

THE ACCUSED AND THEIR RIGHT TO PERSONAL PARTICIPATION AT THE COURT PROCEEDINGS IN THE CZECH CRIMINAL PROCEDURE

ПІДСУДНІ ТА ЇХНЕ ПРАВО НА ОСОБИСТУ УЧАСТЬ У СУДОВОМУ ПРОВАДЖЕННІ У КРИМІНАЛЬНОМУ ПРОЦЕСІ У ЧЕХІЇ

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In the introduction, the author characterizes the current legal situation in the area of criminal law in the Czech Republic. The main source of criminal procedural law remains the Code of Criminal Procedure of 1961 (CCP) created under different socio-political conditions and extensively amended since 1961. Further, the author describes the procedural rights of persons accused of committing a crime. The essence of the article is then an analysis of the right of the accused to personal participation at the court proceedings under the current legal situation in the Czech Republic. The author considers this right a fundamental right of the accused in criminal proceedings since it conditions, among others, the application of other procedural rights. The author perceives the right of the accused to personal participation at the court proceedings in the Czech criminal proceedings as an obligation of the accused to appear in court. The author further specifies the exceptions to this rule in proceedings before the court of first instance, before the appellate court and in the proceedings against a fugitive.

Key words: criminal law, rights of a person, defendant, trial, appeal.

У передмові автор характеризує сучасний стан правового регулювання галузі кримінального права у Чеській Республіці. Основним джерелом кримінально-процесуального права залишається Кримінально-процесуальний кодекс 1961 року (КПК), створений під впливом різних соціально-політичних умов і достатньо змінений з 1961 року. Окрім того, автор описує процесуальні права осіб, обвинувачених у вчиненні злочину. Суть статті полягає в аналізі права обвинуваченого на особисту участь у судовому процесі відповідно до сучасного правового регулювання у Чеській Республіці. Автор розглядає це право як фундаментальне право обвинуваченого у кримінальному процесі, оскільки воно є похідним для інших процесуальних прав. Автор сприймає право обвинуваченого на особисту участь у судовому процесі у чеському кримінальному процесі як зобов'язання обвинуваченого постати перед судом. Крім того, автор також визначає винятки з цього правила у розгляді справи у суді першої інстанції, в апеляційному суді і у судовому процесі проти втікача.

Ключові слова: кримінальне право, права особи, обвинувачений, судовий процес, апеляція.

В предисловии автор характеризует современное состояние правового регулирования отрасли уголовного права в Чешской Республике. Основным источником уголовно-процессуального права остается Уголовно-процессуальный кодекс 1961 (УПК), созданный под влиянием различных социально-политических условий и достаточно измененный с 1961 года. Кроме того, автор описывает процессуальные права лиц, обвиняемых в совершении преступления. Суть статьи заключается в анализе права обвиняемого на личное участие в судебном процессе в соответствии с современным правовым регулированием в Чешской Республике. Автор рассматривает это право как фундаментальное право обвиняемого в уголовном процессе, поскольку оно является производным для других процессуальных прав. Автор воспринимает право обвиняемого на личное участие в судебном процессе в чешском уголовном процессе в качестве обязательства обвиняемого предстать перед судом. Кроме того, автор также определяет исключения из этого правила в рассмотрении дела в суде первой инстанции, в апелляционном суде и в судебном процессе против беглеца.

Ключевые слова: уголовное право, права лица, обвиняемый, судебный процесс, апелляция.

Czech Penal Policy – Current Situation

Compared to neighbouring countries, i.e. the Slovak Republic and the Republic of Poland, where the overall recodification of criminal law took place after the social changes at the end of the last century, the situation in the area of criminal law in the Czech Republic is different.

The permanently ongoing reform of Czech criminal law after the so-called Velvet Revolution in 1989 brought the overall recodification of substantive criminal law that resulted in the new Criminal Code of 2009 (Act No. 40/2009 Coll.). However, an adoption of a completely new Code of Criminal Procedure has never occurred and thus the basic source of criminal procedural law remains extensively (more than ninety times) amended Code of Criminal Procedure of 1961 (Act No. 141/1961 Coll.).

