media point of view, this act was perceived very negatively, especially due to the intensive interference with the right to freedom of information, which is otherwise guaranted by the constitutional basis of the state. The amendment began to be discussed in 2008 and is very closely related to the abuse of children in the Kuřim case. Just the insensitive publicity, insensitive access of the media to child victims formed the basis for considerations of tightening the rules for providing information from criminal proceedings to the public. Undoubtedly, the protection of injured persons and the protection of victims, the protection of victims who are underage, is one of the main ideas of this amendment. Neither the media presentation objected to this direction in any fundamental way, nor did it significantly oppose the protection of adult victims. Lastly, in our opinion that this is not about the age of the victim as it is about the extent and nature of the harm caused to victim by the crime and the fact that the crime has affected her rights and interests protected by law. In view of the above facts should be clearly guiding ideas in providing protection.[12]

The legislation at issue was the subject of several conflicts of opinions, legal and constitutional assessments. Its current legislation differs in part from the original proposed wording, respectively the proposed modification has been partially mitigated, although most of the main parts have been preserved to their present form.

Within the meaning of Section 8a of the Code of Criminal Procedure of Czech Republic, the law enforcement authorities are obliged to provide information from criminal proceedings and implement this obligation through public means of communication. In this process, they must respect the rules and limits laid down in from Section 8a. to Section 8d. of the Code of Criminal Procedure of Czech Republic. In some cases, the provision of information may be reserved by the public prosecutor by police authorities being able to provide information only with the public prosecutor's consent. Such a rule providing more control in our country is completely absent. However, mentioned regulation by the public prosecutor applies only to cases of providing information to the public and by means of communication.[13]

Providing information is realized in accordance with the principle of the presumption of innocence and in such a way as not to jeopardize the purpose of the criminal proceedings. Persons, who are involved in criminal proceedings, may

[11] Šámal, P., Musil, J., Kuchta, J. a kol.: Trestní právo procesní. 4. přepracované vydání. Praha: C. H. BECK, 2013, s. 126.

[12] Stručná historie náhubkového zákona. Dostupné na http://vezenipronovinare.cz/CZ/jak-vznikl-zakon (z 17.2.2020).

[13] Rozhodnutie Mestského súdu Praha 8A 117/2016 - 39.

not disclose information unrelated to the criminal case in question, so it is clearly prohibited to disclose information affecting personal, family, common life and non-criminal matters. At the same time, information in pre-trial may not be disclosed that would lead to the identification of the person prosecuted, injured person, the witness and the person involved, regardless of whether they are adults or under 18 years of age. The rule formulated in this way (from the point of class of persons) is also absent in our country. The wording of the prohibition on disclosure of information on persons involved in criminal proceedings which are not related to the criminal case in question has also been formulated. It is logical that such information should not be provided and should not be detected in criminal proceedings, which is the content of the principle of proportionality and restraint, as one of the guiding principles of the Slovak criminal process. This is limited solely by the purpose of procedural acts and criminal proceedings, beyond which the detection of information about persons cannot go (except for the detection of a possible reason or motive for a crime).

However, it is not a breach of these rules if only general and non-targeted information arising from criminal proceedings is published.[14]

In the context of the Czech legislation, the above information may be provided only necessary cases and extent in which i tis necessary for the search for persons or extent which is necessary to achieve the purpose of the criminal proceedings. Information is always carried out in accordance with the need to achieve the purpose of procedural acts and the purpose of criminal proceedings. The above-mentioned extension of the prohibition on provision of information on accused persons, injured persons or victims, witnesses and persons involved regardless of their age, has been strongly criticized by the Syndicate of Journalists in the Czech Republic and marked as a complete censorship preventing the free practising their profession. The information on persons should not be disclosed which are directly related to the prosecuted crime as outlined above. Persons under 18 years of age, their privacy and personal data are carefully protected.

Despite of such an express prohibition, if the information, which are prohibited to provide, is provided to the person, person is not allowed to disclose it, to give consent to disclose it, except in situations where it is necessary to fulfill obligations, to exercise rights under a separate regulation and for achieving the purpose of criminal proceedings (Section 8b of the Code of Criminal Procedure of Czech Republic).

