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Medzinárodný internetový vedecký časopis zameraný na právne otázky v interdisciplinárnych súvislostiach

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917 01 Trnava
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E-mailová adresa redakcie:
sei.journal@gmail.com

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sei.journal@gmail.com

Hlavný redaktor:
Doc. JUDr. Marianna Novotná, PhD., univ. prof.

Editor in Chief:
Doc. JUDr. Marianna Novotná, PhD., univ. prof.

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Editoriál k zimnej edícii SOCIETAS ET IURISPRUDENTIA 2024

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dovoľte, aby som Vám predstavila štvrté číslo dvanásteho ročníka SOCIETAS ET IURISPRUDENTIA, medzinárodného internetového vedeckého časopisu zameraného na právne otázky v interdisciplinárnych súvislostiach.

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prvá štúdia ponúka čitateľom veľmi komplexný a podrobný pohľad na kľúčové a mimoriadne aktuálne otázky smerovania pracovnoprávnej úpravy zameranej na oblasť športu v Slovenskej republike. Nasledujúca štúdia prináša právnu analýzu využitia mimosúdneho technického dohľadu v trestnom rozhodovaní z národného rumunského pohľadu, ako aj z európskeho pohľadu. Tretia a v poradí posledná štúdia predstavuje systematickú a hĺbkovú analýzu smerovania pracovnoprávneho súdnictva v Českej republike.

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Verím, že časopis SOCIETAS ET IURISPRUDENTIA poskytne podnetnú a inšpiratívnu platformu pre komunikáciu na úrovni odbornej aj občianskej verejnosti, a rovnako tiež pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

V mene celej redakčnej rady a redakcie časopisu SOCIETAS ET IURISPRUDENTIA

s úctou,

Jana Koprlová

Trnava 31. december 2024

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Editorial for Winter Edition of the SOCIETAS ET IURISPRUDENTIA 2024

Dear readers and friends,

let me introduce the fourth issue of the twelfth volume of SOCIETAS ET IURISPRUDENTIA, an international scientific online journal for the study of legal issues in the interdisciplinary context.

The journal SOCIETAS ET IURISPRUDENTIA is issued under the auspices of the Faculty of Law of the Trnava University in Trnava, Slovakia, and it thematically focuses mainly on socially relevant interdisciplinary relations connected with issues of public law and private law at the national, transnational and international levels, while accepting and publishing exclusively original, hitherto unpublished contributions. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal is issued in an electronic on-line version four times a year, regularly on March 31st, June 30th, September 30th and December 31st, and it offers a platform for publication of contributions in the form of separate papers and scientific studies as well as scientific studies in cycles, essays on current social topics or events, reviews on publications related to the main orientation of the journal and also information or reports connected with the inherent mission of the journal.

The website of the journal SOCIETAS ET IURISPRUDENTIA offers the reading public information in the common graphical user interface as well as in the blind-friendly interface designed for visually handicapped readers, both parallel in the Slovak as well as English languages. In both languages the journal's editorial office provides also feedback communication through its own e-mail address. At the same time, the website of the journal offers readers due to the use of dynamic responsive web design accession and browsing by using any equipment that allows transmission of information via the global Internet network.

The current, fourth issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA offers a total of three separate scientific studies. The very first study offers readers a very comprehensive and de-

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tailed view of the key and extremely topical issues of direction of the labour law regulation focused on the field of sports in the Slovak Republic. The following study brings a jurisprudential analysis of the use of extrajudicial technical surveillance in criminal decision-making from the national Romanian perspective as well as the European perspective. The third, final study presents systematic and thorough analysis of the direction of the labour justice in the Czech Republic.

In relation to the release of the fourth issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA we are pleased to inform all its readers, contributors as well as fans that the journal has been registered in the Directory of Open Access Journals (DOAJ) as well as in international scientific databases Crossref, ERIH PLUS and Index Copernicus International and applied for registration in other international scientific databases. At the same time, we would like to inform that till the date of the new issue, the journal's websites had recorded a total of 152 countries of visits (in alphabetical order):

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151. Zambia
152. Zimbabwe

On the occasion of launching the fourth issue of the twelfth volume of the journal, I would be delighted to sincerely thank all the contributors who have contributed in it actively and have shared with the readers their knowledge, experience or extraordinary views on legal issues as well as the top management of the Faculty of Law of the Trnava University in Trnava, all friends, colleagues, employees of the Faculty of Law, the rector's administration at the Trnava University in Trnava for all support and suggestive advices and, finally, also the members of journal's editorial board and the editorial team.

I believe that the journal SOCIETAS ET IURISPRUDENTIA provides a stimulating and inspirational platform for communication both on the

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professional level and the level of the civic society as well as for scientific and society-wide beneficial solutions to current legal issues in context of their broadest interdisciplinary social relations, in like manner at national, regional and international levels.

On behalf of the entire editorial board and editorial office of the journal SOCIETAS ET IURISPRUDENTIA,

Yours faithfully,

Jana Koprlová

Trnava, Slovakia, December 31st, 2024

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The 2024 Draft Amendment to the Sports Act: Labour Disputes in Sports *de lege ferenda*[1]

Tomáš Gábriš

Abstract: *The paper analyses the recently introduced draft amendment to the Sports Act of the Slovak Republic, dealing thereby solely with one specific aspect of this draft bill, namely that of dispute resolution in sports. Solutions to legal problems related to dispute resolution in sports are introduced in the bill, reflecting various proposals which were suggested previously by the Slovak sports lawyers and sports experts. The draft amendment can, therefore, be considered a viable way of solving many of the theoretical and practical problems in the field.*

Key Words: *Sports Law; Dispute Resolution; Court of Arbitration; the Slovak Republic.*

Introduction – the draft amendment overview

In the Autumn of 2024, the Slovak Ministry of Sports introduced a long-awaited draft amendment to the Slovak Sports Act (Act No. 440/2015 Coll.),[2] aimed at resolving numerous critical issues arising in the sporting practice. In this paper, we shall focus solely on one of the problems that is being addressed by the draft amendment – namely the problems and legal issues concerning dispute resolution in sports. The proposed amendment to the Sports Act thereby preserves the already existing mechanisms of dispute resolution, including judicial dispute resolution, but also introduces some novel mechanisms.

Judicial dispute resolution should remain the prime route of dispute resolution first of all in the provisions of Section 28(2) and (3) of the Sports Act, according to which, if the Olympic symbols are used by an un-

[1] The paper is an outcome of the grant project VEGA 2/0073/23: *"Athlete – Employee or Entrepreneur?"*, in the Slovak original *"Športovec – zamestnanec alebo podnikateľ?"*, responsible researcher prof. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA.

[2] The Act replaced the previous Act on Organization and Support of Sports which was in fact very brief and deficient in many aspects which were simply left out of the scope of the Act. See ČORBA, J. The Slovak Act on the Organization and Support of Sport; a Missed Opportunity?. *The International Sports Law Journal*. 2009, vol. 9, no. 3-4, pp. 65-70. ISSN 1567-7559.

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authorized person or if they are used in violation of paragraph (1), the Slovak Olympic and Sports Committee shall call on this person to cease the unauthorized use and to compensate for damage, harm or to render the corresponding unjustified enrichment gained by the use of the relevant symbols. The court in civil contentious proceedings is competent to hear and decide such disputes should the person not comply with the call from the Olympic Committee. This mechanism of dispute resolution via general civil courts is newly regulated in the draft amendment in greater detail than previously.

Besides the cases of judicial dispute resolution, the draft amendment preserves areas where the extra-judicial dispute resolution is preferred. This is the case of autonomous dispute resolution at the level of sports organizations (national sports associations) which have established their own dispute resolution mechanisms already under the existing Sports Act of 2015. In addition, however, according to the proposed draft amendment from 2024, the Slovak Olympic and Sports Committee should also be obliged to establish a special body for autonomous dispute resolution, as a potential common (joint) body serving for those national sports associations, which have not yet been able to staff their own dispute resolution bodies or failed to make them operational. Those (especially smaller) national associations lacking financial means and personnel to run such a body would gain an opportunity to submit to the tribunal established by the Olympic Committee – serving either in the first instance or in the appeal proceedings in various types of sporting disputes; the common dispute resolution body could thereby serve also as a common disciplinary body. However, the aforementioned submission to the body created by the Olympic Committee is not imposed on national sports associations as an obligation, but is suggested to be rather an option only. There is namely an assumption that some associations, the football association in particular, which has a functional Dispute Resolution Chamber, might not be interested in submitting their disputes to this common body, preferring instead to retain their current structure of dispute resolution bodies.

Besides this change, at the same time, the draft amendment also proposes to supplement the existing provision of Section 52 of the Sports Act, dealing with autonomous dispute resolution, with new paragraphs (5) and (6). These should introduce a legal requirement for providing reasons and justification in any and all decisions of the autonomous dispute resolution bodies. The justification is to represent a mandatory part

of any decision of a dispute resolution body. This requirement is related to the right to a fair trial before the dispute resolution body and, at the same time, it is intended to make it possible to better review such decisions by general courts, should that be the case. The amendment to the Sports Act namely also aims to clarify the existing issues as to the jurisdiction conflict between general civil courts under the civil contentious litigation procedure, and the jurisdiction of administrative courts. In this respect, the amendment makes it clear that the decisions are to be reviewed in civil contentious litigation proceedings.

Still, any judicial review is to remain only a secondary option – court review of a decision of a dispute resolution body would be possible only against final decisions of the dispute resolution bodies and only at the request of the person concerned. This is aimed at resolving another important legal issue – as to the competition of jurisdictions between autonomous dispute resolution in sports and judicial dispute resolution. This issue has namely arisen in sporting practice since the entry into force of the Sports Act No. 440/2015 Coll., but has not been clarified so far in judicial practice.

In order to highlight the importance of the draft amendment for the dispute resolution in sport further, in this paper, we shall explain in greater detail the existing problems that the amendment is addressing. Should the amendment be successful, it would namely finally settle numerous doctrinal disputes and would introduce a clear system of dispute resolution in sports, including cases of sporting labour disputes, where the players are claiming their rights as employees. Thus, in general, we argue for the positive effect of the draft amendment that is being currently debated in the Slovak Parliament and fully recommend its adoption, despite the political discrepancies between the Members of the Parliament as to some partial aspects of this amendment.[3]

1 Dispute resolution in sports – the state of the art in Slovakia

Sports and the performance of dependent work in sports is an area that is not void of legal disputes. Thereby, the method of resolving disputes in sports in Slovakia is similar to the resolution of disputes in labour law

[3] On the role of politics in the Slovak sports see VARMUS, M., M. BEGOVIC, M. MIČIAK, M. ŠARLÁK and M. KUBINA. The Development of Sports Policy in Slovakia. *Sports Law, Policy & Diplomacy Journal* [online]. 2024, vol. 2, no. 1, pp. 107-133 [cit. 2024-10-15]. ISSN 2975-6235. Available at: https://doi.org/10.30925/slpdj.2.1.6.

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known in Czechoslovakia before 1989 (in the Communist era), and dissimilar to the currently accepted ways of resolution of labour disputes in Slovakia, which are being entrusted solely to general courts. In 2015, the Sports Act namely entrusted the resolution of (not only) labour disputes in sports to special extrajudicial bodies, mandatorily created by the national sports associations (hereinafter referred to as the "NSAs" or the "NSA"). This is a situation not unlike the situation before 1989, when in Slovakia, in the area of resolving labour disputes, various trade union conciliation and arbitration commissions primarily operated as special bodies for resolving such disputes at the individual workplaces or in individual factories. After 1989, this situation in labour law changed dramatically – by introducing mandatory dispute resolution by general courts, which is even today explicitly expressed in the provision of Section 14 of the Labour Code of the Slovak Republic: *"Disputes between an employee and an employer regarding claims arising from employment relationships shall be heard and decided by the courts."* Still, due to the Sports Act, an exception to this regulation exists – in the area of resolving employment disputes in sports, where one can witness a kind of return to the idea of sectoral bodies for resolving disputes out-of-court.

Specifically, in the provision of Section 19(1)(g), the Sports Act from 2015 assumes that *"disputes that arise from the sports activities of the national sports association and persons with its affiliation are to be resolved by dispute resolution bodies, …"* According to the provision of Section 19(1)(f), concerning the NSAs and their bodies, *"the highest body elects members of the highest executive bodies, chairmen and vice-chairmen of disciplinary bodies, dispute resolution bodies, licensing bodies and control bodies, if they are not elected directly by members of the national sports association"*. The above, therefore, resulted in a requirement that each NSA creates its own bodies for resolving (deciding) disputes, including labour disputes in sports. The NSA is obliged to create such bodies also based on the provisions of Section 52 of the Sports Act, regulating the jurisdiction of these bodies and some procedural safeguards as to their competences.[4] According to the explanatory report to the Sports Act:

[4] *(1) A sports organization shall exercise, in accordance with its regulations, the jurisdiction to resolve disputes pursuant to paragraph (2) over persons within its jurisdiction.*
(2) Dispute resolution bodies are authorized
a) to decide disputes arising in connection with the sports activities of a sports organization and persons affiliated with it,
b) impose sanctions and measures for violations of competition rules, regulations or decisions of the bodies of a sports organization,

"The aim of the proposed regulation is to provide space for sports organizations to autonomously resolve disputes within a specific sports organization, as well as to impose and enforce disciplinary sanctions against persons affiliated with a specific sports organization."[5] The aim was thus to strengthen the autonomy of sports even in the field of dispute resolution by way of introducing mandatory creation of dispute resolution bodies at the level of each NSA.

The proceedings before these autonomous bodies are initiated on the basis of a petition to initiate proceedings filed by one of the parties to the dispute. The proceedings are governed by the accusatory principle, whereby the burden of proof is in principle to be borne by the party who filed the petition to initiate proceedings. However, the details of the proceedings are essentially regulated by the national sports federations themselves, with the sole statutory condition of ensuring the implementation of the principle of a fair trial.[6]

Previously, before the entry into force of the Sports Act of 2015, the NSAs were free to choose from any type of dispute resolution and any type of bodies – be it arbitration commissions, or chambers for dispute resolution, or even a special arbitration court established under the Arbitration Act (Act No. 244/2002 Coll.). In connection with the latter method of dispute resolution, i.e. arbitration, this was mostly used by the Slovak Football Association before it shifted to establishing a Dispute Resolution Chamber following the models of FIFA (La Fédération internationale de football association) dispute resolution chamber. By now, some minor NSAs make use of the arbitration courts, but these are in fact rather used by non-sporting entities to have their property disputes resolved that have nothing to do with sports at all.