Besides the Code of Criminal Procedure of 1961 as the main source of criminal law in the Czech Republic, another source of criminal procedural law is Act No. 218/2003 Coll., on Juvenile Liability for Unlawful Acts and on Juvenile Justice (Juvenile Justice Act). It is a special norm related to the Code of Criminal Procedure and thus the application of the Code of Criminal Procedure is limited only to the cases where the Juvenile Justice Act does not provide otherwise (Section 1(3) of the cited Act). Besides the substantive provisions, the Act also contains procedural arrangements for proceedings against juveniles.

Act No. 418/2011 Coll., on Criminal Liability of Legal Entities and Legal Proceedings is the second so-called supplementary criminal law containing both the substantive and procedural rules. Again, it is a

norm related to the Code of Criminal Procedure that is applicable only if not precluded by the nature of things (Section 1(2) of the cited Act).

The subject of my article is an analysis of a fundamental right of the accused – the right to personal participation at the court proceedings. The substance of this right is contained in the current Czech Code of Criminal Procedure.

Status of a Person against Whom the Criminal Proceedings is Carried Out in the Czech Criminal Procedure

A person against whom the criminal proceedings is carried out is an important subject of and a party to the Czech criminal proceedings and is referred to by various terms such as the suspect, the accused, the defendant or the convict. These different denominations express the stage reached in the criminal proceedings and the procedural rights belonging to the accused.

1. The suspect in the Czech criminal proceedings is a person who has been detained under the conditions provided in Section 76 CCP and against whom the criminal prosecution has not yet been commenced under Section 160 (1) of the CCP. Further, the suspect is a person against whom the so-called summary preliminary hearings is carried out, starting at the beginning of the interrogation under Section 179b (3) of the CCP during which they must be notified of what act they are suspected of committing, and lasting till the public prosecutor serves the petition for the punishment to the court (Section 314b of the CCP). The Czech Code of Criminal Procedure does not use the term “suspect” in the sense that is commonly accepted and understood especially in forensic practice and a common language. In the Czech Code of Criminal Procedure, the term “suspect” has a precise legal meaning.

2. The accused is a person against whom the criminal prosecution has been initiated (Section 160 (1) of the CCP).

3. The accused becomes the defendant after the appointment of the main trial (Section 12 (8) of the CCP). This designation applies also for the appointment of the main trial in the simplified proceedings before a single judge under Section 314d of the CCP, although in this provision the legislature denotes such a person as “the accused”.

4. The convicted person is a person against whom an enforceable criminal warrant or a convicting judgment had been issued and came into full force and effect (Section 12 (9) of the CCP).

The Czech Code of Criminal Procedure uses the term “the accused” as a certain legislative shorthand. Under Section 12 (7) of the CCP, the term “the accused” means also the defendant and the convicted person unless the nature of the matter indicates otherwise. This is the case of e.g. the provisions on preliminary hearing where the term “the accused” never means the defendant or the convicted person. Further on, if possible, the person against whom the proceeding is carried out is referred to as the accused.

The status of the accused in the Czech criminal proceedings is procedurally difficult since such a person is:

- a) a party to the proceedings,
- b) an item of evidence from whom it is likely to learn about the circumstances relevant to the proceedings,
- c) a subject to the future enforcement of the decision.

The capacity to be a subject of criminal proceedings, resp. a party to the criminal proceedings, is not restricted by the Czech Code of Criminal Procedure, as well as the procedural capacity, i.e. the capacity to independently perform procedural actions. Therefore, the accused of a criminal offence may be even an insane person, and a legally incompetent person can take actions in criminal proceedings.

Procedural Rights of the Accused in the Czech Criminal Proceedings

The Czech Code of Criminal Procedure provides the accused with a long series of procedural rights, the content and application of which is naturally different based on the purpose they serve and based on the stage of the criminal proceedings in which the accused exercises them. In the Czech Code of Criminal Procedure, the fundamental rights of the accused are set forth especially in the provisions of Section 33 of the CCP and they are further elaborated in a number of other provisions of the Code. The provisions of Section 33 basically define the right of defence enshrined in the Charter of Fundamental Rights and Freedoms [1].

