

CUSTODY IN CZECH CRIMINAL PROCEEDINGS¹

АРЕШТ У ЧЕСЬКОМУ КРИМІНАЛЬНОМУ СУДОЧИНСТВІ

Galovcová Ingrid,

*JUDr., Ph. D.,**Senior lecturer**Department of Criminal Law, Faculty of Law**Charles University**(Prague, Czech Republic)*

In order to fulfill the purpose of criminal proceedings, it is necessary to ensure the presence of the person against whom proceedings are being conducted. The most serious securing institution is the placing of the accused person into custody. It represents a significant interference with the personal freedom of the accused, and for the legitimacy of such interference, it is necessary to respect constitutional and international standards guaranteeing fundamental rights and freedoms. The author deals with the legal regulation of the custody of the accused in the Czech Criminal Procedure Code in terms of respecting the attributes of the modern criminal trial. The Criminal Procedure Code, valid in the Czech Republic, was adopted in 1961. It has been amended many times, but despite several years of ongoing efforts, the process of its recodification has not yet been completed.

Custody enabling the interference with the personal freedom of the accused must be a means of ultima ratio. It is an extreme measure, and it is the task of both legislation and the authorities interpreting and applying legal norms enabling the use of this institute to treat custody as a means of ultima ratio.

The article describes the basic conditions for deciding on custody in Czech criminal proceedings, describes the types of custody, the authorities responsible for deciding on custody, the maximum permissible time of its duration and the possibility of replacing custody. For understanding the institute of custody, its structure in terms of the reasons for the custody is also significant.

At the same time, an effort is made to point out some shortcomings of this legal regulation and possible ambiguities or problems related to the interpretation and subsequent application of legal norms regulating the conditions of custody in the Czech Republic.

Key words: custody, Criminal Procedure Code of the Czech Republic, principle of ultima ratio, personal freedom, replacement of custody.

З метою виконання мети кримінального судочинства необхідно забезпечити присутність людини, проти якої ведеться провадження. Найбільш серйозним інститутом органів безпеки є тримання обвинуваченого під вартою. Це є істотним втручанням в особисту свободу обвинуваченого, і для збереження законності такого втручання необхідно дотримуватися конституційних та міжнародних стандартів, що гарантують основоположні права та свободи. Автор розглядає правове регулювання тримання обвинувачених під вартою в Кримінальному кодексі Чеської Республіки з погляду дотримання атрибутів сучасного кримінального судочинства. Чинний у Чеській Республіці Кримінальний кодекс ухвалено 1961 р. Він був неодноразово доповнений, але, незважаючи на декілька років постійних зусиль, процес його рекодифікації ще не завершено.

Арешт, що дозволяє втручання в особисту свободу обвинуваченого, має бути засобом ultima ratio. Це є виключною мірою і також завданням як законодавства, так і органів влади, які інтерпретують та застосовують правові норми, що дозволяють використання цього інституту для розгляду арешту як засобу ultima ratio.

У статті окреслено основні умови ухвалення рішення про тримання під вартою в чеському кримінальному судочинстві, описано типи арешту, органи влади, відповідальні за ухвалення рішення про арешт, його максимально дозволений строк, а також можливість заміни тримання під вартою. Для розуміння інституту тримання під вартою, його структура з погляду причин взяття під варту також важлива.

Водночас зроблено спробу виділити деякі недоліки цього правового регулювання та можливі неоднозначності чи проблеми стосовно трактування та наступного застосування правових норм, що регулюють умови тримання під вартою в Чеській Республіці.

Ключові слова: тримання під вартою, Кримінальний кодекс Чеської Республіки, принцип ultima ratio, особиста свобода, заміна тримання під вартою.