The reason for the lesser use of arbitration in the Slovak sport is thereby also the fact that in the Slovak conditions there is a doctrinal dis-

c) review decisions of bodies of sports organizations under its jurisdiction,
d) examine the compliance of the regulations of sports organizations with their founding document (i.e. statutes)…

[5] Vládny návrh zákona o športe a o zmene a doplnení niektorých zákonov: Dôvodová správa – osobitná časť. In: *Národná rada Slovenskej republiky* [online]. 2015 [cit. 2024-10-15]. Available at: https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=5693.

[6] Provision of Section 52(3) of the Sports Act: *"(3) Dispute resolution bodies shall exercise their powers pursuant to paragraph (2) in accordance with the rules of the competition, the regulations of the sports organization to which they belong, and international sports rules, regulations and decisions, while observing the principles of fair trial."*

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pute whether arbitration courts can in fact decide sports disputes at all, and especially labour disputes between professional athletes and sports organizations;[7] in arbitration proceedings, only property disputes are namely to be resolved, which may not be sufficient for the multidimensional nature of sports disputes. We are summing up this doctrinal debate in the following chapter of this paper.

2 Arbitrability of sporting labour disputes?

In relation to the applicability of the arbitration to sports, the provision of Section 14 of the Labour Code of the Slovak Republic (Act No. 311/2001 Coll.) is particularly controversial, which might represent an obstacle to the resolution of sports disputes in arbitration proceedings. The provision of Section 14 of the Labour Code namely stipulates: *"Disputes between an employee and an employer regarding claims arising from employment relationships shall be heard and decided by the courts."* It is not clear whether this provision includes also an arbitration court.

Still, with respect to sportspeople, the provision of Section 2(3) of the Labour Code stipulates that the Labour Code shall apply to professional athletes only if a special legislation (Sports Act) provides for this. In this context, the Sports Act indeed explicitly refers to the Labour Code in several places, and in the provision of Section 46(2) of the Sports Act summarily lists those provisions of the Labour Code that are applicable to professional athletes. However, neither the provision of Section 46(2) of the Sports Act, nor any other provision of the Sports Act refers to Section 14 of the Labour Code as being applicable to sportspeople. This is the basis for our claim that Section 14 of the Labour Code does not apply to labour relations of athletes and sports organizations and that these disputes are, therefore, freely arbitrable.

However, one has to take into account also Section 1(1) of the Arbitration Act, according to which this Act regulates *"... the resolution of disputes arising from domestic and international commercial and civil law re-*

[7] ČOLLÁK, J. Kto bude riešiť pracovnoprávne spory profesionálnych športovcov a klubov v športe alebo – prečo je (vždy) nutné hľadieť z výšky. In: *UčPS – Učená právnická spoločnosť* [online]. 2016-04-25 [cit. 2024-10-15]. Available at: http://www.ucps.sk/riesenie_pracovnopravnych_sporov_v_sporte_profesionalny_sportovec_klub_jaroslav_collak; and ŠTEVČEK, M., T. GÁBRIŠ and L. PITEK. Arbitrabilita športových sporov (alebo prečo sa pri „nutnom" hľadení z výšky vždy oplatí pozerať si pod nohy). In: *UčPS – Učená právnická spoločnosť* [online]. 2016-08-10 [cit. 2024-10-15]. Available at: http://www.ucps.sk/Arbitrabilita_sportovych_sporov.

lations…" Opponents of the arbitrability of sporting labour disputes argue here with the term "civil law" which allegedly does not include "labour law" relations, meaning the impossibility to arbitrate disputes between athletes and their clubs. Still, at the same time, Section 1(2) of the Arbitration Act allows for arbitration of all disputes in which a settlement agreement can be concluded under the Civil Code of the Slovak Republic. The settlement of disputes between an athlete and a club is thereby a settlement governed exclusively by the general provisions of civil law (specifically by Section 585 of the Civil Code No. 40/1964 Coll., as amended), and is thus clearly a settlement according to the Civil Code – again making this type of disputes arbitrable. The aforementioned thus indicates that disputes in sports should be considered arbitrable in the broadest sense (interpretation *in favor arbitrii*). Nevertheless, there are still some doubts as to the arbitrability of sports disputes, which have to do mostly with the efforts to protect the athlete as the weaker party, which serves as an argument against the arbitrability of such disputes.

The above problem was to be partially solved by the previous (unsuccessful) draft proposal of a new Sports Act from 2023,[8] which suggested here a somewhat surprising solution – it assumed that athletes would no longer carry out their activities in an employment relationship, but in a relationship that would be categorized as a *sui generis* relationship.[9] The arbitrability of this type of disputes would thus be definitely confirmed, since no issues with employment aspects would have to be taken into account.

Nevertheless, instead of a wider use of arbitration, the proposed Sports Act from 2023 (not accepted by the Parliament in the end) still gave priority to the autonomous dispute resolution at the level of the NSAs, entrusting the NSAs with the authority, but also the obligation, to ensure the resolution of disputes via autonomous dispute resolution bodies, lacking the form of an arbitration court.

[8] Parlamentná tlač 1554. In: *Národná rada Slovenskej republiky* [online]. 2023 [cit. 2024-10-15]. Available at: https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=1554.

[9] Building up thereby on an earlier Amendment to the Sports Act (from 2020), which allowed the player to choose between their status as workers or self-employed. See GÁBRIŠ, T. The Status of Professional Players between Self-employed and Employee Status: State of the Art in Slovakia and in East-Central Europe. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* [online]. 2020, vol. 41, no. 3, pp. 847-863 [cit. 2024-10-15]. ISSN 1846-8314. Available at: https://doi.org/10.30925/zpfsr.41.3.9.

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3 Competition of jurisdictions between autonomous bodies and courts

Despite NSAs having the obligation to establish their own dispute resolution mechanisms, the actual relationship of these bodies to general civil courts or to administrative courts was never explicitly addressed by the legislator. General civil courts themselves thereby often accepted the jurisdiction of sports bodies and refused to decide on sports cases with the argument that the Sports Act entrusts the adjudication of disputes in sports to special bodies of the NSAs,[10] being "other bodies" under the Civil Contentious Litigation Code of the Slovak Republic (Act No. 160/2015 Coll.), which means they take precedence before a judicial dispute resolution[11] in a sense of a shared jurisdiction.[12] The jurisdiction of sports bodies for dispute resolution thus represents, according to current judicial practice, an obstacle to the jurisdiction of a general civil court, if the given matter, a dispute between the plaintiff and the defendant, is a dispute that falls under the jurisdiction of a body for dispute resolution under the Sports Act.

This issue of the relationship and mutual competition between judicial and extrajudicial means of dispute resolution was recently explicitly addressed by the Competence Senate of the Supreme Court and the Supreme Administrative Court in the proceedings under file no. 1SKomp/38/2022 dated October 6, 2022. In the above case, the dispute resolution body of the Slovak Ice Hockey Federation – the Arbitration Board – expressly refused to resolve a dispute and submitted the dispute to the competent court. The Competence Senate thereby explicitly confirmed the rule that such disputes are to be decided by bodies under the Sports Act, and not by general courts. According to the Competence Senate, the

[10] E.g., *Decision of the District Court in Humenné Ref. No. 11C/26/2018* [2019-01-29], confirmed by the Regional Court in Prešov, *Decision of the Regional Court in Prešov Ref. No. 5Co/31/2019* [2019-06-06]. Similarly, reference can be made to *Decision of the District Court in Trenčín Ref. No. 37Cb/226/2017* [2021-06-11]. The District Court in Veľký Krtíš also ruled similarly in *Decision of the District Court in Veľký Krtíš Ref. No. 12Cb/18/2018* [2018-10-05].

[11] Namely, according to Article 1, disputes arising from the threat or violation of subjective rights are heard and decided by an independent and impartial court, unless such jurisdiction is entrusted by law to another body. In this spirit, also according to Article 3, courts hear and decide private law disputes and other private law matters, unless they are heard and decided by other bodies established according to law.

[12] See in particular *Decision of the Regional Court in Prešov Ref. No. 5Co/31/2019* [2019-06-06].

jurisdiction of general courts in this case was in the end given only because: (1) the Arbitration Board refused to decide the dispute, (2) it was a non-sporting dispute, and, in addition, (3) the internal regulations of the relevant NSA in this case established the jurisdiction and competence of general courts. The decision of the Competence Senate, therefore, confirmed that the jurisdiction of general courts is not given where the jurisdiction of the bodies to resolve disputes under the Sports Act and internal sporting rules is established.

4 A joint "arbitration court" for dispute resolution under the Sports Act?

Since we argue that labour disputes in sports can and should be resolved by the NSA bodies, and we also accept the arbitrability of labour disputes in sport, we can at this point attempt to connect these two lines of reasoning within a hypothetical question of whether an arbitration court under the Arbitration Act could serve as a common dispute resolution body that the 2024 draft amendment to the Sports Act expects to be established under the auspices of the Slovak Olympic and Sports Committee.

Such a situation could have hypothetically occurred even under the currently valid wording of the Sports Act, for example, should the NSA (or several NSAs) lay down in their internal regulations of the supreme power, i.e. in their statutes, that an arbitration court established under the Arbitration Act will serve as their dispute resolution body. The Sports Act does not explicitly exclude such a possibility, specifying only the requirement that the NSAs should ensure the resolution of disputes in sports by special dispute resolution bodies.

The only apparent hindrance under the current wording of the Sports Act is that the provision of Section 19(1)(f) of the Sports Act requires that *"the highest body shall elect members of the highest executive bodies, chairmen and vice-chairmen of disciplinary bodies, dispute resolution bodies, licensing bodies and control bodies, if they are not elected by the members of the national sports association directly"*; thus, members of such a body (arbitration court) are to be elected at the general assembly of the NSA. Theoretically, it is possible to imagine a situation where the NSA would elect at its general assembly all the arbitrators from the list of arbitrators kept by the arbitration court. Such an arbitration court and its arbitrators would thus in fact acquire a kind of a dual status – being arbitrators of the arbitration court under the Arbitration Act, and, at the

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same time, being members of the dispute resolution body under the Sports Act. This would thereby have significant legal consequences from the perspective of both concerned Acts – in those issues that would be considered arbitrable under the Arbitration Court, the decisions of this body and its arbitrators could be considered enforceable titles, as it is generally the case regarding decisions of an arbitration court. On the other hand, in those issues where arbitrability is questionable, the decisions of this body would be considered a decision by a dispute resolution body under the Sports Act and would thus again constitute an obstacle to legal proceedings before ordinary courts.

Still, despite this possibility to reconcile the Arbitration Act and the Sports Act, one very important aspect is to be mentioned. The sports sector in general does not necessarily need a proper "arbitration court", not the enforceable titles of the same legal force as the decisions of general courts. In fact, a joint body of several NSAs does not need to have the nature of an arbitration court within the meaning of the Arbitration Act, because in sports movement, decisions of sports bodies are fundamentally enforced not by bailiffs (executors), but primarily, and almost exclusively, by the bodies of sports associations, especially disciplinary committees. Under the threat of disciplinary sanctions and even expulsion from the sports association, disciplinary bodies effectively enforce compliance with the internal regulations of sports associations and with the decisions of their bodies. This is in fact also how the decisions of the Court of Arbitration for Sport (CAS) in Lausanne are being enforced.

It is, therefore, clear that should the NSAs in the Slovak Republic decide to have their disputes resolved by a single (common) body, its decisions would be practically enforceable by disciplinary committees regardless of whether the body would have the nature of an arbitration court under the Arbitration Act, or only a nature of a dispute resolution body under the Sports Act. Having the status of a dispute resolution body under the Sports Act would in fact be easier, since no theoretical and practical arbitrability issues under the Arbitration Act would need to be addressed. That is actually the way that the 2024 draft amendment to the Sports Act is rightly taking.

This is in contrast with the approach that the legislator attempted to come up with in 2023, when the draft of the new Sports Act (which failed to be enacted in 2023) included the explicit provision on the possibility of creating a joint body for resolving disputes – albeit, preferably in the

form of an arbitration court. In the provision of Section 9(5) of the draft Sports Act from 2023, the following norm was namely assumed: *"If a national sports association or national sports organization does not have the conditions to establish a dispute resolution body with jurisdiction under paragraph (2), it may stipulate in the founding document that disputes of persons affiliated with it shall be decided by a joint dispute resolution body established in cooperation with another sports organization or an arbitration court, unless the regulations of an international sports organization provide otherwise."*

The legislator thereby did not intend to regulate the details and left them to the internal regulation of sports organizations. However, in the legislative process, based on consultations with the Ministry of Justice, a solution was proposed, which was to supplement the draft Sports Act with the establishment of a special nationwide arbitration court for sports, serving as a special arbitration body of the Slovak Republic. This court was thereby assumed to exclude the jurisdiction of the courts of the Slovak Republic – specifically, Section 9 of the draft Sports Act was to be supplemented with paragraph (7), which reads: *"(7) If all means of ensuring justice within the competence of the dispute resolution bodies under the regulations of the national sports federation or national sports organisation have been exhausted, the decision of the dispute resolution body of the national sports federation or national sports organisation shall not be reviewable by a court of general jurisdiction or an administrative court."*

Justification of this proposal ran as follows: *"Dispute resolution in sports is primarily based on the principle that every person affiliated with a national sports association should have access to justice and the opportunity to refer their case to a competent dispute resolution body, which should respect the principles of a fair trial and be created in accordance with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, the Sports Act respects the diverse conditions and possibilities of individual associations, and, therefore, also allows for the creation of a joint dispute resolution body by several national sports associations or several national sports organizations. However, if the NSA or NSO has not created a dispute resolution body, it is proposed to explicitly refer to arbitration regulated by this Act. The Arbitration Court shall be established by the Slovak Olympic and Sports Committee, and its jurisdiction shall include single-instance proceedings in matters of persons affiliated to the NSA or NSO that have not established their own dispute resolution bodies, as well as second-instance jurisdiction in matters that*

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have been decided at the level of the NSA or NSO dispute resolution bodies. Given the expanded possibilities for dispute resolution and the specificity of sport, the jurisdiction of general courts is excluded and the matter will be finally decided at the level of the NSA or NSO dispute resolution body or arbitration proceedings at the Court of Arbitration."