Rights of the accused may be classified in a summarized form in essential points into the following groups:

- a) Right of the accused to personal participation at the court proceedings.
- b) Right to comment on all the facts that found him guilty and the evidence of them, without any obligation to testify.
- c) Right to present the circumstances and the evidence for their defence.
- d) Right to make proposals and submit applications.
- e) Right to seek, submit or propose the presentation of evidence and independently present the evidence under the terms stipulated in the Code of Criminal Procedure.
- f) Right to choose a defence counsel and consult them.
- g) Right to appeal.

These fundamental rights of the accused may be exercised regardless of whether the accused is denied legal capacity or their legal capacity have been restricted (Section 33 (1) last sentence).

All law enforcement authorities are obliged at all times to instruct the accused of their rights and provide them with the full opportunity to exercise such rights at every stage of the proceedings (Section 33 (5) of the CCP and Section 42 (5) of the Juvenile Justice Act).

E.g., where the criminal proceedings are carried out for a criminal offence which allows the conclusion of an agreement on guilt and punishment, the accused must be instructed, inter alia, on the fact that in the preliminary hearing they may conclude an agreement on guilt and punishment with the public prosecutor in presence of their defence counsel, and that such agreement is subject to the court's approval (Section 91 (1) of the CCP).

Right of the Accused to Personal Participation at the Court Proceedings – European Case Law

The right of the accused to personal participation at the court proceeding is their fundamental right. This right can be identified as a characteristic of the adversarial process.

The right to personal participation at the court proceedings applies fully only to those proceedings where the court decides at the main trial and public hearing. In preliminary proceedings (i.e. pre-trial stage of criminal proceedings) is the right to personal participation limited (cf. Section 165 of the CCP).

Only during the court proceedings, the defendant has a real opportunity to oppose the claim and the evidence of the counterparty, and only in such a case the defendant has an opportunity to personally refute the evidence of the prosecution and to present the court their version of the acts, as well as to enforce his defence in cooperation with the defence counsel, while his appearance before the court enables the court to establish a direct and unmediated view of the defendant.

The personal participation of the defendant before the court is one of the attributes of the adversarial process and it conditions the application and exercise of other rights. In order to oppose the allegations and the evidence of the counterparty, the accused must be able to participate personally in the proceedings regardless of whether they used their right to be represented by a defence counsel or whether they defend themselves in person.

It is a certain failure of the Czech law on criminal proceedings that the abovementioned right is not explicitly expressed in the applicable Czech legislation on criminal proceedings in Section 33(1) of the CCP providing the rights of the accused and that this right must be inferred from the contents of other rights expressly set out in the Code of Criminal Procedure.

The right of the accused to personal participation at the court proceedings is explicitly enshrined in Art. 14 (3) d) of the International Covenant on Civil and Political Rights and it can be also inferred from the rights contained in Art. 6 (3) c), d), e) of the Convention (the right to defend themselves in person or through legal assistance, the right to examine or have examined witnesses, the right to an interpreter) because the exercise of these rights is inconceivable without presence of the defendant before the court [2]. The right to personal participation at the court proceedings can also be derived from Art. 36 (1) and Art. 38 (2) of the Czech Charter of Fundamental Rights and Freedoms.

The right of the accused to personal participation at the court proceedings is considered an important element of a “fair trial” [3]. The exception to the accused’s right to personal participation in the Czech criminal procedure is the proceedings against a fugitive (Section 302 et seq. of the CCP).

The accused’s right to personal participation at the court proceedings in connection with the European Convention [4] is described more specifically in the literature by Mr. Repík [5]. The author states that the accused’s right to personal participation at the court proceedings is

one of those rights not expressly stated in Article 6, but derived by the Court’s jurisprudence. Article 14 (3) d) of the International Covenant on Civil and Political Rights is not left without any significance since it explicitly provides this right.

The Court justified the existence of this rule in the Convention as follows: Although the Article 6 (1) does not explicitly mentions the right of the accused to participate in the proceedings, this right arises from the purpose of this article as a whole. In addition, the provisions of paragraph (3) c), d) and e) grant to every accused the right to defend themselves in person, to examine or have examined witnesses and to have free assistance of an interpreter if they do not understand or speak the language used in the court, which would be unthinkable without their presence. The Commission’s report on the same matter implies the right to personal participation at the court proceedings from the adversarial principle and considers it a fundamental aspect of the right to a fair trial [5;150].

