

The presumption of innocence and the right to be present and related issues in the criminal procedure in Slovak Republic

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Abstract— The Author of the presented contribution points out to problems of presumption of innocence and the right to be present during the criminal procedure in the Slovak Republic. The main aim of the paper was to show how these rights are applied in the Criminal Procedure Code and whether the transposition of Directive (EU) 2016/343 has been fulfilled.

Index Terms— criminal proceeding, the Criminal Procedure Code, presumption of innocence, the right to be present.

I. INTRODUCTION

The presumption of innocence and the right to be present at the trial are very important rights during the criminal procedure in the Slovak Republic. Also the European Union (EU) is trying to form the national legislation of the Member States by adopting the regulations in some ways during the trial. The effective instrument for this regulation in the implementation of criminal proceedings is the adoption of various directives which would strengthen mutual judicial cooperation in criminal matters. In relation to the principle of the presumption of innocence and in relation to the right to be present an important piece of legislation is primarily the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The purpose of this Directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial. By establishing common minimum rules on the protection of procedural rights of suspects and accused persons, this

Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States (Klimek, 2017). The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights.

The Directive has been transposed into national legislation by an Act no 236/2017 Coll. regarding the European Investigation Order in criminal matters and on amendments to certain acts.

The rights of the subjects in criminal proceeding in Slovakia are related to the right of a fair trial. The right to a fair trial is one of the fundamental rights and freedoms already mentioned in the Constitution of the Slovak Republic (Act No. 460/1992 Coll.) but it also follows from the European Convention on Human Rights - Article. 6 of the Convention. In the case of criminal proceedings, this is Section 2 paragraph 7 CPC - *Every person has the right for their criminal case to be heard by an independent and impartial court, fairly and in a reasonable period in their presence, so that they can comment on all the performed evidence, unless the Criminal Procedure Code stipulates otherwise.*

The right to a fair trial is a fundamental guarantee of all criminal proceedings, which must fulfil all the attributes set out in Article 6 paragraph. 2 and 3 of the Convention. All the



guarantees under the Convention, which are part of the right to a fair trial, are also part of the criminal proceedings and are set out in the basic principles relating to criminal proceedings - Section 2 CPC –Fundamental Rules of Criminal Procedure.

II. CRIMINAL PROCEDURE IN THE SLOVAK REPUBLIC AND RELATED TERMINOLOGY

The criminal proceedings of the Slovak Republic consist of following stages:

- Pre-trial process:
 - Procedure before the start of the criminal prosecution;
 - Preparatory proceedings (investigation, led by the law enforcements bodies (police body and prosecutor);
- Trial process:
 - Review and preliminary hearing of the indictment;
 - Main trial;
 - Appeal (also includes appeal to the Supreme Court or reopening of the case)
 - Execution process that is carrying out the sentence (Korgo and Marková, 2017; Ivor, Polák, Záhora, 2017).

In criminal proceedings, the person being prosecuted has different denominations (depending on the stage of the criminal proceedings in which he or she is located) and thus different types of rights.

At first – the suspect person – there is no legal definition of this term in Criminal Procedure Code (Act No. 301/2005 Coll. – CPC) in the Slovak Republic, but the Code regulates the right of the person who is a suspect (but not yet accused of the crime). The person is considered a suspect in two situations:

- **The first situation** - detention of a person who was caught red-handed committing a crime or immediately after the crime - Section 85 CPC:
 - Under Section 85, paragraph 1 of the CPC – A person suspected of committing a criminal offence may, if there is a reason for the custody under Section 71 paragraph 1 or 2 CPC or in case pursuant to Section 204 paragraph 1 of the CPC, be apprehended and detained by a police officer even if there has not been an accusation made against them. Detention requires the prior consent of the public prosecutor. The detention may be made without such consent only if the matter is urgent and the consent cannot be obtained in advance, especially if such person was caught committing a criminal offence or if they were apprehended on the run.
 - Under Section 85, paragraph 2 CPC - *The personal freedom of a person who was caught committing a criminal offence or immediately thereafter may be restricted by anyone if it is necessary to establish their identity, to prevent their escape, to secure evidence, or to prevent the commission of further*

criminal activity.