The Court of Arbitration was thus to exercise jurisdiction pursuant to Section 9(2) if the NSA or a national sports organization (hereinafter referred to as the "NSO") failed not establish their own dispute resolution body or if they wished to submit to the Court of Arbitration in first instance. Additionally, the Court of Arbitration was to have the authority to review decisions of the dispute resolution bodies of the NSA or the NSO in second instance. However, the right to a hearing by the Court of Arbitration was to expire after six months from the date of entry into force of the final decision reached at the level of a NSA or a NSO.

The conditions imposed on referees of the Court of Arbitration were to be also specially regulated, as only a natural person could become a referee who:

a) is a citizen of the Slovak Republic,
b) is of full integrity,
c) has full legal capacity,
d) has obtained a second-level university education in the field of law at a law faculty of a university in the Slovak Republic or has a recognized document of second-level university education in law issued by a foreign university; if the person has obtained a university education first in the first level and then in the second level, they are required to have obtained education in the field of law in both levels,
e) has practiced the legal profession for at least ten years,
f) has served as a member of a dispute resolution body of a NSA or a NSO for at least three years.

The Ministry of Sports was to maintain and approve a list of arbitrators at the Court of Arbitration. The arbitrator could be nominated by the Ministry of Sports, a NSA or a NSO.[13]

[13] Informácia o výsledku prerokovania vládneho návrhu zákona o športe a o zmene a doplnení niektorých zákonov vo výboroch Národnej rady Slovenskej republiky v druhom čítaní. In: *Národná rada Slovenskej republiky* [online]. 2023 [cit. 2024-10-15]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=531507.

However, to repeat once again, this draft Sports Act of 2023 was ultimately not adopted by the Parliament, and arbitration of disputes in sports never came into being.

Instead, the amendment to the Sports Act, which was prepared by the Ministry of Tourism and Sports in 2024 and which is currently being debated in the Parliament, came up with a much milder proposal – that the Slovak Olympic and Sports Committee would only create a dispute resolution body (not a Court of Arbitration) under the same conditions as those created by the NSAs, with the aim of relieving the NSAs from the obligation to create a dispute resolution body on their own. Since the minor NSAs do not have qualified members or willing persons to serve on such bodies, they are to be given an option to opt for entrusting their dispute-resolution agenda as well as their disciplinary agenda to the joint body to be established by the Slovak Olympic and Sports Committee.

There is thereby no "hindrance" to this solution even with respect to solving the cases of anti-doping rules violations. The legislator himself namely already previously amended the Sports Act by creating special anti-doping commissions within the Ministry of Sports, centralizing thus the dispute resolution in this area. The amendment to the Sports Act (by the Act No. 351/2020 Coll.) in this context namely introduced a significant revision of the system for deciding on doping cases, in connection with the changes to the World Anti-Doping Agency (WADA) Code, effective from 1 January 2021. Under the provision of Section 92 of the Sports Act, a Commission for Doping Proceedings at First Instance and the Commission for Doping Proceedings at the Second Instance (hereinafter referred to as the "Commissions") were established. The Commissions have their members appointed by the Minister of Sports on the basis of a selection procedure with public participation. These Commissions must also meet certain qualification requirements in terms of their composition. For example, the chairpersons of the Commissions must have at least a second-level university education in the field of law. The term of office of a member and alternate of the Commission is four years; reappointment is possible. The activities of the Commissions are organizationally and materially ensured by the Ministry, which also adopts (issues) the statutes of the relevant Commissions.[14]

[14] In this context, however, it can be pointed out that the establishment of Commissions by the Ministry may not be the best solution from the perspective of the autonomy of sport. Although the state has an obligation to combat doping, which the Slovak Republic derives from its ratification of the UNESCO Convention against Doping (*International Convention*

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A similar centralization could now take place under the auspices of the Slovak Olympic and Sports Committee with respect to all the remaining types of sporting disputes, including disciplinary proceedings. However, while the NSAs are fond of this suggestion, the actual outcome is yet unpredictable, due to the current negotiations between the political parties as to some further changes in the draft amendment, leaving the final decision on the fate of this amendment for February 2025.

Conclusions

The success or failure of the draft amendment to the Sports Act, which was submitted to the National Council of the Slovak Republic in the Fall of 2024, will certainly determine the shape of dispute resolution in sports in the future. If it is not adopted, the indicated legal issues will remain unresolved even in the future. Judicial practice will struggle with inconsistent approaches and solutions, and legal uncertainty in the sports movement will increase.

Foremost, it will remain unclear, whether the disputes in sports are arbitrable or not, whether they are reviewable by the general civil courts or administrative courts, and whether the decision of a dispute resolution body prevents the jurisdiction of general courts in the same matter.

Furthermore, due to the problems of minor NSAs with financing and staffing the dispute resolution bodies under the Sports Act, these bodies are often either not established at all or not exercising their duties under the Sports Act properly, which makes the NSAs subject to a risk of illegality and sanction from the side of the Ministry.

All these problems are thereby addressed by the current draft amendment to the Sports Act – first of all, it is made clear in the amendment that the dispute resolution bodies' decisions are only subsequently reviewable by courts, and namely by the courts of general civil jurisdiction (instead of administrative courts). Secondly, both the dispute resolution competence as well as the disciplinary jurisdiction of the NSAs could be transferred onto a common (joint) body established by the Slovak

against Doping in Sport [UNESCO] – see *Announcement of the Ministry of Foreign Affairs of the Slovak Republic No. 347/2007 Coll.*), it should also be borne in mind that the WADA Code itself, in its Article 22.6 stipulates that *"Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law."*). The ideal should, therefore, not be state-sponsored bodies, but autonomous sports bodies for deciding doping cases.

Olympic and Sports Committee, as a voluntary option offered to the NSAs to use if they deem it fit. Finally, the dispute resolution in sports could face an opportunity for professionalization and improvement of autonomous governance in this field of the sports movement in Slovakia. Still, to what extent any of these hopes will materialize, remains to be decided by the Parliament in February 2025.

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Prof. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA

Faculty of Law
Trnava University in Trnava
Kollárova 10
917 01 Trnava

Institute of State and Law of the Slovak Academy of Sciences, v.v.i.
Klemensova 19
813 64 Bratislava
Slovak Republic
tomas.gabris@truni.sk
Scopus Author ID: 57196413640
Web of Science ResearcherID: AAE-5492-2019
https://orcid.org/0000-0002-6862-2688

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Use of Extra-judicial Technical Surveillance in Criminal Decision-making: European Limitations and National Challenges[1]

Andrei Zarafiu

Abstract: *At the European level, the general rule for the gathering of evidence and the use of investigative methods involving the restriction of fundamental rights and freedoms is that these activities should only be carried out by bodies with judicial powers, only by means of judicial instruments and only in the framework of judicial proceedings. This judicial exclusivity is respected even when pro-active criminal investigations, as it ensures a mechanism of checks and balances on measures consisting in violations of individual rights. The case law of the European Court of Human Rights in Strasbourg has consistently stated that even a severe threat to national security, such as acts of terrorism, or other risks of a global nature are not to be relied upon in order to override this form of protection and control. The present study aims to address the particular situation of technical surveillance carried out through specific intelligence gathering activities that restrict the exercise of fundamental rights or freedoms. Beyond the essential issue of the admissibility of the use of information obtained by officers (bodies) specializing in national security activities as evidence in criminal proceedings, the analysis aims to identify controversies and offer solutions on other issues of interest: the ability of non-judicial bodies to become involved in the conduct of criminal investigations, the effectiveness of the mechanisms for controlling these intrusive methods, the conformity with the European law of national regulations allowing such participation, the way in which information gathered by extrajudicial bodies can influence the criminal decision-making process. The analysis will be carried out from both the European and the national perspective, taking into account the particularities of the Romanian judicial system.*

Key Words: *Criminal Law; Criminal Procedure Law; Technical Surveillance; Criminal Decision-making; Romanian Intelligence Service; Evidence; Extrajudicial Bodies; the European Union; Romania.*

[1] This study was presented at the 24th Annual Conference of the European Society of Criminology, Bucharest, 11 – 14 September 2024.

I. National context

As regards the particular situation of Romania, the problem of use of extrajudicial technical supervision in criminal cases must be referred, from the beginning, to two primary normative coordinates.

According to the constitutional provisions (Articles 131 and 132 of the Constitution of Romania) and of the Code of Criminal Procedure of Romania (Articles 55 – 57 of the Code of Criminal Procedure), according to all modern European criminal procedural systems, there is a veritable judicial monopoly as regards the conduct of criminal investigations.[2]

Thus, the conduct of criminal investigations and, as a result thereof, the bringing of criminal charges against some persons can only be carried out in a judicial context, by judicial bodies and only by judicial means expressly provided for by law. This judicial exclusivity is one of the fundamental pillars of the rule of law and has its origin in the constitutional principle of the separation of powers in the State, transposed and specialized in procedure in the primary principle of the separation of judicial functions. The judicial monopoly arising from this form of exclusivity has also made it necessary to establish a special single authorisation procedure, with the judge at its centre as the only viable guarantor of the rights and freedoms of an individual in criminal proceedings.[3]

Taking into account the old public law rule *delegata potestas non delegatur*, a judicial authority of constitutional rank may not unilaterally delegate elements of its original functional competence to other extrajudicial State bodies.[4]

However, in Romania, in the specific matter of gathering evidence by means of technical surveillance methods (normatively referred to as special surveillance or investigation methods),[5] this natural form of judicial

[2] LANGER, M. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. In: S. C. THAMAN, ed. *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*. 1st ed. Durham, NC: Carolina Academic Press, 2010, pp. 29-30. ISBN 978-1-59460-573-4.

[3] MATEUȚ, G. *Procedură penală: Partea generală* [Criminal Procedure: General Part]. 1-a ed. București: Universul Juridic, 2019, p. 673. ISBN 978-606-39-0393-9.

[4] See *Decision of the Constitutional Court of Romania Ref. No. 26/2019* [2019-01-16], para. 172.

[5] These evidentiary hearings are part of the "special investigative techniques" concept from Recommendation 10 of the Committee of Ministers of the Council of Europe (2005), which includes techniques employed by competent judicial authorities in criminal investigations, aimed at detecting or investigating serious offences and suspects, in order to

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monopoly has been replaced by a delegated form of administrative monopoly.

Without taking into account the substantial period prior to 2014 (before the entry into force of the current Code of Criminal Procedure), in the judicial activity carried out within the fight against corruption, closely monitored at the European Commission level through the Cooperation and Verification Mechanism (CVM) and for which Romania was constantly encouraged and congratulated, the main actor in obtaining, selecting and storing evidence obtained through technical surveillance was an administrative authority, one of the secret services – the Romanian Intelligence Service. The importance of this finding is also based on the generally accepted judicial reality that the so-called electronic evidence is nowadays prevalent in all criminal judicial proceedings.[6]

From the beginning, it should be emphasized that this interference of the Romanian Intelligence Service in the carrying out of technical surveillance was carried out in the context in which, since its establishment in 1991, the main secret service of Romania has been operating according to an extremely clear legal provision, which fully complied with the constitutional framework of the judicial monopoly to which we have referred. Thus, pursuant to the Article 13 of Law No. 14/1992, *"the bodies of the Romanian Intelligence Service may not carry out criminal investigation acts, may not take the measure of preventive detention or arrest and may not have their own detention facilities."*

Analysing the primary and sub-legal normative acts that have generated the activity of the Romanian Intelligence Service and the relations of this administrative authority with the Public Prosecutor's Office, we can identify three procedural forms through which the secret service has substituted itself for the judicial bodies and has actively involved in criminal investigations:

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gather information in such a way that the persons concerned are unaware of it. See UDROIU, M., R. SLĂVOIU and O. PREDESCU. *Tehnici speciale de investigare în justiția penală* [Special Investigation Techniques in Criminal Justice]. 1-a ed. București: C. H. Beck, 2009, pp. 1-3. ISBN 978-973-115-494-7.

6 See MASON, S. and A. SHELDON. Proof: The Investigation, Collection and Examination of Digital Evidence. In: S. MASON, ed. *Electronic Evidence*. 2nd ed. London: LexisNexis, 2010, p. 51. ISBN 978-1-4057-4912-1; and WALDEN, I. *Computer Crimes and Digital Investigations* [online]. 1st ed. Oxford: Oxford University Press, 2007, pp. 353-401 [cit. 2024-10-14]. ISBN 978-1-383-04375-4. Available at: https://doi.org/10.1093/oso/9780199290987.001.0001.

1) The execution of ordinary technical surveillance warrants issued by judges according to the rules of the Code of Criminal Procedure;
2) Carrying out technical surveillance on the basis of special technical surveillance warrants issued on the basis of the Law on National Security – Law No. 51/1991;
3) The active participation of the Romanian Intelligence Service officers in joint operative teams (together with prosecutors or criminal investigation bodies of the Judicial Police) in carrying out criminal prosecution acts on the basis of the secret Protocols concluded between the Romanian Intelligence Service and the Public Prosecutor's Office in 2009 (Protocol of 4. 2. 2009) and 2016 (Protocol No. 09472 of 8. 12. 2016).

In spite of the exclusively administrative nature of the competence of the secret service, the main consequence of this involvement gained, against the law, a judicial dimension materialized in obtaining evidence used in judicial proceedings to substantiate judicial decisions that affected the freedom and other fundamental rights of the individual.

One by one, the legal or sub-legal provisions that substantiated these forms of intervention in the judicial activity have been sanctioned by the Constitutional Court as breaching the constitutional provisions related to the rule of law in its component as regards the guaranteeing of the fundamental rights of citizens (indicating a wide range of rights violated, particularly the right to a fair trial, the right to intimate, family and private life, individual freedom), regarding the principle of legality, the legal security of the individual being breached, since its legitimate trust in the values of the Constitution has not been complied with. From a formal standpoint, this protection is expressed in the legal requirement that any surveillance measure must be commensurate to the restriction of fundamental rights and freedoms, as viewed through the following alternative criteria: the particularities of the case, the importance of the information or evidence to be obtained, or the seriousness of the offence.[7]

In its decisions, the Court has expressly indicated not only the sanctions applicable to acts carried out with the support of extrajudicial bodies, but also the conduct to be followed by the courts (or judicial authorities in the broad sense) based on such decisions. This way of proceeding,

[7] UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 814. ISBN 978-606-18-1322-3.

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with a view to ensuring the full effectiveness of its binding rulings, was referred by the Constitutional Court (Decision No. 26/2019, para. 205) as a *two-step mechanism*.