The author further notes that in comparative law, the presence of the accused at the proceedings is not only a right but in many countries it is also a duty which may be enforced if necessary by a penalty, by escorting a witness to the court or by custody. We can distinguish the systems where the presence of the accused is considered such an essential element of the process that the proceedings in the absence of the accused is only an exception, and is not permitted in the proceedings *in contumaciam* (common law, Germany); and the systems that seek a balance between the requirements of the adversary system and the needs of judiciary that should not be blocked or hindered by the fact that the accused avoids the prosecution. Therefore, these systems allow in a wider range to carry out the proceedings in absence of the accused and the proceedings *in contomaciam*, if the accused is on the run. A default judgment is usually cancelled and the proceedings is held again if the accused file a protest, if they are apprehended or they turns themselves in [5;150].

The author further notes that the Convention allows to enforce the presence of the accused, and that it follows from a number of the Court’s decisions that the accused is obliged to obey the court summons. Some of the judges stated in separate opinions that the accused’s duty to appear at the hearing is an important element of every criminal proceeding that is by its nature of a repressive character and that the Convention does not guarantee the accused the right not to participate at the proceedings concerning them. The opinion of Judge Bonello in Van Geyseghem that the accused has a right, not an obligation, to personal participation at the court proceedings has remained unfulfilled. However, in several cases the Court declared a violation of Article 6 (1), (3) c) of the Convention when the failure to appear by the accused was sanctioned by non-admitting their defence counsel into the proceedings. It stated that although the legislature may discourage the accused of unjustified absences, it may not sanction them by withdrawal of the right to consult a defence counsel. The legitimate requirement of presence of the accused at the hearing can be secured by means other than the loss of the right of defence.

Practically, every criminal procedure allows to carry out the hearing in absence of the accused in less serious matters if they were duly summoned and they fail to appear without an apology. The accused may in fact waive the right to personal participation at the court proceedings, and this practice is not contrary to the Convention if the waiver is voluntary and unambiguous. The waiver may be implied, i.e. upon failing to appear without an apology after duly summoned. The summons must be served into own hands of the accused. If the summons has not been served into own hands of the accused (...), the fact that the accused failed to appear cannot be considered an unequivocal waiver of their right personal participation at the hearing. The summons or notification must be served within a reasonable time and in a language that the accused understands. It is not enough that the accused learned about the proceedings indirectly and unofficially. If the accused is in custody, he must be allowed to personally participate at the hearing, however they must timely provide any necessary information to penitentiary authorities, states Repík [5;151].

Repík puts forth two other cases where the European case law allows the court to conduct the hearing in absence of the accused. Firstly, it is the proceedings before the appellate instance in which it depends on the nature of things, on the nature of the issues addressed and on the discretion of the court, whether the presence of the accused is required or not. According to the author, the presence of the accused is essential before the appellate instance that examines both the factual and legal issues. Likewise, the presence of the accused is usually necessary when deciding on punishment. On the other hand, if the decision concerns a cassation complaint, i.e. legal questions only, the presence of the accused is usually not necessary [5;151].

The third group of cases where the presence of the accused before court is not necessary under the European case law is proceedings against a fugitive. Repík notes that in terms of comparative law, the conditions for holding the proceedings against a fugitive are not uniformly regulated, nor is the course of proceedings, and the effects of apprehension or turning in of the accused to a default judgement. However, the default judgment is usually cancelled automatically after securing presence of the accused and a new proceedings is held in their presence [5;151].

Right of the Accused to Personal Participation at the Court Proceedings – Czech Legislation

The analysis of the Convention and the case law of the European Court of Human Rights is the basis for description of the Czech legislation securing presence of the accused during the acts of criminal proceedings. Similarly, in accordance with the previous interpretation of the European case law, we can distinguish the three situations: the presence of the accused in trying the matter at the main trial, the presence of the accused in trying the matter in the appellate proceedings and the proceedings against a fugitive.

a) presence of the accused in trying the matter at the main trial

The right of the accused to personal participation at the court proceedings is seen as an important element of the right to a fair trial. Although an explicit declaration of this right cannot be found in the provisions of Section 33 (1) of the CCP summarizing the rights of the accused, it can be inferred from their content.