Для достижения цели уголовного судопроизводства необходимо обеспечить присутствие человека, против которого ведется производство. Наиболее серьезным институтом органов безопасности является содержание обвиняемого под стражей. Это является существенным вмешательством в личную свободу обвиняемого, и для сохранения законности такого вмешательства необходимо придерживаться конституционных и международных стандартов, гарантирующих основополагающие права и свободы. Автор рассматривает правовое регулирование содержания обвиняемых под стражей в Уголовном кодексе Чешской Республики с точки зрения соблюдения атрибутов современного уголовного судопроизводства. Действующий в Чешской Республике Уголовный кодекс принят в 1961 г. Он был неоднократно дополнен, но, несмотря на несколько лет постоянных усилий, процесс его рекодификации еще не завершен.

Арест, допускающий вмешательство в личную свободу обвиняемого, должен быть средством ultima ratio. Это является исключительной мерой, а также задачей как законодательства, так и органов власти, интерпретирующих

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и использующих правовые нормы, позволяющие применение этого института для рассмотрения ареста в качестве средства *ultima ratio*.

В статье названы основные условия принятия решения о содержании под стражей в чешском уголовном судопроизводстве, описаны типы ареста, органы власти, ответственные за принятие решения об аресте, его максимально разрешенный срок, а также возможность замены содержания под стражей. Для понимания института содержания под стражей его структура с точки зрения причин заключения под стражу является основной.

В то же время сделана попытка определить некоторые недостатки этого правового регулирования и возможные неоднозначности или проблемы, касающиеся трактовки и последующего применения правовых норм, регулирующих условия содержания под стражей в Чешской Республике.

Ключевые слова: содержание под стражей, Уголовный кодекс Чешской Республики, принцип *ultima ratio*, личная свобода, замена содержания под стражей.

Custody is a traditional institute of Czech criminal law. The modern criminal trial, an important attribute of which is respect for the right to a fair trial, also presupposes respect for the accused person and his/her rights. Custody is mainly connected with the interference with the right to personal freedom, while its legitimacy is dependent on the quality of the legal regulation of this interference, which allows for the strict observance of the conditions for its realization by the public authorities. It is therefore essential that the limits for interference into fundamental rights are clearly and precisely defined in the law, and that there are no interpretative and related application problems when deciding on custody. The sufficient certainty of the expression of legal norms, without arousing the formation of doubts about their interpretation and not containing vague terms in which there is a risk of adapting their interpretation to individual interests, is an absolute prerequisite for the quality of the legal regulation. Custody, like any interference that restricts the fundamental rights of an individual, must meet the requirement of legality, subsidiarity and proportionality. Modern criminal proceedings are also built on respect for the person against whom criminal proceedings are being conducted and the use of criminal law measures as a means of *ultima ratio*. The principle of *ultima ratio* applies not only to the interpretation and application of criminal law standards but should be respected during the process of lawmaking as well. This study therefore focuses on introducing the current legal regulation of custody in the Czech Criminal Procedure Code and identifying some of its problematic aspects, including the fulfillment of the *ultima ratio* principle.

Czech legal theory deals with the individual sub-issues related to custody, with a subject of special interest especially being issues of the duration of the custody or the individual specificities related to decision-making about it. A more comprehensive treatise on this institute is unique in Czech criminal science. In the last century, Mandák thoroughly dealt with custody in the monograph *Detaining the Accused Person in Czechoslovak Criminal Proceedings* [1]. In spite of the fact that more than forty years have passed since the publication of the monograph and social and political circumstances have changed, some shortcomings that Mandák highlighted have not yet been remedied. His conclusions were taken over in many ways by the monograph *Deten-*

tion and Custody in Czech criminal proceedings [2], which provides the prosecutor's view of the institution of custody, the principles and the essence of its legal regulation. The basic source of this study is the current legislation contained in the Czech Criminal Procedure Code [3] in conjunction with the sources regulating the limits of interference with fundamental rights and freedoms at the constitutional and international levels, in particular the Charter [4] and the ECHR [5]. Criminal proceedings in the Czech Republic are of the type of the continental Europe process, the basic source of which is the Criminal Procedure Code of 1961. For many years, the new Criminal Procedure Code has been drafted, but the recodification efforts have not yet led to a successful end. Amendments (whose number is over 100 only after 1990) deal with partial aspects, introduce new institutes and procedural methods, although they sometimes lack conceptuality and are the reason for the internal contradiction of this legislation. At the same time, however, it seeks to take into account the trends and principles typical of modern continental-type criminal procedures.