Although this legislation seems to be very strict, prohibiting the publication or providing of a number of information about persons involved in criminal proceedings in various procedural positions, it should be noted that not only in the Czech Republic, but also in our country there are frequent cases of incorrect public information by the means of communication. The photographs are often published or provided with only minimal adjustments that do not prevent the recognition of the

[14] I. ÚS ČR 1521/2012.

person, personal expressions are disclosed, data by which persons are identifiable, interfere with the privacy of these persons, etc. According to the Czech legislation, this is not only ban on minors, juvenils and injured persons, but on a much wider range of persons.

On the one hand, it may be a relatively intensive interference with the right to inform the public, as well as an intensive interference with freedom of expression, but on the other hand undisciplinary and, in particular, incorrect provision of information by the media, frequent infringement of the guaranteed rights of the persons concerned directly required such action. Frequently, this is nothing more than an interest in media promotion in the market, while the real interests of the victims, their needs and protection requirements are not taken into account at all. They stand far behind in the sequence of interests considered. In this respect, it can only be recommended that the considerations and conclusions that led to such stricter legislation in the Czech Republic should also be discussed here as one of the possible solutions for the consistent protection of selected groups of persons involved in criminal proceedings.

The legislation has promoted the protection of injured persons in general in the context of the above-mentioned prohibition on the provision of data on them. More specifically, the protection of injured persons under 18 years of age was supported if they were victims of selected crimes within the meaning of Section 8b (2) of the Code of Criminal Procedure of Czech Republic. Data about them are not published in criminal proceedings and information about them is not provided from criminal proceedings. In this case, however, criminal protection only applies to the injured person, not to the victim.

In the case of injured juvenile and group of injured who have been subject to exhaustively defined offenses, it is not even possible to publish final convictions if they should show the names, surnames and residences of those persons. Therefore, if they are to be published or provided, then it is important to make the necessary adjustments to their content so that these data are not published. In connection with this, there is a controversy as to whether the principles of the public hearing in the main hearing are being undermined in this way. The main hearing is, in principle, public and, moreover, the judgment is always public. Thus, even if the media are present at the giving judgment, parts of it which contain such data cannot be used even though they have been publicly declared. This problem was solved by the Czech legislation in the way that although during giving the judgement the data of injured persons are provided, but can not be provided such information which can be used to identify, determine, it is not possible to give the judgment if the statement criminal proceedings.

No pictorial, audio or other records towards identification of the juvenile injured or injured persons, against whom exhaustive list of the criminal offenses as defined in § 8b (2) of the Code of Criminal Procedure of Czech Republic have been committed, may not be published from the main hearing and the public session.

In principle, information about injured persons is not disclosed, except when public interest is outbalanced in such disclosure, in particular as regards searches for persons or cases of detect of wider range of witnesses. Otherwise, the disclosure of this information is prohibited. The only exception is when the injured party directly agrees to such a process.

Within the meaning of the Section 8c of the Code of Criminal Procedure of Czech Republic, disclosure of information obtained by tapping is prohibited. The purpose of this provision is to prohibit parts of the evidence, parts of the criminal investigation file from being publicly presented. The newly introduced rule clearly prohibits the disclosure of such information. This amendment responded to the unacceptability of leaks from investigation files in the Czech Republic, which did not help the propose of the criminal proceedings. This is unprecedented in the surrounding European countries, but pursues a clear goal – achieving the purpose of criminal proceedings, procedural acts without unnecessary leaks of information, distortion, media presentation, media pressure, infringement on the principle of fairness of criminal proceedings, etc.

This rule applies in the Czech Republic to the interception and recording of telecommunications traffic and information obtained therefrom, as well as information from the tracking of persons and things, if they contain information that would lead to the identification of the person concerned but not used as evidence in the proceedings before the court (this last rule points to the above-mentioned exception, where the situation is diametrically different, because the information was made in the public trial and forms part of the court's decision). The communication of such information could only be possible with the consent of the data subject or person concerned. It is precisely the protection of those rules and, if that person agrees to disclose them, and must be fully capable of understanding the importance of such protection in terms of age and intelect, as well as by giving up his consent, then naturally their disclosure is possible.

The principles contained in the provisions of Sections 8a to Section 8c of the Code of Criminal Procedure of Czech Republic are not absolute and the legislator has formulated a few exceptions. Thus, information, which abovementioned provisions prohibit to disclose, is nevertheless possible to disclose, but only only to the extent necessary, when:

a.) it is necessary for the purpose of searching for persons,
b.) it is necessary to achieve the purpose of the criminal proceedings,
c.) if permitted by the Code of Criminal Procedure of Czech Republic,
d.) if it is justified by the public interest, if it outweighs the interest in the protection of the privacy of injured person in the given case (particular care should be taken to protect the interests of persons under 18 years of age),
e.) always with the explicit consent of the injured person (consent cannot be given by the offender against the person who died or was declared dead).