In accordance with the European case law mentioned above, the Czech Code of Criminal Procedure understands the accused's right to personal participation at the court proceedings not as a caprice of the accused, but as an obligation to participate at the proceedings, i.e. an obligation to obey the summons and appear.

The presence of the accused in trying the matter at the main trial is also considered a concretization of the constitutional right of each person not to be denied their lawful judge and being tried by a duly constituted court (Art. 38 (1) of the Charter), as well as the right to have their case tried in public, without unnecessary delay, in their presence, and to express their opinion on all of the presented evidence (Art. 38(2) of the Charter) [6].

The importance of the defendant's right to personal participation at the main trial is also emphasized by the fact that it is one of the grounds for extraordinary appeal pursuant to Section 265b (1) d) of the CCP under which the extraordinary appeal may be filed if the provisions on presence of the accused at the main trial or in the public hearing were violated.

According to the case law of the Supreme Court of the Czech Republic, the purpose of the accused's right to personal participation at the court proceedings pursuant to Art. 38 (2) of the Charter is, in particular, to provide them with a real opportunity to comment on all the facts that found them guilty and on all the evidence on which the prosecution is based. An interference with this right can be considered acceptable if the court proceeded on a legal basis, and unless the court proceedings as a whole have been affected to such an extent and in such a manner that it lost the essential features of the right to a fair trial [7].

The personal and continuous presence of the defendant at the main trial arises also from the accusation principle, since only then the defendant may exercise all the procedural rights that belongs to them.

The presence of the defendant at the main trial in the Czech Code of Criminal Procedure is therefore a rule to which there are the exceptions allowing to hold the main trial in absence of the accused. These exemptions are set out in the provisions of Section 202 (1) of the CCP. Due to their importance, we quote them in the full text:

„Section 202

Presence at the Main Trial

(1) The main trial always takes place in the presence of all permanent members of the court, court reporters, and the public prosecutor.

(2) In the absence of the defendant, the main trial may be conducted only if the court considers that the matter can be reliably decided and that the purpose of criminal proceedings may be achieved even without the presence of the defendant, while

a) the indictment was properly served to the defendant and the defendant was properly and timely summoned to the main trial, and

b) on the act, which is the subject of the indictment, the defendant has already been heard by a law enforcement authority and the provisions on the initiation of criminal prosecution (Section 160) was complied with and the defendant was made aware of the opportunity to review the file and make petitions for the additions of the investigation (Section 166(1)).

(3) If the defendant does not appear at the main trial without a proper apology and the court decides that the main trial shall be held in the absence of the defendant, the transcripts of the interrogation of witnesses, experts and co-defendants may be read under the conditions set out in Section 211.

(4) The main trial, in the absence of the defendant, cannot be held if the defendant is in custody or is serving a prison sentence, or if it is a criminal offence for which the law provides prison sentence for an upper limit exceeding five years. In cases of necessary defence (Section 36) the main trial may not be conducted in the absence of the defence counsel.

(5) The provisions of the first sentence of Subsection 4 are not applicable if the defendant requests that the main trial is conducted in their absence. The provisions of Subsection 3 shall apply accordingly."

The essential condition for holding the main trial in absence of the defendant in the Czech criminal proceedings is compliance with the conditions set out in the introductory clause of the Section 202 (2) of the CCP, i.e. only if the court considers that the matter can be reliably decided and the purpose of criminal proceedings may be achieved even without presence of the defendant.

It means, in simple terms, that the court concludes that it is possible to perform the entire main trial to the required extent, to present evidence that the court deems necessary in the main trial, and that the equality of arms will be preserved by allowing the defendant to be represented by a counsel if necessary. It will be up to the court to consider in each case the specific evidence situation and to conclude if the main trial may be carried out even in absence of the defendant and whether their absence does not interfere with the principle of equality of arms.

In contrast, the factual complexity of the case or legal qualification are not primary aspects that the court should follow when considering whether to conduct the main trial with or without participation of the defendant.

The case law published in relation to the cited provision states that the condition under which the main trial may be conducted in absence of the defendant is when the court considers that the matter can be reliably decided and that the purpose of criminal proceedings may be achieved even without presence of the defendant (Section 202 (2) of the CCP) and it applies not only to the decision on guilt but also to the decision on punishment. Therefore, the main trial cannot be held in absence of the defendant if it requires a proper clarification of the circumstances relevant to the decision on punishment of the accused although it would be possible to reliably decide on their guilt even without their presence (File No. 57/1972 Coll. Dec. Pen.)