The rationale for its implementation, even within the sanctioning decisions, of a legislative solution or a specific behaviour of a judicial authority (such as the Public Prosecutor's Office in the case of the legal conflict of a constitutional nature generated by the conclusion of the protocols of collaboration with the Romanian Intelligence Service) is found in the profound change of the judicial paradigm that it has caused and in the phenomenon of rejection manifested at the level of some courts.

Considering the generally binding and strong effects for the future of the Constitutional Court Decisions, for all public authorities and all individual subjects of law, as a result of several consecutive decisions, delivered within a period of 6 years, the Constitutional Court determined that:

(i) The acts by which extrajudicial authorities (such as secret services) have contributed to the taking of evidence in criminal trials are absolutely null and void;
(ii) This severe sanction is determined by the violation of a form of general and primary competence of judicial bodies, the only bodies empowered to act judicially;
(iii) Corollary to the declaration of nullity, the evidence obtained as a result of these vitiated acts must also be sanctioned by exclusion,[8] which makes it impossible to use compromised evidence in criminal proceedings;
(iv) In addition to the main effect of the exclusion of evidence (loss of informational capacity), the secondary effect must be applied, which is manifested in material (administrative) terms: the physical removal of the support on which the evidence from the case file was objectified;
(v) This joint sanctioning mechanism is the only one that can effectively guarantee the fundamental rights infringed by the transfer of pow-

[8] On the exclusion mechanism in the Romanian law, see NEGRU, A. I. *Administrarea și aprecierea probelor în procesul penal* [Administration and Assessment of Evidence in Criminal Proceedings]. 1-a ed. București: Universul Juridic, 2022, pp. 231-256. ISBN 978-606-39-0827-9; for the penalty of the exclusion of evidence in Italian law, DELLA RAGIONE, L. *Manuale di Diritto Processuale Penale*. 5ª ed. Molfetta: Neldiritto, 2019, pp. 215-217. ISBN 978-88-327-0440-2; for the French law, PRADEL, J. *Procédure pénale*. 16e éd. Paris: Cujas, 2011, pp. 343-354. Référence. ISBN 978-2-254-11410-8.

ers to extrajudicial bodies, while ensuring that the relevant regulatory framework is very clear, precise and predictable;

(vi) A positive procedural obligation is established on all judicial, investigative and decision-making authorities to verify, in pending cases, the extent to which such an infringement of the primary powers of the criminal prosecution authorities has occurred and to order the appropriate legal measures;

(vii) In the case law of the Constitutional Court (Decision No. 685/2018, para. 198), the scope of the notion *"pending cases"* has been expressly and extensively defined to include *"both pending cases and cases finalized to the extent that the litigants are still within the time limit for exercising the appropriate extraordinary remedies"*.

It should be emphasized that this process of radical reconfiguration of the paradigm of the secret services involvement in obtaining and using evidence in criminal judicial proceedings has been a laborious one characterized by discontinuity.

Beyond the phenomenon of rejection and opposition manifested at the level of a significant segment of the judicial authorities who considered that the application of these constitutional rulings would significantly affect the process of fighting against crime and in particular the fight against corruption, the period during which these consecutive decisions were delivered meant a veritable judicial and normative epic, manifested in non-uniform practice and jurisprudential controversies, lack of legislative predictability, changes in attitudes at the level of the criminal policy, etc.

The following temporal landmarks of this period, which are still in the process of crystallization, are eloquent:

- as regards the situation of evidence obtained as a result of ordinary surveillance but with the support of extrajudicial bodies, specialized in intelligence gathering, the consequences of the Constitutional Court Decisions No. 51/2016, No. 302/2017, No. 26/2019, No. 22/2018 have manifested themselves, temporally, in the following stages:

1. for the period until 14 March 2016 (the date of entry into force of the Government Emergency Ordinance No. 6/2016 caused by the original "pilot" Decision No. 51/2016), all acts of execution of (ordinary) technical surveillance warrants by *other State bodies*, without judicial powers, have become null and void – as a result of the violation of

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rules of functional competence or primary material competence – which, once declared judicial, led to the exclusion of the evidence thus obtained followed by the removal from the case file of the material supports in which they had been objectified: means of evidence, content of the procedural documents in which they had been reproduced/copied;

2. for the period 14 March 2016 – 11 April 2022 (date of publication in the Official Gazette of the Constitutional Court Decision No. 55/2022), the acts of execution of the technical surveillance warrants by the Romanian Intelligence Service bodies were validly carried out since, according to the Article 57 para. (2) Code of Criminal Procedure and the Article 13 of Law No. 14/1992 on the Organization of the Romanian Intelligence Service, these bodies could be appointed as special criminal investigation bodies with a unique vocation to execute technical surveillance warrants pursuant to the Article 57 para. (2);

Note: after it was declared unconstitutional by the Decision No. 55/2022, Article 57 para. (2) the Code of Criminal Procedure, it was formally repealed by Law No. 201/2023 which, paradoxically, did not operate the natural, consequential amendment of the Article 13 of Law No. 14/1992.

3. After 11 April 2022, the bodies of the Romanian Intelligence Service can no longer execute technical surveillance warrants, however, by Decision No. 64/2023, the High Court of Cassation and Justice decided that *the making available of the necessary infrastructure by the National Centre for Interception of Communications within the Romanian Intelligence Service, in order to ensure the technical conditions for the implementation of technical surveillance measures, does not constitute an activity of execution of the technical surveillance warrant, according to the Article 142 of the Code of Criminal Procedure*.

- as regards the surveillance carried out on the basis of national security warrants, the temporal milestones are:

1. the period until 20 April 2018 (the date of publication in the Official Gazette of the Constitutional Court Decision No. 91/2018), the evidence obtained from the execution of the warrants issued according to Law No. 51/1991 was considered legally acquired and judicially exploited without reservation;
2. between 20 April 2018 and June 2020 (the date of publication of the Constitutional Court Decision No. 55/2020) the evidence obtained

from the surveillance carried out by means of national security warrants issued according to the Article 3 letter f) of Law No. 51/1991 could no longer be used in cases having as object offences of corruption, money laundering, crimes against the person, etc. (common law offences), even if they had been obtained prior to the publication of the aforementioned decision;

3. between June 2020 and 9 July 2023 (date of entry into force of Law No. 201/2023), the recordings obtained as a result of the activities authorized under Law No. 51/1991 could no longer be used as evidence in any criminal case, as they lacked their primary aptitude and could not be used as evidence under the Article 139 para. (3) Code of Criminal Procedure;
4. starting with 9 July 2023, the information obtained through national security warrants may be used as evidence, conditionally, according to the provisions of the Article 139[1] of the Code of Criminal Procedure.

One of the insidious forms of the involvement of the Romanian Intelligence Service in the activity of gathering evidence used in criminal cases can be found in the technical surveillance carried out on the basis of national security warrants.

Regulated even since the entry into force of Law No. 51/1991 on the national security of Romania, the intelligence gathering procedure involving the restriction of the exercise of fundamental rights or freedoms has meant for a long time a parallel mechanism for obtaining evidence with the support or direct involvement of bodies without judicial powers. Essentially, this procedure was triggered by a finding on the part of specialized national security workers related to the existence of a threat to Romania's national security. The provision of such a legal condition is essential, even if not subject to an adequate burden of proof, because in the absence of an adequate risk or threat, a proportionality test cannot be realistically exercised.[9]

[9] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. București: Solomon, 2021, p. 565. Pro Foro. ISBN 978-606-8892-82-5. If the provisions regulating such techniques are not regulated by a clear and foreseeable legal framework, the essential conventional standard that the interference with the right to privacy must be provided under the law cannot be deemed as fulfilled. See *Case of Kruslin v. France* [1990-04-24]. Judgement of the European Court of Human Rights, 1990, Application No. 11801/85, para. 36.

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The phrase *"threat to national security"* is legally defined in the Article 3 of Law No. 51/1991 and included:

a) plans and actions aimed at suppressing or undermining the sovereignty, unity, independence or indivisibility of the Romanian State;
b) actions aimed, directly or indirectly, at provoking war against the country or civil war, facilitating foreign military occupation, servitude to a foreign power or aiding a foreign power or organization to commit any of these acts;
c) treason by helping the enemy;
d) armed or any other violent acts aimed at weakening the state power;
e) espionage, the transmission of state secrets to a foreign power or organization or their agents, unlawful procurement or possession of State secret documents or data with a view to their transmission to a foreign power or organization or their agents or for any other purpose not authorized by law, as well as disclosing state secrets or negligence in keeping them;
f) undermining, sabotage or any other actions meant to remove by force the democratic institutions of the State or which seriously prejudice the fundamental rights and freedoms of the Romanian citizens or which may prejudice the defence capacity or other such interests of the country, as well as acts of destruction, degradation or rendering in a state of disuse the structures necessary for the proper functioning of social-economic life or national defence;
g) acts that threaten the life, physical integrity or health of persons who perform important functions in the State or of representatives of other States or international organizations, whose protection must be ensured during their stay in Romania, according to the law, treaties and conventions concluded, as well as international practice;
h) initiating, organizing, committing or supporting in any way totalitarian or extremist actions of communist, fascist, legionary origin or any other nature, racist, anti-Semitic, revisionist, separatist, which may endanger in any way the unit and territorial integrity of Romania, as well as incitement to acts that may endanger the rule of law;
i) terrorist acts, as well as initiating or supporting in any manner whatsoever any activities the purpose of which is to commit such acts;
j) attacks against a community, committed by any means;
k) the theft of arms, ammunition, explosive or radioactive, toxic or biological materials from establishments authorized to hold them, their smuggling, their production, possession, alienation, transport or use

in conditions other than those provided by law, as well as the carrying of arms or ammunition, without right, if by so doing they endanger national security;

l) initiating or establishing organizations or groups, or joining or supporting them in any form, for the purpose of carrying out any of the activities mentioned at letters a) – k), as well as the secret carrying out of such activities by organizations or groups established according to the law;

m) any actions or inactions that harm the strategic economic interests of Romania, those that have the effect of endangering, illegally managing, degrading or destroying natural resources, forest, hunting and fishing stocks, waters and other such resources, as well as monopolizing or blocking access to them, with consequences at national or regional level;

n) cyber threats or cyber-attacks against information and communication infrastructures of national interest;

o) actions, inactions or states of affairs with national, regional or global consequences that affect the State's resilience to hybrid risks and threats;

p) actions carried out by a state or non-state entity, by conducting propaganda or disinformation campaigns in cyberspace, likely to affect the constitutional order.[10]

The text has been deliberately regulated in a permissive manner, as it has determined, on the occasion of its interpretation and application at judicial level, the inclusion in this category of common criminal offences (corruption, money laundering, etc.), and has been used to circumvent the rules for obtaining surveillance warrants according to the ordinary procedure.

Therefore, the Constitutional Court was asked to examine the extent to which these provisions meet the requirement related to the need to regulate the invasion of privacy by an accessible and predictable law.

According to two successive decisions,[11] the constitutional administrative court found that the phrases *"any other actions that seriously in-*

[10] On the legal conditions to be met for the authorisation of special techniques constituting specific intelligence-gathering activities, see SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. București: Solomon, 2021, pp. 565-568. Pro Foro. ISBN 978-606-8892-82-5.

[11] *Decision of the Constitutional Court of Romania Ref. No. 91/2018* [2018-02-28]; and *Decision of the Constitutional Court of Romania Ref. No. 802/2018* [2018-12-06].

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fringe the fundamental rights and freedoms of the Romanian citizens" (Decision of the Constitutional Court of Romania No. 91/2018) and *"or other such interests of the country"* in the Article 3 letter (f) are unconstitutional.

Therefore, after ascertaining a threat to national security, the secret service bodies could initially ask the prosecutor, subsequently only a specifically designated judge of the High Court of Cassation and Justice, for authorization to carry out specific intelligence gathering activities, based on a warrant, such as:

a) interception and recording of electronic communications, carried out in any form;
b) the search for information, documents or records which, in order to obtain them, it is necessary to enter a place, access an object or open an object;
c) picking up and putting back an object or document, checking it, extracting information from it, recording, copying or obtaining extracts by any procedures;
d) the installation of objects, their maintenance and removal from the places where they have been deposited, surveillance by photographing, filming or other technical means or personal findings, carried out systematically in public places or carried out in any way in private places;
e) locating, tracking and obtaining information by GPS or other technical means of surveillance;
f) intercepting postal items, picking up and putting them back, checking them, extracting the information they comprise, as well as recording, copying or obtaining extracts by any means;
g) obtaining information concerning a person's financial transactions or financial data, as provided by law.

One should note that some of these specific information-gathering activities involving the restriction of fundamental human rights and freedoms do not have an equivalent among the ordinary surveillance techniques under the criminal procedural law, are tantamount to classic espionage techniques and have been criticised for their complementary nature as opposed to ordinary techniques, and the ambiguous legal framework in which they are regulated.[12]

[12] See in this regard, TUDORAN, M. V. *Teoria şi practica interceptărilor şi înregistrărilor audio sau video judiciare: Abordare dual actualele şi noile Cod penal şi Cod de procedură*

These activities could be carried out for a period of 6 months, which could be extended thereafter by 3 months. In its original form, the law allowed, in urgent cases, for this technical surveillance to be carried out without authorization directly by secret service officers for a limited period of 48 hours.

At present, the request related to the issue of a national security surveillance warrant, even if made by the Romanian Intelligence Service officers, has to go through a filter at the level of the Public Prosecutor's Office in order to be referred before a judge at the High Court of Cassation and Justice.

Although initiated and carried out by administrative authorities, the main purpose of this procedure in the field of national security was that data and information obtained extrajudicially could be used as evidence in ordinary criminal proceedings.

In relation to the significant intrusive potential and impact on fundamental rights and freedoms, the technical surveillance carried out according to national security warrants has shown a number of systemic shortcomings from the perspective of the European standards of protection:

- the absence of minimum guarantees to temper excesses in the use of these measures; unlike ordinary technical surveillance carried out through the judicial mechanisms provided for by the Code of Criminal Procedure, the ordering of surveillance according to national security warrants has never required the existence of a criminal case with a lawfully triggered investigation;
- not only has the law not established the requirement of a minimum standard of proof, that of reasonable suspicion or plausible grounds for the commission of an act under criminal law; not even the existence of a judicial decision to initiate a criminal investigation has been

penală [Theory and Practice of Judicial Interceptions and Audio or Video Recordings: Dual Approach to the Current and New Criminal Code and Criminal Procedure Code]. 1-a ed. București: Universul Juridic, 2012. 408 p. Biblioteca profesioniștilor. ISBN 978-973-127-872-8; MÂȚĂ, D. C. *Securitatea națională: Concept: Reglementare: Mijloace de ocrotire* [National Security: Concept: Regulation: Means of Protection]. 1-a ed. București: Hamangiu, 2016, pp. 371-373. ISBN 978-606-27-0614-2; and UDROIU, M., R. SLĂVOIU and O. PREDESCU. *Tehnici speciale de investigare în justiția penală* [Special Investigation Techniques in Criminal Justice]. 1-a ed. București: C. H. Beck, 2009, p. 30, 47 and 51. ISBN 978-973-115-494-7.