This study is focused on foreign readers. It is not intended to provide them with a detailed explanation of the law on custody in Czech criminal proceedings, nor would it be possible to do so due to the scope. It focuses on introducing the basic conditions for taking a person into custody and its duration, and considers their compatibility with the attributes of the modern criminal trial.

In a Czech criminal trial, custody is the most severe means of detaining the accused person. It is regulated in the fourth title of the Criminal Procedure Code entitled "Preliminary measures and securing of persons and matters important for criminal proceedings", in the first section. The law defines the conditions for taking a person into custody, its duration, the method of deciding on custody and the possibility of replacing it². Based on the fact that custody represents a significant interference with the guaranteed rights and freedoms of an individual, it is essential that the conditions for such intervention are strictly and clearly defined. The modern criminal trial, an important attribute of which is respect for the right to a fair trial, presupposes respect for the accused person and his/her rights. Custody is mainly connected with the interference with the right to personal freedom, while its legitimacy is dependent on strict adherence to the limits for the implementation of such intervention by public authorities. To this end, it is essential that the conditions for limiting the rights of the individual through custody are clearly and precisely defined in the law and that there are no interpretative and related application problems when deciding on it.

² In addition to the Criminal Procedure Code, the legal regulation of custody is also contained in special regulations in relation to juvenile custody or extradition and transfer custody. This study deals only with the legal regulation of custody contained in the Criminal Procedure Code.

In Czech criminal proceedings, custody is designed as a facultative institute³. Czech Criminal Law does not recognize mandatory custody, so it is necessary in each individual case to examine not only the fulfillment of the legal conditions for the custody decision but also the fulfillment of the requirements of subsidiarity and proportionality of such interference with the rights of the individual.

Material conditions of custody. The basic prerequisite for the custody decision is the existence of material preconditions of custody consisting in the justification of the criminal prosecution of the accused, the existence of the grounds for custody and the absence of circumstances excluding the custody.

The justification for criminal prosecution needs to be assessed in the light of the circumstances of the case thus far, it is not sufficient simply to establish whether criminal prosecution has begun. The announcement itself of a motion to initiate a criminal prosecution against the accused can be considered as a formal condition of custody, since only an accused person can be taken into custody⁴. The custody of a suspect or a witness is not admissible. Whether the suspicion of the committing of a criminal offense for which criminal prosecution is being conducted is well founded must be properly investigated by the custodial authority. This requirement is of particular importance at the stage of decision-making on custody in preliminary proceedings, where the court has no powers in relation to the rationale of conducting the prosecution itself, with the public prosecutor having the status of *dominus litis* here.

Regarding the grounds of custody in the Czech Criminal Procedure Code, their legal regulations have not undergone fundamental changes since the adoption of the Criminal Procedure Code in the early sixties of the last century. Based on the reasons for the custody, we distinguish the following three types of custody:

Flight risk – custody on account of the fear that the accused will escape or hide in order to avoid criminal prosecution or punishment [Section 67 (a) of the Criminal Procedure Code].

Collusive – custody because of the fear that the accused will influence not yet interrogated witnesses or the co-accused or otherwise obstruct the clarification of the relevant facts [Section 67 (b) of the Criminal Procedure Code].

Preventive – custody because of fears that the accused will repeat the criminal activity for which he/she is being prosecuted, will complete the criminal offense which he/she has attempted or will commit the criminal offense he/she has prepared or threatened with [Section 67 (c) of the Criminal Procedure Code].

Ad 1) in the case of flight risk custody, the law demonstrates the reasons from which the fear of escaping or hiding may ensue. In practice, this is the most com-

mon situation where the identity of the accused cannot be identified immediately, there is an absence of a permanent residence or the threat of a severe sentence. In addition, however, fear of escape or hiding may be based on other identified circumstances. For example, Mandák as an example sets out circumstances that are based on the accused's personal situation, such as family crises, job dissatisfaction, the feeling of irredeemable shame from the nearby surroundings [1, p. 96–97]. However, the fear of escape must always be borne in the specific circumstances identified in each individual case.