Another case law states that the term "duly summoned" under Section 202(2) a) of the CCP denotes serving the

summons into own hands of the accused; such service of the summons cannot be substituted by any affidavits of other persons that the accused has been notified by them on holding the main trial (No. 52/1975 Coll. Dec. Pen.).

If the main trial is held in absence of the defendant, it is necessary to preserve the principle of ensuring the rights of defence. This is the objective of the decision published under No. 33/2000 Coll. Dec. Pen. stating the principle under which in the cases of necessary defence (Section 36 of the CCP) the main trial cannot be held or continue in absence of a defence counsel even though the defence counsel is not present at the main trial because they agreed so with the defendant. In such a case, the holding of the main trial (its part) in the absence of the defence counsel would violate the accused's right to defence and the evidence presented in the absence of their defence counsel would be ineffective to this defendant.

The defendant's request to conduct the main trial in their absence (Section 202 (4) of the CCP) must be submitted personally by the defendant, not through a defence counsel, since the nature of these actions precludes such a practice. If the accused does not make the request orally in the transcript, they may do so in any other form of submission, i.e. in writing, via telegram, fax or telex (Section 59 (1) of the CCP); however, always in a way that does not make any doubts that the submission has been made personally by the defendant. The law does not allow to submit these acts over the phone (cf. No. 16/1998 Coll. Dec. Pen.).

If the defendant voluntarily and with knowledge of the case decides not to participate in the main trial and if the conditions for holding the main trial in their absence are met, the defendant voluntarily waives his right to personally inform the court of their opinion, as well as to personally comment on the evidence presented and to interrogate witnesses if needed. The Czech Code of Criminal Procedure permits in absence of the defendant at the main trial and in making the decision that the main trial will be held in their absence to read the transcripts of the testimony of witnesses, experts and co-defendants under the conditions set forth in Section 211 of the CCP.

In juvenile proceedings, the public hearing cannot be held without the participation of the juvenile (Section 64 (1) of the Juvenile Justice Act).

b) presence of the accused in trying the matter in the appellate proceedings

In the Czech criminal procedure, an appeal is the only ordinary remedy against a judgement of the court of first instance. The appellate court decides either in closed or public hearing.

The closed hearing shall take place in presence of all members of the court and the court reporter. Any other persons are excluded from participation in the closed hearing (Section 242 of the CCP). Mandatory participation of the public prosecutor in the closed hearing on appeal was repealed by the amendment to the Code of Criminal Procedure in 1993 as a provision contrary to the principle of procedural equality of the parties.

The closed hearing in the appellate proceedings is allowed facultatively (Section 263(1) of the CCP) in

order to simplify and expedite the proceedings, however, only to a limited extent. The closed hearing will be ordered especially when it is necessary to dismiss or to reject the appeal on formal grounds or if the decision can be made on the file basis without any oral hearing and presentation of evidence. However, the court may also decide the matter in the closed hearing only partially (e.g. to dismiss the appeal if it was filed late by an entitled person or to reject the appeal for failure to meet its requirements) and to refer the rest to the public hearing.

The public hearing is a regular form of proceedings before the appellate instance. The public hearing on appeal is governed by the Chapter fourteen of the Czech Code of Criminal Procedure. Beside these, the Czech Code of Criminal Procedure contains also a special provision under Section 263. Participation of the public prosecutor is always mandatory (Section 263 (2)). Participation of a defence counsel is mandatory under the same conditions as in the main trial (cf. Section 263 (3) a Section 36). Participation of the defendant is fundamentally desirable. In juvenile proceedings, the public hearing cannot be held without participation of the juvenile (Section 64 (1) of the Juvenile Justice Act).

In absence of the defendant who is in custody or serving a prison sentence, the public hearing may be held only if the defendant expressly declares that they waive their right to personally participate at the public hearing (Section 263 (4)). Such a declaration of the defendant does not relieve the court of its obligation to timely notify the accused of the date of the public hearing under Section 233 (cf. No. 19/1977 Coll. Dec. Pen.). If the defendant is at the liberty, it is possible to hold the public hearing in their absence only if they were properly served the summons, resp. notification (cf. Section 233 (2)) and the court is of the opinion that their attendance at the public hearing is not necessarily required (Section 233 (1)).