There is no infringement if there is a public interest in the disclosure of information, and that outweighs the interest in protecting the privacy of the person con-

cerned. It is a question of the proportionality assessment when it is necessary to take into account the facts, the relevance of the information to the public, public life, the person concerned and the extent to which it affects him. Proportionality requires that interference with guaranteed rights be assessed and must be balanced in order to limit the rights concerned. It is certainly not only the public interest that can be considered as a public interest, but it must be seen in a narrower sense and therefore that information is needed for public life, useful for shaping political views and for perceiving and judging the activities of state authorities, politicians or public life of society. Both politically important functions and important official capacity can lead to an overriding interest in disclosure of information.[15]

3. Conclusion

Several of the outlined changes of the Czech procedural legislation regarding the provision of information from criminal proceedings can only be appreciated, although they have significantly affected the freedom of the press and information to the public. We believe that the achievement of the purpose of procedural acts and criminal proceedings is the primary objective to be pursued in providing information, together with the protection of the rights and rights of the protected interests of involved persons in criminal proceedings. In many cases, it is not so much a question of the age of these persons, but rather a question of protecting their rights and legally protected interests, which often do not mean any significance in media presentation at all.

It can be positively considered that this legislation aims at the protection of privacy, injured persons, witnesses, protection of personal data, prevents unwanted leak from criminal proceedings, distribution of video and audio recordings from criminal proceedings. This is undoubtedly a significant step, but it adversely affects the right to freedom of expression. On the other hand, if the media do not really respect the rules for the protection of the rights and legally protected interests of persons, their activities lead to further victimization and leak of information from criminal proceedings threatens the achievement of the purpose of criminal proceedings, procedural acts and negatively impact on right of fair trial, public opinion, is necessary to restrict the media, even in a significantly restrictive way (through restrictive measures). It is not necessary to mention about the negative consequences of such insensitive, sensational eager and disrespectful informing the public even in the Slovak conditions, especially nowadays. For this reason, too, in our opinion if the media fails to respect the rules of providing information from criminal proceeding and the principles of achieving purpose of procedural acts and criminal proceeding, if they are not taking into account the interests of specific individuals involved in criminal proceedings, this prohibition is fully relevant and can be recommended

[15] Rozhodnutie Úradu na ochranu osobních údajov 2As 304/2017 - 42.

to open discussions with subject of limitation of the scope of providing information from criminal proceedings also in our conditions.

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Criminal proceedings against a member of the Israeli government as an alternative to Czech experience

Tomáš Pezl

Metropolitan University Prague, Czech Republic

tomas.pezl@mup.cz

Abstract: *Criminal proceedings against a member of the government not only always create criminal law questions but also constitutional consequences. These are mainly related to options and abilities of the constitutional system to react to such situations and to prevent them. The presented chapter introduces the practice of the Israeli constitutional system that has plenty of experience with politicians' criminal investigations, and it is prepared so far for this reality. Nevertheless, also new challenges are emerging in the Israeli system, particularly in connection with the criminal proceedings of Prime minister Netanyahu.*

Keywords: *Israeli constitutional system, criminal investigation, criminal proceedings, procecution, member of government*

1. Introduction

Criminal proceedings of a representative of one of the constitutionally defined powers represent a problematic issue in every democratic state; in the case of a representative of the chief executive, the issue becomes even more sensitive. It is a prerequisite for the proper performance of the function that the representatives of individual powers are people who respect the law, and their actions are not subject to doubts about their legality. On the other hand, this is not a situation unknown in many countries worldwide, including established democracies.

The subject of interest is not the fact that a person in the position of an executor of state power is prosecuted or suspected of committing a crime, but rather the possibility of the constitutional framework to react, the degree of preserving the principle of presumption of innocence, or other rights associated with defence.

If a member of the government is charged with a criminal offence, it is common in many countries for such a government member to resign and subsequently resolve the criminal matter as a private person. This approach is often referred to as a manifestation of high political culture or even a constitutional custom. In the vast majority of states, no legislation would prevent a prosecuted person from participating in government.

Israel could be mentioned as the example of the opposite approach, and its constitutional system will serve as a comparison within this section. The basic law –

Government of the State of Israel, which is a law replacing the constitutional regulation defining the executive power, includes an obstacle enshrined in the exercise of function if a member of the government is prosecuted.