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established as a primary condition for the carrying out of surveillance by the secret service;

- through a mechanism distorted from its original purpose, a means of anticipatory evidence-gathering was thus implemented with the circumvention of fundamental judicial mechanisms of balance and control.
- although the intrinsic rationale for this surveillance was naturally the existence of a threat to national security, the data and information obtained through this parallel mechanism were subsequently used (sometimes years after they were obtained) exclusively as evidence in criminal trials[13] having as object common law offences;
- another negative feature of this procedure was the unreasonable length of time for which it could be ordered, abolishing the fundamental principle that the restriction of a fundamental right has mandatorily a temporary character and must be proportionate to the purpose for which it was ordered.

If ordinary surveillance is ordered for an initial period of 30 days, only after criminal proceedings have been initiated, which may be extended, for duly justified reasons, by 30 days, not exceeding 120 days in the case of surveillance in private premises or 180 days in the case of ordinary surveillance, in the case of surveillance on the basis of national security warrants, the warrant is now issued for an initial period of 6 months, which may be extended by 3 months, the maximum duration of surveillance in these circumstances being 2 years.

However, it should be noted that this maximum duration of 2 years operates only in respect of the same data or information from which the existence of a threat to national security is established, which means, *per a contrario*, that invoking other data or information may justify exceeding the maximum duration even if the surveillance concerns the same person and the same factual threat.

Moreover, it is to be noted that between 1991 and 2014 the law on the Romanian National Security did not establish a maximum duration

[13] The probative value of the results of special techniques under Law No. 51/1991 was the subject of serious controversy even before the adoption of the New Code of Criminal Procedure (1 February 2014). See DABU, V. and V. RADU. Interceptions Legality during Preliminary Acts. *Revista de Drept Penal* [Penal Law Review]. 2012, vol. 19, no. 1, pp. 1-14. ISSN 1223-0790.

for the authorization of this special surveillance, which could be extended without time limit.

The extent of special surveillance and its use as a parallel way of obtaining evidence prior to any criminal trial.

In the context of an obvious information deficit, apparently justified by reasons related to the confidentiality of national security activities, the estimated number of national security warrants issued between 2009 and 2018 was over 26,000.[14]

The official point of view of the Romanian Intelligence Service[15] indicates a number of 28,784 national security warrants requested by the secret service between 11. 12. 2004 (the date when Law No. 535/2004 entered into force, which introduced for the first time the requirement of authorization by a judge of the High Court of Cassation and Justice for special surveillance) and 16. 2. 2016 (the date when the first solution of the Constitutional Court sanctioning the involvement of secret services in judicial activity was issued).

With regard to a later period much more concentrated in time, the official point of view of the High Court of Cassation and Justice[16] (No. 81/EP/28.12.2021) showed that in the first 11 months of 2021 (placed under the pandemic challenge spectre) there were 3,132 requests for surveillance authorization based on national security warrants.

These statistics justify the assessment made in the literature[17] in the sense that such an *a priori* control is not sufficient, leading to the possi-

[14] MAREŞ, M. Mandatele de supraveghere în domeniul securităţii naţionale, dincolo de statistică. *Universul Juridic* [online]. 2020-06-05 [cit. 2024-10-14]. Available at: https://www.universuljuridic.ro/mandatele-de-supraveghere-in-domeniul-securitatii-nationale-dincolo-de-statistica/.

[15] Point of view evoked in DOBRESCU, P. Câte mandate de interceptare pe siguranţă naţională a emis ICCJ în ultimii 9 ani [How Many National Security Interception Warrants Has the HCCJ Issued in the Last 9 Years]. In: *Libertatea* [online]. 2018-06-12 [cit. 2024-10-14]. Available at: https://www.libertatea.ro/stiri/cate-mandate-de-interceptare-pe-siguranta-nationala-emis-iccj-ultimii-9-ani-2290478.

[16] Point of view published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiţie pe mandatele de securitate naţională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

[17] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 566. Pro Foro. ISBN 978-606-8892-

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bility of automatic authorization of any proposal coming from a secret service.

If we add to these official figures those ones corresponding to the 13-year period as of the entry into force of the National Security Law until the time of the first communications made by the authorities involved (1991 – 2004), and take into account that a single surveillance warrant can cover dozens of individuals and telephone numbers, the overall picture of special surveillance carried out by secret services without judicial powers is disturbing.

It should not be forgotten that, in addition to this surveillance on the basis of national security warrants, affecting private life by special surveillance methods was also carried out during the same period by means of ordinary technical surveillance warrants issued under common law by judges of all courts in the country.

Taking into account the technical monopoly in the field of surveillance means held by the Romanian Intelligence Service, these ordinary technical surveillance warrants were executed, for the most part, also by specialized national security workers, without judicial powers.

We can therefore speak of a form of mass surveillance carried out under the pretext of threats to national security without, during the reference period, Romania being confronted with any consistent threat in this area and without any case having been registered on the national courts' docket regarding any offence against national security.

From a judicial perspective, all data and information obtained as a result of this substantial special surveillance has been used exclusively in criminal cases involving common criminal offences.[18]

82-5; *Case of Iordachi and Others v. Moldova* [2009-02-10]. Judgement of the European Court of Human Rights, 2009, Application No. 25198/02, para. 50; *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 230; and ÖLÇER, F. P. The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights. In: S. C. THAMAN, ed. *Exclusionary Rules in Comparative Law* [online]. 1st ed. Dordrecht: Springer, 2013, p. 394 [cit. 2024-10-14]. Ius Gentium: Comparative Perspectives on Law and Justice, vol. 20. ISBN 978-94-007-5348-8. Available at: https://doi.org/10.1007/978-94-007-5348-8_16.

[18] CASAGRAN, C. B. Surveillance in the European Union. In: D. GRAY and S. E. HENDERSON, eds. *The Cambridge Handbook of Surveillance Law* [online]. 1st ed. Cambridge: Cambridge University Press, 2017, pp. 652-653 [cit. 2024-10-14]. ISBN 978-1-316-48112-7. Available at: https://doi.org/10.1017/9781316481127.028.

In practice, the judicial decision related to these common law offences, which often meant a guilty plea and a custodial sentence, was based, from an evidential point of view, on material gathered in advance, in an extrajudicial context, without going through the usual mechanisms that guarantee effective protection of fundamental rights, which are secret and for which there was no effective remedy at the normative level to verify the legality of its administration.

What is striking in the above-mentioned official statistics is the almost total absence of effective control by the jurisdictional authorities in the procedure for issuing these national security warrants. However, the authorisation and effective control of the measure by an independent judicial authority (judge or court), which cannot proceed *ex officio* but only within the limits of its jurisdiction, is an essential condition for the compliance of any surveillance technique with the European protection safeguards.[19]

Thus, for the approximately 30,000 proposals for authorization of special surveillance between 2009 – 2018, there were only two rejected proposals!

It should be emphasized that none of the official replies made public indicated the total number of persons subject to these special surveillance methods, the refusal to communicate this type of information being justified by invoking the legal provisions on the protection of classified information.

As regards the period 1. 1. 2012 – 1. 12. 2021, the same official reply[20] of the High Court of Cassation and Justice shows that, out of a total of 3,132 applications for authorization on the national security law, 3,128 were admitted and 4 were rejected, resulting in an approval rate of

[19] *Case of İrfan Güzel v. Turkey* [2017-02-07]. Judgement of the European Court of Human Rights, 2017, Application No. 35285/08, para. 96; *Case of Klass and Others v. Germany* [1978-09-06]. Judgement of the European Court of Human Rights, 1978, Application No. 5029/71, para. 56; and *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 233.

[20] *Reply of the High Court of Cassation and Justice of Romania No. 83/EP* [2022-01-13] published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiție pe mandatele de securitate națională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

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99.8 % by the High Court judges; at the same time, for the approval filter set up at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice, in the official reply[21] communicated to the author of the article cited by this judicial authority indicates that, for the same period of 11 months of 2021, out of the 2,835 requests for authorization for national security surveillance received from the intelligence service, 2,833 were approved and sent for analysis to the High Court of Cassation and Justice. The approval rate for the two rejected requests was 99.92 %.

In order to highlight plastically the dimension of this special surveillance, the author of this article presents a comparison of the situation of warrants approved by the United States Foreign Intelligence Surveillance Courts (FISA courts) in 2020 for electronic surveillance for national security offences in the USA, a country with a population 17 times larger than Romania and facing real and constant threats to national security: of the total 489 requests for 2020, 68.3 % were fully approved, 24.7 % were modified, 4.4 % were partially denied, and 2.4 % were totally denied, the maximum number of individuals targeted by these FISA warrants being a maximum of 499.

In the same context of the problem of the absence of effective judicial control, other additional aspects should also be mentioned, some of which naturally derive from the specific nature of the work of the services responsible for security or national security.

The absence of some foreseeable and accessible legal criteria for designating the magistrates involved in this extrajudicial procedure, both at the level of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the High Court of Cassation and Justice, Law No. 51/1991 only establishes that the magistrate empowered to approve or authorize the surveillance is either the head of the court or the magistrate appointed by this one.

This regulatory gap is compounded by the absence of a regulation that meets the requirements of clarity as regards the actual procedure for

[21] *Reply of the Public Prosecutor's Office at the High Court of Cassation and Justice of Romania No. 1475/VIII-3/2021* [2021-12-13] published in MATEI, S. EXCLUSIV. Haos la Curtea Supremă de Justiție pe mandatele de securitate națională din România din 2021 [EXCLUSIVE. Chaos at the Supreme Court of Justice over Romania's 2021 National Security Warrants]. In: *Mediafax* [online]. 2022-02-09 [cit. 2024-10-14]. Available at: https://www.mediafax.ro/justitie/exclusiv-haos-la-curtea-suprema-de-justitie-pe-mandatele-de-securitate-nationala-din-romania-din-2021-20512623.

the judicial authorization mechanism at the level of the High Court of Cassation and Justice.

Compared to the ordinary procedure for authorizing surveillance governed by the Code of Criminal Procedure, the special surveillance procedure, which is provided for exclusively by the Law on National Security, contains rules limited in number and content, which are not capable of ensuring effective subsequent control as to the lawfulness of the surveillance.

In this regard, according to the Article 15 of Law No. 51/1991, the proposal to authorize specific intelligence gathering activities is submitted to the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and is examined for legality and reliability within 24 hours as of the registration or immediately in urgent cases by prosecutors[22] appointed[23] by this one. Where the proposal is well-founded and the conditions established by law are met, the General Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice or his legal substitute shall apply in writing to the President of the High Court of Cassation and Justice for authorization of the proposed activities.

Subsequently, this request will be examined, as a matter of urgency, in closed session by one of the judges appointed by the President of the High Court of Cassation and Justice, who may immediately request in writing that the arguments submitted be supplemented if he considers that there is insufficient information to determine the authorization of technical surveillance.

If the judge finds that the request is justified and that the surveillance activities are necessary, this one shall order authorization by rea-

[22] Based on the model of ordinary surveillance, in this special procedure the law also allows prosecutors to order measures in urgent cases and for a limited period of time. At the European level (*Case of Blaj v. Romania* [2014-04-08]. Judgement of the European Court of Human Rights, 2014, Application No. 36259/04), it was held that a violation of the right to privacy cannot be held solely on the basis that wiretapping was ordered in emergency situations by the prosecutor, as long as the measure was subsequently subject to judicial review.

[23] This procedure does not imply a form a judicial delegation. On the nature of the delegation in the Romanian system see CRISTE, L. Unele considerații privind delegarea organelor judiciare [A Few Aspects Regarding the Delegation of Criminal Judicial Bodies]. *Caiete de Drept Penal* [Criminal Law Writings] [online]. 2023, no. 3, pp. 64-65 [cit. 2024-10-14]. ISSN 1841-6047. Available at: https://doi.org/10.24193/CDP.2023.3.4.

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soned judgment. Otherwise, the request will be rejected by a reasoned decision which will be final.

A new request for authorization for a technical surveillance measure in respect of the same person may be requested and issued only if the request indicates new data and information which would justify such an interference with the right to privacy.

Probably the main challenge in relation to the use and judicial challenge of data and information obtained as a result of national security surveillance relates to the secrecy of the whole procedure (both the authorization and the actual conduct). There is no doubt that preventing the defendant's access to the entire body of evidence on which the accusation is based and restricting their right to challenge the legality of the evidence are among the grounds for exclusion of the so-called secret evidence.[24]

As a consequence of the specific nature of the national security authorities, the entire documentary support of the activity of authorizing and carrying out special surveillance is classified under the Law on the Protection of Classified Information, Law No. 182/2002, being classified as *state secret* or, where appropriate, *official secret*.

In this regard, the rules governing the surveillance based on national security warrants have expressly provided, since its regulation in 1991, that both the authorization procedure for specific activities and the carrying out of the authorized activities shall be carried out in compliance with the legal provisions regarding the protection of classified information.

Therefore, paradoxically, although the result of the special surveillance could be used in criminal cases, the documentary support in which the whole activity of authorization and realization was objectified, being of a secret nature, is not attached to the case file, and cannot be consulted under the same conditions as the material collected by the judicial bodies.

[24] On the principles which may justify the exclusion of evidence unlawfully collected lato sensu in the common law system, see GLOVER, R. and P. MURPHY. *Murphy on Evidence* [online]. 13th ed. Oxford: Oxford University Press, 2013, p. 65 [cit. 2024-10-14]. ISBN 978-0-19-966987-5. Available at: https://doi.org/10.1093/he/9780199669875.001.0001; and ASHWORTH, A. and M. REDMAYNE. *The Criminal Process* [online]. 4th ed. Oxford: Oxford University Press, 2015, pp. 343-345 [cit. 2024-10-14]. ISBN 978-0-19-181135-7. Available at: https://doi.org/10.1093/he/9780199547289.001.0001.

Documents originating from the extrajudicial authority, including administrative correspondence with judicial bodies, bearing the mention strictly secret/official secret/secret, etc., are kept separately in specially arranged offices near the heads of the court.