Under Section 233 (1) of the CCP, the defendant shall be summoned to the public hearing on appeal if their personal involvement in the public hearing is necessary; especially in the cases where the appellate court considers necessary to hear them, to invite them to comment the evidence presented in this public hearing, or to ask for clarification of their appeal, resp. to react on the appeal of the other party to the proceedings if they failed to appear at the public hearing. In other cases where personal attendance of the accused at the public hearing of the appellate court is not necessary, the accused shall be notified about this public hearing as the person who initiated the public hearing by their petition, reps. as the person who may be directly affected by the decision in this public hearing (No. 38/2003 – I. Coll. Dec. Pen.) [8; 622-623].

c) Proceedings against a Fugitive

Proceedings against a fugitive is a special type of criminal proceedings which logically takes place with-

out presence of the accused because they cannot be brought to justice since they evade criminal proceedings by staying abroad or by hiding (Section 302 of the CCP). The staying abroad itself, although unjustified, however not motivated by the effort to avoid the criminal proceedings, is not sufficient to commence the proceedings against a fugitive.

The proceedings against a fugitive may be held also in juvenile criminal cases because the Juvenile Justice Act does not exclude such a method of proceedings (File No. 54/2007 – I Coll. Dec. Pen.).

The Czech Code of Criminal Procedure conceives the proceedings against a fugitive as an ordinary proceedings characterized by various deviations from the regular course of the proceedings.

The Czech Code of Criminal Procedure provides a specific procedure that is called the proceedings against a fugitive (Sections 302 to 306a). The proceedings against a fugitive under Section 302 et seq. can only be held against the accused, i.e. a person against whom the criminal proceedings have been commenced (Section 32), even if it is held in a subsidiary form under Section 303. If the proceedings against a fugitive is held, it is logically conceptually impossible to initiate the criminal prosecution pursuant to Section 160 (1) of the CCP; the Code of Criminal Procedure therefore provides a specific method of initiation of criminal prosecution respecting the principle of serving all the records of the accused to their defence counsel (Section 303 (1)).¹

The deviations from the general principles of criminal proceedings applicable in the proceedings against a fugitive shall apply to all stages of criminal proceedings, while the grounds for this special procedure do not have to exist from the commencement of criminal proceedings and can occur at any time in their course; in such a case it is necessary to proceed pursuant to the provisions of the Subdivision two of the Chapter twenty of the Code of Criminal Procedure since the time when such grounds arose.

In contrast, if the proceedings against a fugitive is held and the grounds for conducting such a proceedings cease to exist before termination of the criminal proceedings because the presence of the accused can be secured, i.e. when the accused returned from abroad where they were evading the criminal proceedings, the prosecution shall proceed pursuant to the general provisions of the Code of Criminal Procedure, not pursuant to the special provisions for the proceedings against a fugitive under Section 302 et seq. – cf. No. 20/1975 Coll. Dec. Pen.

The Court is therefore obliged to investigate during the criminal proceedings whether the grounds for the proceedings against a fugitive still apply. See also No. 58/1975 and No. 38/1995 Coll. Dec. Pen.

In the proceedings against a fugitive, the accused must always have a defence counsel pursuant to Section 304; the defence counsel has the same rights as the accused and any documents designated for the accused are served only to the defence counsel (Section 306 (1)). The method of service of documents to the accused's defence counsel in the proceedings against a fugitive is exactly the same as if the documents are served on the

¹ Under Section 303(1) of the Czech Code of Criminal Procedure, the criminal prosecution in proceedings against a fugitive shall commence by serving of the resolution to initiate criminal prosecution of the accused to the defence counsel. If a defence counsel is not yet appointed to them, they must be appointed.

accused. This implies that the summons to the main trial or public hearing and the judgement in the proceedings against a fugitive must be served into own hands of the accused under Section 63 (1), (3) – cf. No. 71/1980 – II. Coll. Dec. Pen.