- **The second situation** that may occur is the situation regulated in Section 196, paragraph 2 of the Criminal Procedure Code when the prosecutor or a police body finds out that the received criminal complaint is necessary to be completed. The completion of the criminal complaint shall be performed by interrogating the reporting person or victim. Other possibilities of criminal complaint completions are for example: by requesting written documentation from the reporting person or from another person or authority such as a competent public prosecutor or a competent police officer. A decision has to be made under Section 197 or 199 CPC within the deadline of 30 days from the receipt of the criminal complaint. The public prosecutor or police officer may interrogate the person on the circumstances suggesting that they were supposed to commit a criminal offence on the basis of a criminal complaint or another notion. Such person has the right to refuse to testify if their testimony would cause a risk to their own criminal prosecution, or to their direct relative, their sibling, adoptive parents, adopted child, spouse or partner, or other persons in the family or a similar relationship, whose harm they would rightfully feel as their own; however, they may not be interrogated in the cases referred to in Section 129 CPC. Such person must be instructed on the consequences of false accusations. The interrogated person has the right to the legal assistance of an attorney (Čentěš, 2016).

The accused person – Section 33 CPC - The person who is suspected of having committed a criminal offence may be deemed accused, and the means set out by this Act may be used against them only if an accusation was raised against them. The conditions for being accused of a crime are in Section 206 paragraph 1 CPC. If on the basis of criminal complaint or findings after initiation of prosecution which are sufficiently reasonable to conclude that the crime was committed by a person, the police body shall issue a resolution on the pressing of charges without undue delay, which the accused shall be immediately notified of, and it shall be served to the public prosecutor - within 48 hours. If the resolution on pressing charges was announced by its pronouncement, the police officer is obligated to issue a copy of such resolution to the accused without undue delay.

The charged person /defendant - After the order of the main trial, the accused shall be referred to as the charged person /defendant - Section 10 paragraph 13 CPC.

The convicted person - The convicted person shall mean a person against whom a convicting judgment was issued, which then became valid -Section 10 paragraph 14 CPC.

The person against whom the criminal procedure is conducted (prosecuted person) has the same status throughout the criminal proceedings and as has been described above, the terminology varies depending on the stage of the criminal proceedings. The rights and obligations of that person are different in the various stages of the criminal proceedings, although very similar (Čentěš, 2016).

III. THE PRINCIPLE OF INNOCENCE

Under the Slovak legal order, the presumption of innocence has always been a part of the legal order (always in the meaning of the period since 1993). The abovementioned follows, in particular, from the basic principle of criminal proceedings within the meaning of Section 2 paragraph 4 CPC which states: – *A person against whom a criminal proceeding is carried out shall be deemed innocent until the court pronounces their guilt by a final convicting judgment.* It follows from this that the principle of the presumption of innocence applies to anyone against whom the criminal proceedings are conducted. These persons may include the suspect person, the accused person, as well as the charged person (defendant). A person who has been convicted (convicted person) has no such status, since the decision on his/her guilt has entered into force.

Presumption of innocence is a fundamental rule of criminal procedure. The bodies involved in criminal proceedings and the courts, when issuing individual decisions in criminal proceedings, must accept especially the status of the person against whom the criminal prosecution leads and also the reasons which entitles them to designate a person (the accusation can be lodged against a person when there are reasonable grounds for suspicion, or there is no reason to doubt for issuing of judgment on conviction). Presumption of innocence relates to the question of guilt or innocence, which is only the court's decision, and the conviction must be final. The legal fiction about innocence applies throughout the criminal proceedings. Some procedural rules also follow from the presumption of innocence:

- Unproved guilt has the same meaning as proven innocence;
- Rule *in dubio pro reo* (in case of doubt in favour of the accused);
- The accused is not obliged to prove his innocence (Korgo and Marková, 2017).

In the application of the principle of presumption of innocence, it is possible to use the possibility of apprehension of persons and items against the person against whom the prosecution is conducted if this is necessary for the purposes of criminal proceedings. These do not mean that the presumption of innocence does not apply, but that there are reasons why these reinsurance methods are used. Due to the fact that the person against whom the methods are used is not finally found guilty, account must be taken of the principle of proportionality and restraint - Section 2 paragraph 2 CPC: *Fundamental rights and freedoms of persons may be, in cases permitted by law, interfered with to the extent necessary to achieve the purpose of criminal proceedings with due respect to the dignity of persons and their privacy.*

This principle must also be respected by law enforcement authorities in the provision of information in criminal proceedings - Section 6 CPC – (1) The law enforcement authorities and the court shall inform the public on the criminal proceedings under this Act by providing information to the media. However, such information must observe the protection of classified information, trade secrecy, banking secrecy, tax

secrecy, postal secrecy, and telecommunications secrecy. (2) When providing information, the law enforcement authorities and the court are entitled to conceal such facts that might obstruct or hinder the clarification and investigation of the case. At the same time, they are obligated to observe the principle of presumption of innocence; they shall observe that protected personal information or facts of a private nature, especially on family life, home and correspondence, directly not related to the criminal activity are not disclosed. In particular, they shall observe the interests of minors, juveniles and victims that their personal information shall not be disclosed.