2. Israel

In the case of Israel, it is not an attempt to prevent prosecutions, but rather a reaction to their existence. The sad reality of the political scene is that members, especially of smaller parliamentary parties, are often accused and subsequently convicted of crimes, mostly of a corrupt nature. In the current Israeli government (i.e. the one finishing its period after the March 2020 elections), the Minister of the Interior could serve as a good example. Arye Deri is a member of a smaller party called Shas – Sephardic Torah Guardians, a party representing a certain spectrum of the ultra-Orthodox part of the Israeli population. Its election results are in mandate units, but it is one of the parties with a wide potential for coalitions.

Arye Deri was re-elected to the Knesset as one of the party's leaders and subsequently became a member of several Israeli governments, despite being unconditionally sentenced to three years in 1999 for bribery and abuse of power.[1]

He is not the only politician in Israel to be accused and convicted; a total of 11 ministers, one Prime Minister, and one President have been convicted. Therefore, it can be stated that the Israeli political and legal system is not only accustomed but also prepared for the eventuality of a top politician being accused of a crime.

As serious cases should be considered as cases when politicians were investigated while holding office. The case of Moshe Kacav, the Israeli President, who during his term of office was accused and subsequently sentenced to imprisonment, can undoubtedly be considered as fundamental. And the case of Ehud Olmert, who was accused and convicted of corruption after resigning from the position of Prime Minister. Finally, the case of Prime Minister Benjamin Netanyahu, who is currently accused in three criminal cases.

The case of Moshe Kacav, as well as Benjamin Netanyahu, differs from the others in that the investigation took place during their term of office, and they were accused during their term of office, or more precisely, immediately after its completion.

Moshe Kacav was elected to office in 2000 for seven years. In 2006, he accused an employee of the Ministry of Tourism of blackmailing him. However, an investigation that his charges initiated showed that Kacav himself was suspected of sexually assaulting and raping several women. The Attorney General ordered an investigation, culminating in search of the President's house, followed by the Attorney General's announcement that he was ready to press charges against the President. Only the President's immunity prevented him from being prosecuted. The prosecu-

[1] Highest Court Decision, *Arye Deri vs. the State of Israel,* case no. CrimA 4360/99, from 12.7.2000, 721(2) PD 120.

tion and the defence subsequently attempted to settle an agreement on a negotiated sentence based on which Kacav consequently resigned from the President's office.[2] Subsequently, Kacav himself withdrew from the agreement with the prosecution and was indicted and in December 2010 found guilty of rape, sexual harassment and coercion and influencing a witness and obstructing justice, and was sentenced to seven years imprisonment. The Supreme Court upheld the decision in the appellate proceedings in 2011.[3]

3. Basic Law: Government

Basic law: Government[4] is one of the regulations that create Israel's unwritten constitution. The constitutional system in Israel is still based on an unwritten constitutional framework, which consists of both the so-called basic laws and constitutional customs. The category of basic laws was created to distinguish those laws that will form the Israeli constitution in the future. Their origin dates back to the time of the first Israeli parliament of Knesset, which was elected as a constituent and subsequently, by the so-called Harari resolution, transferred constitutional authority to other subsequent Knessets.[5]

Basic Law would constitute an obstacle to the appointment of a government minister if the minister were sentenced to a criminal offence with imprisonment in the past. This obstacle is not absolute but lasts if seven years had not passed from the time of serving a sentence or conviction. The set time limit may be waived if the chairman of the Central Elections Committee decides that the offence did not involve the candidate's moral failure. However, if the moral failure is expressed directly in the final conviction, then the chairman of the Central Elections Committee cannot decide on the relief in any way.[6] Unlike ministers, there is no similar obstacle stipulated for the execution of the Prime Minister function.

If a member of the government is being investigated for suspicion of a criminal offence, then there are different rules applying for government ministers and different rules for the Prime Minister. The primary difference lies in the higher protection of the Prime Minister when the Prosecutor General has to decide on his investigation and indictment.

[2] NAVOT, Suzi. *The constitution of Israel: a contextual analysis*. Portland, Oregon: Hart Publishing, 2014. Constitutional systems of the world. ISBN 978-1-84113-835-0. s. 137.

[3] Highest Court Decision, *Mose Kacav vs. the State of Israel,* case no. CrimA 3372/11, from 11. 8. 2011.