In particular, application problems are caused by deciding on custody because of a fear of a high sentence, from the point of view of interpretation of what sentence can be considered “high” in this sense. This question was dealt with in the decision-making practice of the Constitutional Court of the Czech Republic, which expressed the view that the threat of a high sentence is a prison sentence of at least about eight years [6]. However, such a lump-sum definition is the subject of criticism of the theory. I agree with Jelínek that the threat of a high sentence needs to be deduced individually in relation to the specific qualification of the deed and the particular accused person [7, p. 707]. The probable amount of punishment that could be imposed is subjectively perceived by every individual differently. Even imminent high sentences for a particular person may not be a reason for which criminal prosecution should be avoided. The interpretation of the concept of “high sentence” by the Constitutional Court of the Czech Republic calls for a binding decision on taking a person into custody only when the expected sentence is over eight years, without the existence of other circumstances that justify the fear of the flight of the accused. In its decision-making practice, the Constitutional Court of the Czech Republic states that “the type (but only objective) of threat of high punishment itself is no longer sufficient to fulfill the cited reason for custody” [6], and also states that “not only the type of threat of the high sentence, based on the unique specific circumstances of the committed act, may be (in conjunction with other aspects of the criminal case) the reason that leads to a justified and reasonably well-anticipated fear of the consequences flight risk custody should face <...> however, it must clearly be a specific threat of high punishment, within the scope of the term of imprisonment set by the Criminal Procedure Code” [8]. I have a critical stance to this conclusion because its interpretation of the threat of a high punishment as a reason for custody approaches custody in an obligatory manner, which is clearly not a means of ultima ratio. It does not correspond to the nature of custody as an optional facultative institute of the criminal trial. The reason for flight risk custody cannot be the nature of the crime itself for which the accused is prosecuted, even on the basis of established facts from which it is possible to deduce the probable level of impending punishment. I believe that the fear of escape must always be assessed with regard to the accused person and in conjunction with other specific circumstances that would justify this fear. Only in the context of assessing other aspects unrelated to the committed deed, its legal qualifi-

³ An exception is mandatory extradition custody regulated by Act № 104/2013 Coll., on International Judicial Cooperation in Criminal Matters, the legislation of which is not the subject of this study.

⁴ The term the accused in this study refers to the person against whom the prosecution is taking place, regardless of the trial stage of the criminal proceedings.

cations or other aspects of the criminal offense for which he/she is prosecuted, it can be ascertained whether the amount of the presumed sentence is indeed a possible reason for the accused to avoid criminal prosecution. Another problem in decision-making appears to be the stabilizing of the probable level of impending punishment, especially in the initial phase of prosecution for criminal offenses where the term of imprisonment is set at a wide range, and the factual circumstances so far ascertained are still insufficient to assess all aggravating, mitigating or other circumstances that will ultimately affect the amount of the sentence imposed.

Ad 2) the purpose of collusive custody is to prevent the accused from adversely affecting the results of identifying the circumstances important for decisions in criminal matters. The law as a reason for collusive custody indicates the fear that the accused will influence unheard witnesses or co-defendants or otherwise obstruct the clarification of facts relevant to criminal prosecution [Section 67 (b) of the Criminal Procedures Code].

Collusive custody has its supporters and critics in theory and in modern times the reservations are directed at the question of its compatibility with international conventions, in particular Article 5 (1) (c) ECHR. [2, p. 414]. A possible contradiction was also considered by the Constitutional Court of the Czech Republic on the basis of a petition to annul the provisions of Section 67 (b) of the Criminal Procedures Code, precisely because of its conflict with Article 5 (1) (c) of the ECHR but the proposal was rejected [9].