The defence counsel of the accused is not considered a person entitled to file an appeal against the decision under Section 64 (1) b); thus it is usually sufficient to deliver them a copy of the judgment in the manner specified in Section 64 (3); however, this does not apply to a defence counsel of the accused in the proceeding against a fugitive and also e.g. to a defence counsel of a deceased – see No. 20/1973 – I. Coll. Dec. Pen.

The criminal prosecution in the proceedings against a fugitive shall commence by serving the resolution to initiate criminal prosecution of the accused to the defence counsel (Section 303 (1)).

The proceedings against a fugitive, i.e. without personal presence of the accused, is possible if these statutory conditions are met:

- a decision to hold the proceedings against a fugitive is issued upon the petition of the public prosecutor or even without it; the petition of the public prosecutor can be incorporated into the indictment (Section 305), the decision may be made even later, e.g. at the stage of the main trial or in the appellate proceedings if the grounds for holding the proceedings against a fugitive occurred in its course; if the conditions for holding the proceedings against a fugitive pursuant to Section 302 are not proved, the court remands the case to the public prosecutor for an additional investigation under Section 188 (1) e) – cf. No. 4/1971 Coll. Dec. Pen.; on the other hand, the fact that the accused, who at the time of preliminary hearing was illegally abroad and against whom the proceedings against a fugitive was held pursuant to Section 302 et seq. returned after filing the indictment to the territory of the country does not itself justify the procedure under Section 188 (1) e) of the CPP; if the matter is adequately clarified and there are no other grounds for which it would be necessary to remand the case for further investigation to the public prosecutor, the court continues the prosecution of the accused under the general provisions of the Code of Criminal Procedure Code (cf. No. 43/1972 Coll. Dec. Pen.);

- an indictment against the accused was filed; however, does not require to be served on the fugitive;

- the offender cannot be brought before the court because they evade criminal proceedings by residing abroad or hiding.

In contrast to the main trial and public hearing on appeal against the defendant that is not present, the previous interrogation of the accused is not necessary in proceedings against a fugitive.

The summons to the main trial and the public hearing shall be published in an appropriate manner. The main

trial (resp. public hearing) shall be performed even in the absence of the defendant, regardless of whether the accused knows about it (Section 306 (2)). An omission of the duty to publish the summons to the main trial and public hearing in an appropriate manner is a very serious procedural defect in the proceedings against a fugitive, resp. it is a similar procedural defect as if the summons is not duly served on the accused (No. 71/1980 – I. Coll. Dec. Pen.).

If the grounds for the proceedings against a fugitive ceased to exist, the proceedings shall continue within the meaning of Section 306a (1) of the CCP pursuant to the general provisions. If the accused requests so, the evidence presented in the previous court proceedings shall be presented before the court again if they are admissible by their nature or if their recurrence is not prevented by another significant fact; otherwise the transcripts on the performance of such evidence is read to the accused and they shall be allowed to comment on them.

If the proceedings against a fugitive had ended with a final convicting judgment and the grounds for holding the proceedings against the fugitive then ceased to exist, the court of the first instance shall revoke such judgment upon the petition of the convicted if it is filed within eight days of serving of the judgment, then the main trial shall be conducted again to the extent provided by Section 306a (1). Upon serving of the judgment, the convicted must be instructed on their right to petition for the revocation of the final convicting judgment. The court proceeds accordingly if an international treaty, by which the Czech Republic is bound, requires it.

If the prosecution was conducted in the form of proceedings against a fugitive after the court of first instance delivered the judgment (e.g. because the accused went into hiding after that), thus only before the appellate court by whose decision the case has been finally terminated, the main trial is not repeated when filing the petition under Section 306a (2), and the court of the first instance shall only revoke the judgment of the appellate court and return the case to the appellate court for a new decision on appeal (No. 10/2010 Coll. Dec. Pen.).

Moreover, the prohibition of *reformatio in peius* under Section 306a (3) is applied in relation to the original convicting judgement, and thus the judgement in the new proceedings cannot be altered against the accused [9; 750-753].

In conclusion, it can thus be stated that the Czech Code of Criminal Procedure, as regards the accused's right to personal participation at the court proceedings, respects and guarantees this right adequately. In cases where it is clear, based on the circumstances of the case, that the matter can be decided and the purpose of criminal proceedings can be achieved even without presence of the accused, it allows, in accordance with the EU case law, to carry out the court proceeding even in absence of the accused.

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