The access to these documents is allowed only to magistrates, on the basis of protocols concluded between the Superior Council of Magistrates and the services responsible for national security.

The lawyer of the defendant for whom the criminal charges are based on classified information may not consult it unless the issuing authority declassifies it or downgrades it, in which case access to the information is subject to the authorization of access provided by law.

However, the procedure for obtaining this ORNISS (National Registry Office for Classified Information) certificate is difficult, takes several months and, by the way it is regulated, has the characteristics of an intrusion into the autonomy and independence of the lawyer profession.

Until the year 2023, if the chosen lawyer of the defendant did not have a security certificate or access authorization valid for the level of security of classified information, this information could still be used in the judicial decision-making process even if it could not be known by the person against whom it was used.

Thus, in its consistent case law (Decisions No. 1120/16 October 2008, No. 1335/9 December 2008, No. 21/15 January 2008), the Constitutional Court has established that, to the extent that these legal provisions do not have the effect of effectively and absolutely blocking access to information, but only of making it conditional on the fulfilment of certain procedural steps, justified by the importance of such information, it cannot be argued that there has been a violation of the right to a fair trial or of the principle of uniqueness, impartiality and equal justice for all.

We consider that such an approach is excessive, as it conflicts with one of the fundamental principles of the free and independent practice of the legal profession, requiring the accused to refer to lawyers who have such access authorization.

It is only with the amendments made by Law No. 281/2003 that the usual procedural rules provide for the possibility for the judge, in cases where the defendant's lawyer does not hold the access authorization provided by law and the defendant does not choose another lawyer, to

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appoint a court-appointed lawyer who does hold such authorization, thus guaranteeing access to classified information.

Such a compensatory mechanism lacks effectiveness, as it only formally resolves the issue of access to classified information used in special surveillance.

The lawyer, whether elected or appointed *ex officio*, even after having consulted the secret information, cannot make full use of it, since he cannot consult with his client about it, discuss it in a public procedure or refer to it in writing, and the same restrictions apply to judges who, although they can use this information, cannot use it in the grounds of their decisions.

In these circumstances, the requirements of subsidiarity and proportionality which may justify, according to the law, the authorization of special surveillance can never be effectively challenged and verified as to legality as long as it is based on confidential information with limited access.

Judicial practice has shown that, since the secret service never declassifies in full the documentary material drawn up when authorizing and carrying out surveillance, the only documents that were declassified in full and to which the defendants' lawyer had access, without the security certificate being necessary, were the actual resolutions and warrants issued by the judges of the High Court of Cassation and Justice.

However, this declassification operation, which was not always authorized, was carried out only upon the request of the person concerned and not *ex officio*.

Another shortcoming of this procedure concerns the decisive role of the bodies responsible for national security and outside judicial control in initiating and carrying out the procedure.

The mechanism by which the law allows this procedure to be triggered excludes the intervention of judicial bodies and makes them secondary actors.

This way, it has been allowed, related to the scope mentioned above, to create a substantial database of data and information obtained through technical surveillance not determined by the suspicion of the commission of an offence, concerning public officials, political decision-

makers, magistrates, members of the executive and legislative powers, judges of the Constitutional Court, etc.

In the absence of the aforementioned checks and balance, there is no guarantee that this information has not subsequently been used in criminal proceedings in a selective and circumstantial manner.

Beyond the referrals addressed to the investigative bodies which, on the basis of this data and information, triggered their own investigation carried out according to the usual procedural rules, the result of technical surveillance was often used directly as evidence in criminal trials, being directly submitted as evidence obtained in advance, according to the Article 139 para. (2) of the Code of Criminal Procedure, by secret service officers, following a *post factum* request by the judicial authorities or *ex officio*.

This data and information gathered in an extrajudicial framework has been used in court as evidence, sometimes at substantial intervals of time from the moment they were obtained.

We cannot speak of effective and real control over the management of this information as long as its storage or use exceeds the scope of judicial control, as does the selection of the elements considered to be of interest.

Neither the judicial bodies, and even less so the persons subsequently charged, have had the benefit of effective mechanisms to ensure that the information sent represents the totality of the data obtained as a result of special surveillance.

The secret service's monopoly also manifested itself with regard to the process of objectification of the information gathered, the transcription of intercepted conversations and communications, for example, being made by transcribing them into minutes also concluded and certified by the Romanian Intelligence Service officers.

Moreover, the optical support on which the surveillance activities were stored was never sent in original to the judicial authorities, so that what could be technically examined upon the request of the accused persons was always a copy.

On the same note, the administrative control which could be exercised over the special surveillance activity following petitions from parliamentary committees with powers in the field of surveillance of nation-

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al security bodies is not capable of becoming an effective remedy for any unlawful or excessive actions, as long as they were not intended to cancel or render ineffective the activities carried out.[25]

The difficult route of the regulation of the possibility of using as evidence in criminal cases the data and information obtained as a result of extrajudicial surveillance, a significant impact, with the potential to show even a paradigm change in criminal policy, was made by the Constitutional Court Decision No. 55/2020 (Official Gazette No. 517/17.06.2020).

The constitutionality control was exercised with regard to the provisions of the Article 139 para. (3) of the Code of Criminal Procedure which, through judicial interpretation considered excessive or even distorted,[26] has allowed the probative value of evidence to be attributed to data and information obtained on the basis of national security warrants.

The Constitutional Court ruled that *"the provisions of the Article 139 paragraph (3) final sentence of the Code of Criminal Procedure are constitutional insofar as they do not concern recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental human rights or freedoms carried out according to the law, authorized under Law No. 51/1991"*.

In the reasoning of this decision it was held, in essence, that *"the regulation of the possibility of conferring evidentiary value on recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental human rights or freedoms is not accompanied by a set of rules allowing their legality to be effectively challenged. By simply regulating the possibility of conferring the status of evidence on such recordings, without creating the appropriate framework for the possibility of challenging their legality, the legislature has failed to comply with the requirements of clarity and predictability*. [para. 55].

However, the lack of clarity and predictability of the regulatory framework applicable to the challenge of the legality of recordings – means of evidence – resulting from specific activities of gathering information

[25] ROTARU, C. Tehnici speciale de supraveghere sau cercetare. Supravegherea tehnică – interceptarea convorbirilor şi comunicărilor [Special Techniques of Surveillance and Investigation. Technical Surveillance – Telephone Tapping]. *Caiete de Drept Penal* [Criminal Law Writings]. 2011, no. 1, p. 18. ISSN 1841-6047.

[26] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 581. Pro Foro. ISBN 978-606-8892-82-5.

which involve restricting the exercise of fundamental human rights or freedoms, used in criminal trial, in fact leads to a formal and ineffective review, with the consequence that the fundamental rights and freedoms laid down by the Constitution are infringed. However, conferring the status of evidence in criminal proceedings on certain elements is intrinsically linked to the creation of the appropriate framework which makes it possible to challenge their legality. [para. 56].

Thus, conferring the status of evidence in criminal trials on recordings resulting from the specific activity of gathering information which entails restricting the exercise of fundamental human rights or freedoms, according to Law No. 51/1991, can be achieved only to the extent that that regulation is accompanied by a clear and explicit procedure for verifying the legality of that element." [para. 57].

After a period of ideological convulsions and broad social debates on the purpose and limits of the secret services' involvement in gathering information that can be used as evidence in criminal trials, as of 9 July 2023, the date of entry into force of Law No. 201/2023, a new normative paradigm change has taken place in this matter.

Therefore, nowadays, following the express qualification made by law, the recordings resulting from specific intelligence gathering activities involving the restriction of the exercise of fundamental rights or freedoms can be used, subsequently and conditionally, as evidence in criminal proceedings (Article 139^1 of the Code of Criminal Procedure).

There are two legal conditions that must be met cumulatively in order for information obtained on the basis of national security warrants to be considered as evidence.

However, once these conditions are met, the legal value of the evidence can no longer be ignored or challenged in court, and the probative value of this evidence will be complete, unaffected by any modality or conditionality.

These conditions are:

1. from the content of the recordings made, data on the preparation or commission of an offence referred to in the Article 139 para. (2) of the Code of Criminal Procedure.

This first condition evokes an apparent specialized or particularized character of technical surveillance, which should be limited, in terms of

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use, only to certain categories of criminal cases, where the seriousness of the facts would justify the intrusion into privacy.

Referring to the body of rules governing special surveillance, this condition of specialization is manifested in two successive forms: the primary, original, provided for in Law No. 51/1991, which makes such surveillance conditional on the existence of a threat to national security, and the secondary, subsidiary one provided for in the Article 139 para. (2) of the Code of Criminal Procedure.

In reality, however, this condition does not have the ability to limit the use of special surveillance, since the scope of the acts to which the condition applies is extremely wide: *"Technical surveillance may be ordered in the case of offences against national security provided for by the Criminal Code and special laws, as well as in the case of drug trafficking offences, offences against the regime on doping substances, illegal operations with precursors or other products that may have psychoactive effects, offences concerning non-compliance with the regime on arms, ammunition, nuclear materials, explosive materials and restricted explosives precursors, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of currency, stamps or other values, counterfeiting of electronic payment instruments, in the case of offences committed by means of computer systems or electronic means of communication, offences against property, extortion, rape, unlawful deprivation of liberty, tax evasion, corruption offences and offences treated as corruption offences, offences against the financial interests of the European Union or other offences for which the law provides for imprisonment of 5 years or more."*

In this regard, it is worth recalling the criticisms in the literature[27] related to the normative shortcomings of the criteria for determining the offences for which technical surveillance methods may be used, which allow their excessive use, since not only the seriousness, but even the manner of commission would lead to the fulfilment of the condition.

[27] See in this regard, SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, pp. 52-53. Pro Foro. ISBN 978-606-8892-82-5; UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 813. ISBN 978-606-18-1322-3; and PAŞCA, V. Principiul egalităţii armelor în procesul penal român – O realitate sau o ficţiune? [The Principle of Equality of Arms in the Romanian Criminal Trial – Reality or Fiction?]. *Revista Universul Juridic*. 2016, no. 8, p. 8. ISSN 2393-3445.

The mechanism for applying these criteria is also prone to excesses, since it is based not only on reactive elements, but also on elements specific to proactive investigations; even if they are also known in other European systems and tend to evoke a new paradigm of criminal procedural systems,[28] since these proactive elements are not regarded *de plano* as incompatible with the protection guaranteed by the Article 6 or the Article 8 of the European Convention on Human Rights, they are capable of distorting the original purpose of the methods of technical surveillance.[29]

2. the second condition concerns compliance with the initial requirements of legality, in the sense that the national surveillance warrant must have been issued lawfully.

To make this condition effective, the law has established three ways to challenge the legality of surveillance activities authorized under the Law on National Security:

(i) in the pre-trial chamber procedure, which entails a criminal case subsequently opened in which criminal charges have been brought against a person referred to the court called to establish his possible guilt also on the basis of the evidence obtained through special surveillance;
(ii) in the complaint procedure against the decision to close the case, which involves the opening of criminal proceedings, the bringing of criminal charges against a person by initiating criminal proceedings against this one followed by the closing of the file by discontinuance of proceedings (non-prosecution);
(iii) in an autonomous procedure, which entails initiating criminal proceedings without the need to bring criminal charges against a person or bringing criminal charges followed by the adoption of other non-trial solutions (dropping criminal proceedings).

The essential premise for the activation of one of the three challenge procedures is the prior information of the supervised person either fol-

[28] See SERELL, T. Preventive Policing, Surveillance, and European Counter-terrorism. *Criminal Justice Ethics* [online]. 2011, vol. 30, no. 1, pp. 2-3 [cit. 2024-10-14]. ISSN 1937-5948. Available at: https://doi.org/10.1080/0731129x.2011.559057; and ASHWORTH, A. and L. ZEDNER. *Preventive Justice* [online]. 1st ed. Oxford: Oxford University Press, 2014, p. 10 [cit. 2024-10-14]. ISBN 978-0-19-178082-0. Available at: https://doi.org/10.1093/acprof:oso/9780198712527.001.0001.

[29] SUIAN, M. *Metode speciale de supraveghere sau cercetare* [Special Surveillance or Research Methods]. 1-a ed. Bucureşti: Solomon, 2021, p. 51. Pro Foro. ISBN 978-606-8892-82-5.

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lowing consultation of the case file at the time of the referral to the court or following an official notification made according to the law.

In this regard, the regulation is deficient in that, although it refers to the general rules on informing persons subject to technical surveillance, it does not include express provisions on the fixed time limit within which the information must be provided (within 10 days as of the end of the technical surveillance measures).

However, the provisions relating to the possibility of postponing, for reasons of jeopardizing the investigation or the protection of victims or witnesses, the information until the case has been settled at the latest have been taken over.

Normatively regulated as an exception, this legal provision has been transformed by the courts into a genuine rule.

This regulatory shortcoming must be linked to another challenge of a temporal nature, since there is no time limit in the entire regulation for the subsequent use of special supervision in criminal proceedings.

Considering that the application of procedural rules is governed by the principle of timeliness (*tempus regit actum*), the entry into force of the new provision on the matter in July 2023 will also allow the use of previously issued (without time limit) national security surveillance warrants that could not be used for a long time.

In this regard, however, the binding case law of the Constitutional Court should be mentioned, which, even since 2018, sanctioned the legislative solution intensively used in the issue of national security warrants, namely the one that allowed this special surveillance also for threats to national security not expressly regulated (such as acts of corruption, money laundering, etc.).

In spite of the six years that have passed since the two decisions became binding (the constitutional deadline is a maximum of 45 days for remedial intervention), Article 3 letter f) of Law No. 51/1991 has not been formally amended, but has amplified the judicial controversies over its application.

In conclusion, related to these binding decisions, the national security warrants previously issued on the basis of the Article 3 letter f) of Law No. 51/1991 (the text declared unconstitutional) cannot be considered as issued in compliance with the legal provisions.

In principle, data and information obtained as a result of the authorized activities of the secret services can nowadays be used as evidence in criminal proceedings (including in relation to common law offences), except for those obtained as a result of national security warrants issued on the basis of texts declared unconstitutional.

Last but not least, as the condition of the legal issue of such warrants is an essential requirement for the information obtained as a result of special surveillance to be considered as evidence, the legality of such information should be verified in one of the three autonomous judicial procedures provided for by the new provisions, not only upon the request of the persons concerned, but *ex officio* by the judge.