Similarly to other reasons for custody, concerns about collusive behavior must result from concrete facts. The mere fact that important witnesses or co-defendants have not been heard in the criminal case cannot itself be the basis for taking a person into custody. The existence of circumstances that would cause fear that the accused would influence these persons in an undesirable manner is essential. In contrast to the original legal regulation, the reason for the collusive custody was specified by amendment № 166/1998 Coll., by inserting the attribute “not yet interrogated”, i. e. it was clearly stated that the fear of collusion is threatened exclusively by parties whose testimony has not yet been procedurally recorded. This is also important for assessing the extinguishment of the grounds for custody. There is no doubt that by the interrogation of a witness or co-accused, in relation to which the fear of the accused’s collusion was concerned, this reason for custody falls away. I see the legal definition of the method of further collusive behavior, combined with the fear that the accused will “otherwise obstruct the elucidation of the facts relevant to criminal prosecution” to be more problematic. The scope of the negotiation which could be inferred under the notion of “otherwise obstruct” is too broad and does not fully meet the requirement of clarity and certainty of the legal norm. On the one hand, it is understandable

that it is not possible to casuistically list all the ways in which clarification could be abused, on the other hand, however, vague formulations can be misused to overuse this reason for custody.

Ad 3) the purpose of preventive custody is preventive. It is to prevent the accused from committing further crimes. It is imposed when a justified fear results from the particular facts regarding the repetition of the criminal offense for which the accused is being prosecuted or the fear of the completion of the criminal offense he/she has attempted or the execution of a criminal offense which he/she has prepared or threatened. However, this exhaustive list of reasons for preventive custody does not fulfill the main purpose of custody in general, consisting in detaining a prosecuted person for the purposes of criminal proceedings. It does not detain the accused for the needs of criminal prosecution conducted against him/her, but his personal freedom is limited to prevent him/her from committing any other legally defined possible future criminal activities. Mandák adequately characterizes preventive custody as “a preventive safety measure that is essentially not related to the basic objective of the ongoing procedure (determination of guilt and punishment)” [1, p. 122]. However, he refers to this discrepancy only as a “insignificant defect” and, despite the inconsistency of the nature of the safety measure, he considers preventive custody to be a suitable solution in terms of purposefulness (not its being purpose-built) [1, p. 124]. Such a conclusion may be understandable in the context of the period in which the monograph originated⁵, but it cannot be identified with at present, almost 30 years after the change in political and social relations. In the meantime, the legal regulation of preventive custody has undergone only minor adjustments, namely the first reason of preventive custody (out of a total of four exhaustively stated reasons stated in the law), where there was clarification on account of the fear of the repetition of the criminal act for which he/she is being prosecuted, as opposed to the original one, where there was fear of repetition of the crime (without the addition “for which he/she is being prosecuted”). However, the original version was interpreted in such a way that it does not concern the fear of repetition of any criminal activity, but only the one for which the accused is being prosecuted. The amendment thus only specified the legal formulation, but did not narrow the reasons for preventive custody. At present, it is therefore necessary to address the question of whether the character of preventive custody in terms of its purpose meets the requirements of legitimacy of interference with the rights and freedoms of individuals. There may be doubts as to the fulfillment of the appropriateness of such a measure. The legal regulation of preventive custody is based on the presumption of the future offense committed by the accused. It is the role of the state to prevent the commission of a crime, but doesn’t it have other, sufficiently effective means not related to the restriction of the personal freedom of a person to whom the fear of possible future criminal activity relates? On the one hand, there is no doubt that it is not permissible to restrict the personal freedom through custody of persons to whom the oper-

⁵ The monograph was published in 1975, i. e. at a time of deepening normalization in the Czechoslovak Socialist Republic, where state security measures were often applied regardless of the legitimacy of interference with individual rights.

ative-search information obtained would indicate possible future criminal activity without their actions reaching a criminally relevant stage in which it would be possible to implement the procedures of the Criminal Procedure Code. On the other hand, however, we allow the fear of possible future criminal behavior of a person accused to be a reason for limiting personal freedom. The only difference is that it concerns a person against whom criminal prosecution is already well-founded for an act that has already been committed but which may not end with imprisonment. Preventive custody is intended to prevent possible future undesirable conduct of the accused, which, however, even in the event of its realization, would not have a direct connection with the ongoing criminal proceedings and the determination of guilt and punishment. Although, in order to prevent the most serious criminal activity, under certain circumstances, the legitimacy of this measure could be inferred, the current legislation does not take into account the degree of seriousness of the threat to public order that should be avoided through preventive custody. Strong interference with the personal freedom of the accused may also occur in situations where possible threats to public order through further crimes committed by the accused may be addressed by more mild means unrelated to such a serious interference with the individual's freedom.