[4] Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

[5] *"The First Knesset instructs the Constitutional, Legislative and Judicial Committee to prepare a draft constitution for the State of Israel. The Constitution will consist of separate parts, each of which will form a separate Basic Law. Each part will be submitted to the Committee for discussion after completion, and together, these parts will form the constitution of the state"*, 5 *Divrey Haknesset*, 1711-1722, 1743 (1950).

[6] Art. 6 para. c), Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

If, based on an investigation, an indictment is filed against a government minister, until a final decision on the merits, Basic Law does not link any consequences with this fact. Of course, this does not preclude the minister's possible resignation or his dismissal by the Prime Minister.[7] However, the Supreme Court has ruled in the past that a government minister who is being investigated or even indicted should be dismissed. This was the case with the aforementioned Arye Deri, who was Minister of the Interior in 1990 and was already under investigation at the time. Still, the then Prime Minister decided not to remove him from office, as there was no legal obligation to do so. This was challenged by a civic association for quality government, which demanded the Supreme Court to order the Prime Minister to dismiss Minister Deri. The Supreme Court upheld the appeal, stating that in such a case, the Prime Minister was directly obliged to dismiss a member of the government in order to preserve the government's position and, in particular, the confidence in the government and the governance regime in the country.[8] If the minister is found guilty and the court states in the judgment that the crime constitutes a moral failure, then the ex-lege of the minister's office expires on the day of court's final decision.[9]

In the Prime Minister's case, the Attorney General must give his consent to the investigation; this also applies to those who held the office of prime minister in the past, and the investigation should relate to the time they held this position. At the end of the investigation, the case is again taken over by the Attorney General, who decides whether or not to file a lawsuit.[10] If a lawsuit is filed, the Jerusalem District Court has jurisdiction to hear it.[11]

If the Prime Minister is convicted, he may be removed from office by a resolution of the Knesset if he is found guilty, and at the same time, the court has ruled that the crime constitutes a moral failure. The Knesset's possibility to dismiss the Prime Minister is limited by the judgment of the court of the first instance and the moment when the conviction decision becomes final. If the conviction becomes final, then the government has resigned on that date.[12]

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[7] Art. 23 para. a), Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

[8] Supreme Court Decision, *The Movement for Government Quality in Israel v. Government of Israel,* HCJ 3094/93, 47(5) PD 422.

[9] Art. 23 para. b), Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

[10] Art. 17, Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

[11] The Israeli judicial system has three levels, with the district courts being the courts of the second instance.

[12] Art. 18, Basic Law: Government, 5761 – 2001, *Sefer Ha*-Chukim, no. 1780, from 18. 3. 2001, p. 158.

4. Criminal proceedings in Israel

Criminal proceedings in Israel are based on the English criminal procedure, which was introduced in the country shortly after the establishment of the British Mandate in 1922. However, many adjustments have been made since then, with the Criminal Procedure Laws' adoption in 1965 and further major amendments in 1982.[13] A fundamental change that may raise certain terminological doubts is the very concept of the individual stages of criminal prosecution. Over time, the jury decision-making process was omitted from the criminal procedure. The preliminary hearing of the indictment in the English sense was subsequently omitted, i.e. a real oral hearing, sometimes even with the hearing of some witnesses. Preliminary hearings are currently held only in more complex cases at the behest of the Attorney General.[14]

Today, criminal proceedings basically have two phases, firstly the investigation, which is carried out by the police under the prosecutor's supervision, and secondly, the court proceedings themselves after the lawsuit has been filed. The understanding of the position of the accused is probably different when, during the investigation, the accused is not understood in the same way as in the Czech Republic as a person in a specific procedural position.

The crucial moment indeed is filing the lawsuit at a competent court, when the person enters the procedural position of the accused, and the criminal proceedings themselves are initiated before the court. For this reason, the consequences for the people concerned in the position of the accused under the Basic Law – Government are only connected after filing the lawsuit.

5. Prosecution of the Prime Minister

Israeli Prime Minister Benjamin Netanyahu is currently facing criminal proceedings. The investigation initiated in 2016 based on the approval of the Attorney General. The investigation was gradually carried out in 5 cases, and in 2019, the Attorney General filed a lawsuit against Netanyahu in two cases.

The cases referenced as Case no. 1000, Case no. 2000, and Case no. 4000. The first case involves suspicion of bribery in the form of luxury goods, which reached a value of almost $ 200,000. In exchange for these goods, Netanyahu was to help the merchant Arnon Milchan. Case 2000 involves the Prime Minister's negotiation with the publisher of the daily Yedioth Achronot on the change of the legislative framework in exchange for a positive image of the Prime Minister in this newspaper. In this case, Netanyahu is suspected of abuse of power and bribery.