II. With regard to the European benchmarks related to the standards of protection applicable in the case of technical surveillance, the following should be mentioned:

- *case Weber and Saravia v. Germany*, the Court held that *the regulation of special secret surveillance measures, such as the interception of communications, must essentially be caried out by clear, detailed rules, since the technology available for carrying them out is constantly becoming more sophisticated*. Kopp v. Switzerland case (para. 72) and Valenzuela Contreras v. Spain case (para. 46) go to the same direction;
- *case Huvig v. France*, the Court developed the minimum guarantees that should be provided for in the State legislation to avoid abuses of power, such as: the nature of the offences giving rise to the need for interception; the determination of the categories of persons liable to have their telephone conversations recorded; a limitation on the duration of the recording of telephone conversations; the mandatory procedure for the examination, use and storage of the data obtained; the precautions to be taken in the event of other parties being informed; the circumstances in which the recordings may or must be erased or destroyed;
- *case Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria* – para. 84 – the concept of national security must provide substantial guarantees against arbitrary and discriminatory surveillance, not only at the stage of its authorization, but also when it is actually carried out. The Court criticized the lack of verification by an official body or entity (external to the services carrying out the surveillance measures) related to the implementation of such

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measures, so as to ensure independence and compliance with the principles of the rule of law;

- *case Iordachi and Others v. Moldova* – the Court sanctioned the apparent lack of regulations that should specify, with an appropriate degree of precision, the manner of examination of information obtained as a result of the surveillance or the procedures for preserving its integrity and confidentiality, as well as the procedures for its destruction;
- *cases Dumitru Popescu v. Romania* and *Stana v. Romania* – the issue of surveillance warrants in corruption cases represents a measure that has no legal basis and violates the Article 8 of the European Convention on Human Rights. The Court also found that the system for issuing national security warrants in corruption cases *lacks adequate guarantees* in view of the impossibility for the persons concerned to challenge the interceptions;
- *the European Union Agency for Fundamental Rights* pointed out in the material "Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU" that an *organizational separation between secret services and law enforcement authorities is usually considered as a guarantee against the concentration of powers in one service and the risk of arbitrary use of information obtained in secrecy*;
- according to the *Recommendation 1402 (1999) adopted by the Parliamentary Assembly of the Council of Europe on 26 April 1999, "Services with internal security powers should not be authorized to carry out law enforcement activities such as criminal investigation, arrest or detention. Because of the high risk of abuse of these powers and in order to avoid duplication of traditional police activities, these prerogatives should be vested exclusively in other law enforcement bodies."*

The European Court of Human Rights ascertained that the right to be notified of the conduct of surveillance of a person is inextricably linked to the right to an effective judicial remedy against the measure, if it is found to be abusive.[30] It would be inconceivable to conceive the possibility of a challenge in the absence of notification of the supervision measure even if the person did not have the right to challenge the measure *a posteriori*. Going further, the case-law of the Court of Justice has recognized the need to provide in national law for an effective *a posteriori* remedy related to the technical supervision measures, recalling the findings in case

[30] *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06.

Roman Zakharov v. Russia on the conditioning of the possibility to exercise an effective information remedy of the supervised person.[31] This effective remedy must not be one in order to obtain damages, but must concern the legality of the measure and open up the actual possibility for the person under supervision to obtain the cancellation of the measures taken against this one.[32]

Also, the European Court of Human Rights, in its constant case law, has emphasized that it is not sufficient for the prosecutor to request the authorization of technical surveillance, showing, without further specification, that the criminal investigation cannot be carried out using other evidentiary procedures, or that in the absence of technical surveillance it would be much more difficult, it being necessary to detail the reasons why other less intrusive evidentiary procedures would not be effective.[33]

Also, as regards the technical surveillance of the conversations had by the lawyer with his client, the Court[34] emphasized that such interception affects professional secrecy, which is the basis of the relationship of trust which must exist between the two persons, even if it is not the lawyer but his client who has been the subject of the technical surveillance warrant. Also in this case, the lawyer is entitled to file a complaint related to the breach of his right to respect private life and correspondence because of the interception of his conversations, because when a person's conversations are recorded and used in a criminal case, that person must have *effective control* in order to challenge those interceptions.[35] The lack of an actual possibility for the lawyer to refer the technical surveillance measure to judicial review (since it had not been the direct subject of the

[31] *Case of İrfan Güzel v. Turkey* [2017-02-07]. Judgement of the European Court of Human Rights, 2017, Application No. 35285/08, para. 98.

[32] *Case of Xavier Da Silveira v. France* [2010-01-21]. Judgement of the European Court of Human Rights, 2010, Application No. 43757/05, para. 48.

[33] *Case of Dragojević v. Croatia* [2015-01-15]. Judgement of the European Court of Human Rights, 2015, Application No. 68955/11 in UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 814. ISBN 978-606-18-1322-3.

[34] *Case of Pruteanu v. Romania* [2015-02-03]. Judgement of the European Court of Human Rights, 2015, Application No. 30181/05 in UDROIU, M. *Sinteze de procedură penală: Partea generală: Volumul II* [Criminal Procedure Summaries: General Part: Volume II]. 4-a ed. Bucureşti: C. H. Beck, 2023, p. 817. ISBN 978-606-18-1322-3.

[35] OHM, P. The Surveillance Regulation Toolkit: Thinking beyond Probable Cause. In: D. GRAY and S. E. HENDERSON, eds. *The Cambridge Handbook of Surveillance Law* [online]. 1st ed. Cambridge: Cambridge University Press, 2017, p. 493 [cit. 2024-10-14]. ISBN 978-1-316-48112-7. Available at: https://doi.org/10.1017/9781316481127.022.

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measure and the lawyer had not been ordered to be prosecuted) led to the conclusion that the interference was, in the circumstances of the case, disproportionate to the aim pursued and that the person did not benefit from effective control, as required by the rule of law, capable of limiting the interference to what is necessary in a democratic society.

Conclusions

The normative mechanisms that ensure balance and protection in the event of interference with individual rights and freedoms are an eloquent indicator of the relationship between the State and citizen and of the degree of development and maturity of a procedural system. The tendency to expand the special surveillance methods may affect the traditional balance between effective and fair justice, a balance that is not only the society's choice but is also required for effectiveness' sake.[36]

Regardless of the nature of its seriousness and actuality, not even a global or national threat can justify the abolition of the minimum set of guarantees for the effective protection of the right to privacy.

A clear and predictable regulatory context represents the primary condition for the use of special surveillance methods, so that any individual can assess, in real terms, the degree of interference to which this one may be subjected.

The fundamental principles of the rule of law impose a real monopoly by judicial bodies as regards the use of technical surveillance in order to gather the evidence necessary to hold offenders criminally liable.

Under the pretext of the need to protect national security, the establishment of a secret system of technical surveillance of the population can undermine or even destroy democracy through measures which, in theory, would be put in place to protect it.[37]

The inherent restriction of the fundamental rights of the individual which the use of technical surveillance entails must not be exacerbated by the possibility of replacing ordinary methods with special methods

[36] See THOMAS-TAILLANDIER, D. *Contribution à l'étude des procédures pénales dérogatoires* [Contribution to the Study of Exceptional Criminal Proceedings]. 1e éd. Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2014, p. 55. Laboratoire de droit privé & de sciences criminelles. ISBN 978-2-7314-0932-1.

[37] *Case of Roman Zakharov v. Russia* [2015-12-04]. Judgement of the European Court of Human Rights, 2015, Application No. 47143/06, para. 232.

governed by legislation which is inconsistent, difficult to access and lacking predictability.[38]

Even if it is not incompatible *de plano* with the European standards of protection of the right to privacy and the right to a fair trial, the possibility of using special surveillance cannot be a pretext for transferring specific powers from investigative bodies to authorities that usually carry out secret activities in the field of national security.

Moreover, this type of technical surveillance carried out by extrajudicial bodies (secret services) must not be turned into a form of circumvention of procedural protection mechanisms and procedural guarantees established with regard to obtaining evidence in criminal proceedings.

It is inconceivable that an administrative authority should be allowed to use special techniques excessively or automatically and abusively.

Obtaining data or information in an extrajudicial framework, in advance, by justifying the removal of a risk to national security, followed by their subsequent use in criminal cases concerning common law offences, is an indication of procedural abnormality.

The establishment of an effective, subsequent, legality and proportionality control of the special surveillance measures *ex officio* or upon the request of the person under surveillance is *a sine qua non* condition for accepting the use of such data or information in subsequent criminal proceedings.

This control becomes illusory if the documentary basis of the special surveillance measures consists of classified documents specific to the development of secret services activity.

Updating the normative framework with the European requirements and standards, implementation in the active legislative background of the mandatory rulings of the constitutional and the European courts is a positive obligation of the State in order to prevent any forms of excess and arbitrariness.

[38] GRĂDINARU, S. *Supravegherea tehnică în Noul Cod de procedură penală* [Technical Supervision in the New Criminal Procedure Code]. 1-a ed. București: C. H. Beck, 2014, p. 97. ISBN 978-606-18-0389-7.

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Assoc. Prof. Andrei Zarafiu, Ph.D.

Faculty of Law
University of Bucharest
Mihail Kogălniceanu Blvd. 36-46
050107 Bucharest
Romania
andrei.zarafiu@drept.unibuc.ro
https://orcid.org/0000-0003-0932-9630

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Budoucnost pracovněprávního soudnictví v České republice[1]

The Future of Labour Justice in the Czech Republic

Jakub Morávek[2]

Abstract: *The paper is focused on the general prerequisites of good judiciary. Specifically, the author points out the current problems and shortcomings of the Czech judiciary, such as the length of proceedings, inconsistency in decision-making, and insufficient erudition. He then discusses individual conditions, possibilities and measures that could be used to achieve improvements (prerequisites for performing the function of a judge, specialization, education, involvement of the lay element). In addition, the paper discusses the current draft of law on cancelling the institute of assessors at the labour courts in the Czech Republic. The author presents arguments for maintaining the institute in question, with which he refutes the justification of the draft according to the explanatory memorandum. Along with this, the author suggests a possible suitable form of the institute of assessors.*

Key Words: *Labour Law; Labour Court; Judiciary; the Czech Republic.*

Abstrakt: *Příspěvek je zaměřen na obecné předpoklady dobrého soudnictví. Konkrétně autor poukazuje na stávající problémy a nedostatky české justice, jako je délka řízení, nekonzistentnost rozhodování či nedostatečná erudice. Na to pojednává o jednotlivých podmínkách, možnostech a opatřeních, jimiž by bylo možné dosáhnout zlepšení (předpoklady pro výkon funkce soudce, specializace, vzdělávání, zapojení laického prvku). Vedle toho se příspěvek věnuje aktuálnímu návrhu na zrušení institutu přísedících u pracovních soudů v České republice. Autor předkládá argumenty pro zachování předmětného institutu, jimiž vyvrací zdůvodnění návrhu podle důvodové*

[1] Příspěvek vznikl díky podpoře poskytované v rámci výzkumného projektu Cooperatio/SOC/LAWS 10 s názvem „*Labour Law and Social Security Law*“ a zohledňuje stav právní úpravy ke dni 30. září 2024.

[2] Autor působí na Katedře pracovního práva a práva sociálního zabezpečení Právnické fakulty Univerzity Karlovy v Praze jako docent. Je vedoucím Katedry pracovního práva a práva sociálního zabezpečení Právnické fakulty Západočeské univerzity v Plzni, místopředsedou České společnosti pro pracovní právo a právo sociálního zabezpečení a advokátem v Praze.

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zprávy. Spolu s tím autor naznačuje možnou vhodnou podobu institutu přísedících.

Klíčová slova: *Pracovní právo; pracovní soud; justice; Česká republika.*

Úvod

Každá společnost vyrůstá a staví na nějakém hodnotovém základu a struktuře. V tom se společnosti mohou v návaznosti na kulturní blízkost, ale i řadu dalších aspektů, více či méně lišit.

Má-li každý člen společnosti bezezbytku hodnotový základ vštěpen, neexistuje-li riziko vnějších ingerencí a usiluje-li každý nesobecky a s plným respektem k ostatním ze všech sil o obecné blaho představující ideální uspořádání společenských hodnot, není třeba pravidel.

Není-li třeba pravidel, není třeba ani nástrojů k posuzování souladu jednání s nimi, či institutů ke kontrole jejich dodržování, k trestání jejich porušování, respektive, obecně řečeno, k jejich prosazování.

Takový stav, který snad existuje v nějakém společenství andělů, není, a ani nemůže být aspirací žádné lidské společnosti, neboť mu brání lidská přirozenost.

Aby společnost mohla dobře fungovat, potřebuje pravidla. Jednotlivé civilizační okruhy se s ohledem na jejich vývoj a tradice liší ve vnímání, jak se pravidla ustavují. V každém případě však platí, že se musí jednat o pravidla v základu inkorporovaná do obecných sociálních vzorců, což je předpoklad jejich většinového dobrovolného a intuitivního dodržování. Způsob, jak ke vštěpování pravidel dochází, se mezi společnostmi může nikoli nepodstatně lišit.

Pojetí západní civilizace a její koncept liberálně demokratického právního státu předpokládá předem formulovaná pravidla vzešlá z vůle legitimně ustavené autority reprezentované zástupci lidu zvolenými ve všeobecných, svobodných, rovných a tajných volbách. Pravidla směřující k ochraně a zachování hodnotové struktury, o níž se společnost a koncept liberálně demokratického právního státu vycházející z křesťanské tradice opírá.

Aby měla pravidla větší cenu, než je cena papíru, na němž jsou zapsána, a aby společnost vykazovala potřebnou míru stability, musí být jejich dodržování efektivně kontrolováno, vynucováno a porušování trestáno. Musí existovat soubor nástrojů pro uplatnění veřejné moci, ať již

z její vlastní iniciativy (*ex officio*), nebo z vůle osoby, jíž pravidla chrání nebo ji přiznávají určité oprávnění či nároky. Institut určený pro individuální obranu práv musí být rozumně dostupný bez větších administrativních a jiných (například nákladových/majetkových) překážek.

Jak u nástrojů uplatňovaných *ex officio*, tak u institutů záležících na iniciativě jednotlivce se předpokládá bezodkladnost a přiměřenost.

Způsoby, jakými lze dosáhnout naznačeného stavu, který můžeme označit za dobrý právní řád a právní stát, popisují obecně známé teoretické konstrukty.