As already mentioned above, the material prerequisite for the decision to take a person into custody or on the unavoidability of its continued duration is also the absence of circumstances excluding the possibility of taking a person into custody under Section 68 (2) to (4) of the Criminal Procedure Code. In accordance with the principle of proportionality, the law does not allow the custody of an accused person who is being prosecuted for an offense of a lesser magnitude, namely for a crime for which the law sets an upper limit of imprisonment not exceeding two years for intentional crimes and three years for negligent criminal offenses. However, in these criminal cases, a different procedure and the possibility of a custody decision may be admitted, under the conditions defined by law, consisting in the offender's offense already carried out (Section 68 (3) of the Criminal Procedure Code) or in the interest of protection of the injured person in relation to preventive custody (Section 68 (4) of the Criminal Procedure Code).

With regard to the nature of custody as a subsidiary measure, a condition of the decision to place a person in custody and its continued duration is the impossibility of achieving the purpose of custody by other measures, in particular by imposing one of the precautionary measures. It is the duty of the authority deciding on custody to investigate whether its purpose cannot be achieved by other, more lenient measures.

Deciding on custody. The decision to take a person into custody is the sole jurisdiction of the court. At the time of the adoption of the Criminal Procedure Code, the prosecutor was entitled to decide on custody, which became the subject of criticism of the professional public. As a result of the objections to the illegitimate interference with the personal freedom of the defen-

dants, Amendment № 149/1969 Coll. enabled at least investigating the prosecutor's decision on custody by the judiciary [1, p. 156–157]. The authorization of the prosecutor to decide to take a person into custody was abolished by an amendment to Criminal Procedure Code № 558/1991 Coll. The current legislation allows prosecutors to make custody decisions only in the case of the release of the accused from custody or deciding to drop one of the multiple reasons for custody. It is a decision in favor of the accused, alleviating the interference with his/her rights. The legislation thus respects the standard of protection of fundamental rights and freedoms under the Charter and the ECHR. Article 8 (5) of the Charter states that “no one may be placed in custody, except on the grounds and for the period of time laid down in a law, and only on the basis of a judicial decision”. In this context, Repík emphasizes that the entire period of custody at any time must be based on a court decision [10, p. 291]. The requirement for judicial decision-making thus applies not only to custody, but also to the decision on the continuation of custody or the extension of the grounds for custody.

The duration of custody. Custody can take only the necessary time, i.e. the person cannot be held in custody when the reasons for the custody have ceased. The law also establishes the maximum admissible durations of custody, beyond which the accused must be released even after the reasons for the custody are still given. These periods are determined by the type of seriousness of the offense for which the accused is being prosecuted. The maximum period of custody for misdemeanors (all negligent crimes and intentional criminal offenses with a maximum sentence of up to five years imprisonment) is set at one year while for crimes (intentional offenses with a maximum sentence of imprisonment of more than five years, and less than 10 years) it is two years. For particularly serious crimes (intentional criminal offenses with a maximum sentence of imprisonment of at least 10 years), the maximum admissible period of custody is set at three years. The longest period of custody, for a period of 4 years, is set for particularly serious crimes for which extraordinary punishment can be imposed, i.e. imprisonment of more than 20 to 30 years or life imprisonment. One third of the maximum admissible term of custody thus determined corresponds to the preliminary procedure and 2/3 for proceedings before a court. The admissibility of the continuation of custody must therefore be assessed in the light of the stage of the criminal proceedings, without allowing any unnecessary time shifts between these stages. An exception to the thus determined maximum admissible durations of custody is represented by collusive custody. If the accused is in custody exclusively for fear of collusion [on the grounds of Section 67 (b) of the Criminal Procedure Code], the maximum admissible duration of custody is 3 months. However, that does not apply if the actual collusive behavior of the accused was identified, i.e. not only the fear of such conduct but its realization. In such a case, the court may decide to keep a person in custody even for more than the specified three-month period.