[13] Criminal Procedure Code, 5742-1982, *Sefer Ha*-Chukim, no. 1043, from 1. 3. 1982, p. 43.

[14] HARNON, Eliahu. Criminal Procedure in Israel – Some Comparative Aspects. *University of Pennsylvania Law Review*. 1967, **115** (7), 1091-1110. ISSN 0041-9907.

The last case concerns agreements between the owner of the largest telecommunications company Bezeq and Netanyahu, regarding access to contracts in exchange for a positive campaign on the walla! server from the Bezequ portfolio.[15]

In addition to these cases, two more cases are open, investigating the circumstances of the purchase of German submarines for the Israeli Navy and a bribe to a District Court judge.

At the end of 2018, the Prosecutor in charge of the investigation recommended that the Attorney General file a lawsuit against the Prime Minister, who stated in February that, in three cases, he was prepared to file a lawsuit after a preliminary hearing, and subsequently in November 2019 decided to file the lawsuit, which he consequently did.[16]

6. Conclusion

As mentioned at the beginning, the prosecution of a member of the government is always problematic for the functioning of the state's constitutional system as such. In the Israeli case, it is possible to demonstrate several findings that may be of some interest to the Czech Republic.

First, it is clear from the legal regulation of the conditions for the minister and Prime Minister function performance that the current legal regulation provides for the possibility of prosecuting a member of the government, and only then with the conviction, it connects the consequences in the form of loss of office. On the other hand, reference was also made to the Supreme Court decision, which requires the Prime Minister to dismiss the minister if the minister is already under investigation to protect public trust in the government and the constitutional system.

Although the wording of Basic Law – Government may seem to be in conflict with the Supreme Court case law, but this is not the case. In the case of Basic Law, it is the definition of the consequence of a final conviction as an obstacle to the minister or prime minister function execution. On the contrary, in the decision of the Supreme Court, much more emphasis is put on the prime minister's responsibility, so that the government the minister manages is truly credible, and to prevent party interests from taking precedence over the interests of the state.

The big unknown in terms of the impact on the constitutional system is now what kind of effect will have the fact that the current Prime Minister has a great chance to face a trial (the first hearing is scheduled for May 2020) in the position of the accused. Or worse, if he tries to enforce a law in the Knesset that gives him

[15] Attorney General, Decision on investigation files in which the Prime Minister is the accused, from 28. 2. 2019 [online]. 23. 2. 2019 [cit. 2020-04-09]. Available from: <https://www.gov.il/BlobFolder/news/28-02-2019-01/he/file_decision.pdf>.

[16] Attorney General, „I made the decision to press charges with a heavy heart, but also with all my heart, from 21. 11. 2019 [online]. 21. 11. 2019 [cit. 2020-04-09]. Available from: <https://www.gov.il/he/departments/news/21-11-2019-04>.

the immunity, as he has already tried. Both may damage the constitutional system. Although the option that the prosecution will continue even if Benjamin Netanyahu remains Prime Minister seems to be more acceptable. What matters here is that the Attorney General, who decided to prosecute the Prime Minister, confirmed his independence, saying that if the Prime Minister were to be found guilty, he would initiate a fast removal. Were it not for the coronavirus pandemic, the proceedings at the Supreme Court regarding the decision to remove the prosecuted Prime Minister from office before the trial began would have been easier.

The Czech Republic cannot compare with Israel in the number of people accused of corruption and serving as government ministers, nor has it a President suspected of committing a crime at the time of his office. However, there are still some parallels, whether in relationship with the current Prime Minister and, if necessary, in the case of MUDr. David Rath, and some others. The fundamental difference, which seems obvious at first sight, is the fact that the Czech Republic is not prepared in its constitutional order for situations where a member of the government could be prosecuted and possibly convicted. Their retention in government is not resolved, except for political responsibility. However, this presupposes that the government of the state and the head of state will respect political responsibility and the spirit of the constitution. In this regard, statements made by the head of state about the possible pardon granted to the Prime Minister are somewhat disruptive.

On the other hand, it is possible to trace parallels identical in both countries, firstly, the Chief Prosecutor's decision to continue the prosecution and the Israeli decision to press charges. Not only were both decisions made within a week, but the message of both actors is very similar, namely respect for the law and faith in a fair trial.

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