According to the legal order of the Slovak Republic, the right to remain silent and the right not to incriminate oneself is guaranteed to the suspect or accused person according to:

- Section 34 paragraph 1 CPC – (1) *From the commencement of the proceedings against them, the accused has the right to comment on all the facts that found them guilty, as well as on the proposed evidence, however they also have the right to refuse to testify.*
- This right shall be applied, as appropriate to a suspect.
 - Section 85 paragraph 5 - *Provisions of Section 34, and 121 to 124 shall apply accordingly even if the detained person is being interrogated at a time when the accusation against them has not yet been raised.*
 - Section 196 paragraph 2 CPC – *The prosecutor or a police body may interrogate the person on the circumstances suggesting that they were supposed to commit a criminal offence on the basis of a criminal complaint or another notion. Such person has the right to refuse to testify if their testimony would cause a risk to their own criminal prosecution, or to their direct relative, their sibling, adoptive parents, adopted child, spouse or partner, or other persons in the family or a similar relationship, whose damage they would rightfully feel as their own; however, they may not be interrogated in the cases referred to in Section 129. Such person must be instructed on the consequences of false accusations. The interrogated person has the right to the legal assistance of an attorney.*

IV. THE RIGHT TO BE PRESENT

The right to be present at the trial is another fundamental right of the accused. The right to be present at the trial is the right of the accused not his duty. It is a right based on the fundamental principles of criminal proceedings, in the sense of which the accused has the right to have his/her criminal case heard fairly and within a reasonable time by an independent and impartial tribunal in his/ her presence so that he/she can comment on any adduced evidence, unless the Criminal Procedure Code provides otherwise.

When the presence of the accused is required at the trial, the accused person should be sent a summon to the main hearing. The term of the main hearing shall be determined in such a way

that the defendant has at least five working days from the delivery of the summons. This time limit may be shortened if the defendant refused to take part in the main hearing or requested that the main hearing be held in his absence (Čentěš, 2016).

The summons to the main hearing is delivered to the defendant in his/her own hands. At the same time, however, the fictitious delivery is valid, so the summons is deemed to have been delivered on the third day after the shipment has been deposited with the competent body that ensures delivery. Documents are deemed served to the addressee even if the consignment is returned from the address they stated for such purposes for the reason that the addressee is unknown as of the date the consignment was returned to the law enforcement authority or the court, even if the addressee never learns of the fact. However, it should be emphasized that this method of delivery is possible only if the accused was instructed in his first hearing.

This is the basic instruction of the accused within the meaning of Section 122 section 1 CPC when the accused is informed of the terms of the serving of documents and the consequences associated therewith.

After the opening of the main hearing, the court ascertains whether the period of serving summons has been observed (Ivor, Polák, Záhora, 2017).

Ensuring the presence of the defendant at the main hearing is also done in accordance with the provisions of the Criminal Procedure Code by delivering a copy of the indictment to his or her own hands, whereby TP does not allow for an alternative delivery, so the indictment must be delivered to the defendant's own hands. Self-hand delivery is marked on a special envelope with confirmation return, which the addressee confirms by hand.

If all conditions are met, it is possible to hold a main hearing even without the defendant being present.

However, the law also presupposes that the court will suspend criminal prosecution:

- if it is not possible to clarify the matter in the absence of the defendant, and even then;
- if it is not possible for the accused to deliver a summons to the main hearing.