Possibilities of replacing custody. In accordance with the principle that custody is to be a means of ultima ratio, the law allows the replacement of custody by several possible means. Their use depends on the existence of the material conditions of custody and their reasons, because the law approaches the possibility of replacing custody differently in relation to flight risk custody and preventive custody on the one hand, and collusive custody on the other. Flight risk and preventive custody can be replaced by:

- a) the guarantee of citizens' associations or trusted persons;
- b) a written promise of the accused;
- c) supervision of the accused by a probation officer;
- d) by imposing one of the preventive measures;
- e) financial guarantee, but only in relation to the accused being charged for any of the exhaustive list of offenses (Section 73a of the Criminal Procedure Code).

In principle, collusive custody cannot be replaced⁶ as based on the interpretation of the provisions of the Criminal Procedure Code on the replacement of custody (Sections 73 and 73a of the Criminal Procedure Code). However, the provision governing the conditions of custody (Section 67 of the Criminal Procedure Code), as one of the conditions for the decision to place the accused in custody, sets out the requirement of subsidiarity, i. e. the need to examine whether other measures can achieve the purpose of custody at the time of deciding, in particular by imposing some of the preventive measures. This provision applies to all types of custody, therefore even when the reasons for collusive custody are established, it is necessary to consider the possibility of its replacement by imposing one of the preliminary measures provided by the Criminal Procedure Code when deciding on custody.

The nature of the legal regulation of custody in the Czech Republic is based on the original version of the Code of Criminal Procedure adopted in 1961, while the various amendments to the Criminal Procedure Code adopted after 1990 sought to respond to changing social conditions and the development of criminal policy. Although the amendments adopted partly reflect the objections of the parties' theory

and practice of deciding on custody, in accordance with the requirement of legitimacy of the interference with the personal freedom of the accused, the legal regulation of custody by *de lege ferenda* should be improved. An attribute of the modern criminal trial is the respect for the rights and freedoms of the individual. These requirements, however, are not always fulfilled by the institute of custody, especially as regards its material conditions. The unambiguous fulfillment of the purpose of the custody of an accused person for the purposes of criminal proceedings, or the execution of the imposed sentence is seen in flight risk custody. But even here, the legislation is not without a problem. It is critically possible to build on an alternative to this custody because of fears of avoiding prosecution or punishment if there is a high sentence that causes interpretation and application problems.

Similarly, it may be argued against the uncertainty of the concept of "otherwise obstruct the facts relevant to criminal prosecution" as a reason for collusive custody, as it is contrary to the requirement of legal certainty and the certainty of the definition of legal norms interfering with the fundamental rights and freedoms of individuals. In the future, it is also necessary to clarify the legal regulation of the possibility (impossibility) of replacing collusive custody.

I perceive the regulation of preventive custody in the Czech criminal process as the most problematic. In my view, it does not respect the *ultima ratio* requirement to achieve the purpose of custody because the monitored objective, which is not directly related to the purpose of the criminal proceedings in which the custody is decided, can be achieved by other unrestricted means of personal liberty available to the public authorities. This lack of legal regulation strengthens the absence of a distinction between criminal activities to be prevented by this institution in terms of its type of seriousness. It is possible that the interference with personal freedom in order to prevent the commission of the most serious crimes, which could be justified in a particular individual case, would pass the proportionality test, but the legal regulation does not differentiate the crime to be prevented in terms of its severity.

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⁶ The different approach chosen in juvenile detention law is not taken into account by this study; it deals only with the institution of custody in relation to adult offenders, regulated by the Criminal Procedure Code.