If it is possible to clarify the case without the presence of the accused, the court has two options:

- I. Hold a main hearing in the absence of the defendant, but the following conditions must be met:
 - only if the court believes that the matter may be decided and the purpose of the criminal proceedings can be achieved even without the presence of the defendant, and if
 - the indictment was duly served to the defendant and the defendant was duly and timely summoned to the hearing,
 - the defendant had the opportunity to comment on the act, which is the subject of an indictment, before a law enforcement authority and the provisions on investigations or summary investigations were

observed, and the accused was advised on the possibility to study the file and file petitions for the completion of the investigation or summary investigation,

- the defendant was advised on the possibility of the performance of the main trial even in their absence,
 - the defence counsel of a defendant who is denied their legal capacity or whose legal capacity is restricted declares that they do not insist on the personal interrogation of the defendant,
 - the main trial may not be performed in the absence of the defendant if they are in custody or serving a prison sentence, or if it is a criminal offence for which the law stipulates a prison sentence with an upper penalty limit exceeding ten years. This shall not apply if the defendant expressly refuses to participate in the main trial, or if they expressly request that the main trial is performed in their absence.
- II. Proceedings against a Fugitive may be performed – under the section 358 – 362 CPC. These proceedings may be performed against those who evade criminal proceedings by staying abroad or hiding (hereinafter referred to as “fugitive”). The accused must always have a defence counsel in proceedings against the fugitive. They have the same rights as the accused. Proceedings before the court shall be performed upon the petition of the public prosecutor who may file it in an indictment or even without such petition on the basis of the measure by the presiding judge. All documents intended for the accused shall only be served to the defence counsel. The summons to the main trial and the public hearing shall also be published in an appropriate manner. The main trial or the public hearing shall then be performed in the absence of the accused, regardless of whether the accused knows about it. The convicted person in proceedings under this Division has the right to file a petition for a repeated hearing of the matter by the court in their presence if the terms under Section 358 paragraph 1 were not met, until the expiry of the period of six months from the date when they learnt about the criminal prosecution or conviction, however, no later than within the period of limitation set out in the CPC. There is also a Decision of the Supreme Court of the Slovak republic no. R 11/2012, which states, that when the condition of the Proceedings against a Fugitive are not met, and the Proceedings was done and as a result of this process it was impossible for the defendant to be present at the trial, this error is a reason for making an extraordinary appeal under Section 371 paragraph 1, letter d) CPC.

If these conditions are not met, the main trial must be adjourned by giving the defendant a new summons to the main trial, possibly giving the accused the opportunity to demonstrate his presence at the main hearing, as well as the possibility of imposing a disciplinary fine of 1650 €. The accused may be

presented to the main trial without a prior summons if it is necessary for the successful performance of the act, especially when they are in hiding or they do not have a permanent residence, if it is not possible to serve them the summons at the address that they stated.

All consequences of failure to act must be part of the summons, otherwise they cannot be saved. The affected persons must be advised in advance on the possibility of the imposition of the disciplinary fine and also of other consequences of failure to act.

If the main trial took place in the absence of the defendant, even if the conditions about his absence set out in the Criminal Procedure Code have not been met, the defendant has the right to file:

- an appeal –for the violation of the provisions on the proceedings that preceded the judgment, if such violation could have caused a statement that is incorrect or missing - Section 307 paragraph 2 CPC;
- an Extraordinary Appeal – an Appellate Review – Section 371 paragraph 1 d) if the main trial or the public hearing was performed in the absence of the accused, although the statutory requirements were not met for such a case.

In the national legislation it is impossible find a statistic data related to the right to be present at the trial for example in the case of reopened cases due to the absence of the accused. One can find specific data about an Extraordinary Appeal in the Supreme Court of the Slovak Republic due to Section 371, but not for 371 paragraph 1, letter d) - if the main trial or the public hearing was performed in the absence of the accused.

If the court of appellate review ascertained reasons for an appellate review under Section 371, it shall pronounce the violation of the law in the relevant provisions, on which this reason rests by a judgment.

V. THE CONCLUSIONS

Thanks to the information based on the collected literature on the topic and also from the Directive and national legalisation of the Slovak Republic it can be stated that:

- the right to be present at any stage of the courts procedures especially in the cases of accused persons is an integral part of basically all acts of international laws on fundamental human and civil rights;
- as such it is also an integral part of any democratic system wherein the respect for fundamental human rights is one of the key pillars of any democratic system of governance;
- as the right to be present is an integral part and thus one of the core stones of the fundamental human rights and also fundamentals of the democratic system of governance it has also to be considered and respected as the permanent ones.

Finally, it can be concluded that the implementation of the Directive in criminal proceedings has been complete.

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