Stále platná se v tomto směru zdá například Fullerova konstrukce morálky, která umožňuje právo (přirozené procesní právo),[3] doplněná o bezpodmínečnou návaznost právních pravidel na hodnotový základ společnosti a z něj plynoucí obecně přijímané a dodržované úzy a pravidla (morálku povinnosti).[4]

Pravidla však nejsou právem, nejsou-li živá. Živými se stávají v momentě, kdy s nimi veřejná moc poměřuje konkrétní situace a rozhoduje, zda tyto jsou, či nejsou po právu, a pokud po právu nejsou, určuje důsledky takového stavu, vynucuje plnění pravidel a jí dále vyřčené soudy. Právo tedy vzniká nikoli jako produkt činnosti moci zákonodárné, nýbrž jako výstup společného působení všech složek tvořících v úhrnu veřejnou moc.

Vedle státní kontroly, správního a trestního procesu a postihu je základním stavebním kamenem uvádění práva v život civilní soudní řízení. I k němu můžeme formulovat obecné předpoklady dobrého práva, funkčního právního řádu a právního státu. Jsou jimi zejména rychlost, efektivnost, přesnost a dostupnost soudní ochrany.

Předložený příspěvek se v kontextu naznačených výchozích tezí a v současné době v Parlamentu České republiky projednávaného návrhu na zrušení institutu přísedících v pracovněprávních sporech[5] zaměřuje

[3] Viz FULLER, L. L. *Morálka práva*. 1. vyd. Praha: Oikoymenh, 1998. 229 s. ISBN 80-86005-65-8.

[4] V dalším, včetně souvisejících tezí o pozitivní a objektivní morálce viz MORÁVEK, J. *Model práva: Vztah práva a morálky*. 1. vyd. Praha: Linde, 2013. 103 s. ISBN 978-80-7201-911-3.

[5] Viz Sněmovní tisk 598/0: Novela zákona o soudech a soudcích – EU. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 2023-12-13 [cit. 2024-09-30]. Dostupné z: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=598&CT1=0.

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na problematiku pracovněprávního soudnictví a na jeho předpokládané budoucí perspektivy.

1 Předpoklady dobrého soudnictví

Nejhospodárnější, nejvýhodnější, nejracionálnější a obecně ve všech směrech nejlepší je sporům předcházet. Mimořádně účinným prostředkem prevence právních sporů je srozumitelná a jednoznačná právní úprava, která dává adresátovi vysokou míru jistoty stran jeho postavení.

V rovině pracovněprávních vztahů lze za bezmála stejně významný prvek prevence pracovněprávních sporů považovat aktivní, racionální a efektivní zapojení zástupců zaměstnanců (odborů) v plné škále jejich možných rolí, jako je poradenství pro zaměstnance, postavení prostředníka či *de facto* mediátora při jednání zaměstnance a zaměstnavatele, zástupce zaměstnance při jednání se zaměstnavatelem a (je-li to nutné) i při soudním řešení věci.

Nahlédneme-li touto perspektivou úroveň právního státu a právního řádu v České republice, je hodnocení, mírně řečeno, znepokojující.

V prvé řadě v posledních letech soustavně upadá úroveň pracovněprávní legislativy. Právní předpisy jsou přijímány překotně bez potřebného odborného diskurzu. Není tak výjimečné, že je legislativa mezerovitá, právní předpisy těžko srozumitelné a dosažení alespoň trochu rozumného výsledku si, nikoli výjimečně, žádá užití teleologické redukce a dalších více či méně mimořádných prostředků výkladu. Případně jsou zaváděny instituty od počátku nefunkční či prováděny změny navozující stav, který je podstatně horší než *status quo*.[6]

V základu by si přitom zlepšení nežádalo příliš. Stačilo by při formulaci záměrů a návrhů vycházet z podkladových analýz potřebnosti a dopadů a návrhy před jejich předložením do Parlamentu České republiky důsledně diskutovat s odbornou veřejností, či alespoň nebýt lhostejný k jejím komentářům a připomínkám, v nichž je často poukazováno na nedostatky a na možné problémy spolu s návrhy, jak těmto nežádoucím efektům předejít.[7, 8]

[6] Viz například MORÁVEK, J. Novela zákoníku práce, aneb jak se to (ne)povedlo. *Právní rozhledy*. 2020, roč. 28, č. 13-14, s. 488-494. ISSN 1210-6410, nebo MORÁVEK, J. K některým (nejen) problematickým otázkám dovolené po 1. 1. 2021. *Právní rozhledy*. 2021, roč. 29, č. 2, s. 59-64. ISSN 1210-6410.

[7] Viz například PICHRT, J. a J. MORÁVEK, et al. *Whistleblowing – závěry a perspektivy*. 1. vyd. Praha: Wolters Kluwer, 2022. 134 s. ISBN 978-80-7676-590-0, nebo PICHRT, J. a J. MO-

Nahlédnuto perspektivou pracovněprávních sporů je aktuální stav pracovněprávní legislativy problematický (nejméně) ve dvou směrech.

Nejistota stran právních pravidel plynoucích z právních předpisů (nejednoznačnost právních předpisů) je podhoubím právních sporů.

Vedle toho, a to je nejméně stejně závažné, jde o jednu z příčin nejednotnosti a nestálosti judikatury.[9]

Koncept právního státu si v návaznosti na jeho výchozí hodnoty, jako je právní jistota a ochrana nabytých práv, žádá věcně správná, stálá, předvídatelná a srozumitelná, tedy rozumně a přesvědčivě zdůvodněná rozhodnutí orgánů veřejné moci, zejména soudů.

Ani v tomto si však nevedeme nijak excelentně.

Problémy s věcnou správností, přesvědčivostí, konzistentností i rychlostí nejsou navíc doménou jen okresních a obvodních soudů, nýbrž (a to je ještě větší problém) se občasně vyskytují i u soudů vyšších, Nejvyšší soud nevyjímaje.[10]

Nedostatky na úrovni zejména některých nižších soudů pramení do značné míry ze shodných příčin. Jde o nepřipravenost soudce, nedosta-

RÁVEK, eds. *Slaďování soukromého a pracovního života*. 1. vyd. Praha: Wolters Kluwer, 2023. 227 s. ISBN 978-80-7676-881-9.

[8] Ani aktuálně navrhovaná novela zákoníku práce zřejmě nevybočí z řady, když přináší se zdůvodněním „jde o požadavek praxe, kdy zejména zaměstnankyně na rodičovské dovolené stojí o přivýdělek u svého zaměstnavatele a chtějí konat stejný druh práce“ například nekoncepční a nesmyslnou změnu ustanovení § 34b odst. 2 zákoníku práce, do nějž se doplňuje za větu prvou věta druhá tohoto znění: „Toto omezení neplatí pro další právní vztah založený dohodou o provedení práce nebo dohodou o pracovní činnosti, který byl uzavřený na dobu čerpání rodičovské dovolené“, místo toho, aby byla zcela nově zpracována právní úprava rodičovské a mateřské dovolené, třeba na základě expertní analýzy zpracované pro Svaz průmyslu a dopravy České republiky členy Katedry pracovního práva a práva sociálního zabezpečení Právnické fakulty Univerzity Karlovy v Praze, viz Projekty související s § 320a Zákoníku práce. In: *Svaz průmyslu a dopravy České republiky* [online]. 2023-10-16 [cit. 2024-09-30]. Dostupné z: https://www.spcr.cz/projekty/probihajici-projekty/projekty-souvisejici-s-320b-zakoniku-prace.

[9] V dalším srovnej MORÁVEK, J. Ústavněprávní aspekty pracovněprávního soudnictví. In: J. KUDRNA, ed. *Ústava v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2022, s. 301-322. ISBN 978-80-7676-587-0.

[10] Na jiném místě bylo k tomuto tématu poukazováno na to, že Nejvyšší soud České republiky (nejméně v pracovněprávních věcech) projevuje jistou nekonzistentnost i v pojímání sama sebe a moci soudní z hlediska tradiční mocenské triády. V této souvislosti viz například MORÁVEK, J. Ústavněprávní aspekty pracovněprávního soudnictví. In: J. KUDRNA, ed. *Ústava v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2022, s. 301-322. ISBN 978-80-7676-587-0.

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tečnou orientaci v právní úpravě, neznalost doktrinálních názorů a judikatury vysokých soudů, a kvůli nedostatku „životní“ zkušenosti také o neschopnost odpovídajícím způsobem se zorientovat v rozhodných skutkových okolnostech věci.

Stále není výjimečné, že pracovní zkušenost nově ustanoveného soudce v oblasti práva obnáší pouze působení v justici. Justice je přitom ve srovnání s běžnými provozy, nadnárodními korporátními strukturami, a tak dále, atypické pracovní prostředí. Soudci tak nemůže poskytnout odpovídající zkušenosti, na nichž lze stavět reálné představy o skutečném fungování příslušných pracovněprávních vztahů, výkonu práce, skutečném významu jednotlivých událostí v celkovém kontextu, a tak dále. S výlučnou pracovní zkušeností z justice tak soudce získává představu o podobě vztahů, průběhu jednotlivých procesů a skutkových dějů, významu rozhodných skutečností v nich, a tak dále, převážně z průběhu řízení a z obsahu spisu, tedy z tvrzení a důkazů předložených účastníky řízení.

Vyjdeme-li z předpokladu, že účastníci mají zájem na úspěchu ve věci, a proto tvrdí a prokazují svoji pravdu, která může být značně vzdálená od skutečného stavu věcí, může být důsledkem zkušenost stavící na značně zkreslené představě o vnější realitě.

Nejde ale jen o nedostatečnou zkušenost a zkreslené představy. V některých případech je minimálně k diskusi i odborná úroveň rozhodnutí, respektive orientace soudu v základních právních otázkách.

Poukázat lze pro příklad na dvě rozhodnutí odvolacích soudů v pracovněprávních věcech.

Krajský soud v Praze ve věci sp. zn. 23 Co 34/2024 v pracovněprávním sporu zaměstnance odměňovaného mzdou mimo jiné konstatoval: *„Podle ustanovení § 134 zákoníku práce, za úspěšné splnění mimořádného nebo zvlášť významného pracovního úkolu může zaměstnavatel poskytnout zaměstnanci odměnu. Podle ustanovení § 134a zákoníku práce, za splnění předem stanoveného mimořádně náročného úkolu, jehož příprava, postupné zajišťování a konečná realizace bude z hlediska působnosti zaměstnavatele zvlášť významná, může zaměstnavatel zaměstnanci, který se na jeho splnění bezprostředně nebo významně podílí, poskytnout cílovou odměnu* […] *A protože za rok 2021 bylo jak dosaženo kladného výsledku hospodaření, tak žalobkyně splnila v potřebném rozsahu své osobní cíle pro tento rok, přísluší jí ve smyslu § 134a zákoníku práce nárok na vyplacení této odměny…“*

Vedle toho Městský soud v Praze ve věci sp. zn. 62 Co 391/2016 ve sporu o určení neplatnosti rozvázání pracovního poměru mimo jiné uvedl: *„Za situace, kdy výpověď z pracovního poměru daná žalobci byla pravomocným rozhodnutím soudu určena neplatnou, přičemž toto rozhodnutí má nepochybně konstitutivní povahu, představuje odstupné vyplacené žalobci bezdůvodné obohacení ve smyslu § 324 zákoníku práce za použití § 451 občanského zákoníku.“*

Do značné míry přirozeným a předpokládatelným důsledkem všech naznačených problematických momentů, které se v žádném případě netýkají všech soudů a soudců, jsou však v soustavě natolik zastoupeny, že mají zřetelné projevy, je nepřiměřená délka řízení od jeho zahájení do jejího skutečného pravomocného skončení.

S délkou řízení jdou ruku v ruce náklady řízení. Opětovně pro ilustraci dva příklady.

Ve věci žaloby o určení neplatnosti rozvázání pracovního poměru, která je řešena před Obvodním soudem pro Prahu 8 pod sp. zn. 16 C 39/2018, bylo řízení zahájeno 28. února 2018. Po více jak 6 letech řízení stále běží a v současné době o věci po trojím zrušení prvostupňových rozhodnutí odvolacím soudem opětovně rozhoduje Obvodní soud pro Prahu 8.

Ve sporu vedeném před Obvodním soudem pro Prahu 10 pod sp. zn. 16 C 130/2015, v němž se zaměstnanec domáhal zaplacení částky 294 451 Kč s příslušenstvím z titulu dlužné mzdy za přesčasovou práci, byla věc skončena 27. března 2017 odmítnutím (nikoli zamítnutím) žaloby. Obvodní soud pro Prahu 10 uložil žalobci povinnost uhradit náhradu nákladů řízení v částce 107 690 Kč. Odvolací soud nicméně následně rozhodnutí soudu prvého stupně změnil tak, že žádný z účastníků řízení nemá právo na náhradu nákladů řízení.

K aktuálnímu postavení a působení zástupců zaměstnanců a k jeho rezervám lze odkázat na dřívější texty, v nichž je tato materie v podrobnostech rozebrána.[11]

[11] Viz MORÁVEK, J. Odborové sdružování v 21. století. In: J. KUDRNA, ed. *Listina v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2021, s. 135-144. ISBN 978-80-7552-076-0, nebo MORÁVEK, J. Princip majority v odborovém sdružování. In: A. OLŠOVSKÁ, ed. *Est naturalis favor pro laborantibus: Pocta prof. JUDr. Helene Barancovej, DrSc*. 1. vyd. Trnava: Typi Universitatis Tyrnaviensis, 2024, s. 130-142. ISBN 978-80-568-0659-3.

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2 Cesta k dobrému soudnictví

Kroky, jimiž by bylo možné dosáhnout zlepšení stávající úrovně pracovněprávního soudnictví, jsou průběžně s větší či menší intenzitou diskutovány (bohužel, pouze) v rámci akademické obce.

Vynecháme-li shora poukázaný předpoklad dobré hmotněprávní úpravy, lze uvažovat zejména o následujícím:[12]

a) *předpoklady pro výkon funkce soudce* – návrh na změnu ustanovení § 60 odst. 1 zákona č. 6/2002 Sb., o soudech a soudcích, jímž došlo v roce 2003 zákonem č. 192/2003 Sb. k posunu věkové hranice nezbytné pro výkon funkce soudce z 25 let na 30 let, nebyl součástí původního návrhu změnového zákona.[13] Vzešel z jednání Ústavněprávního výboru sněmovny.[14] Schází tedy jak důvodová zpráva, tak odpovídající podkladová analýza.

Z přepisu přednesů při projednání návrhu zákona na plénu Poslanecké sněmovny lze nicméně dospět k závěru, že cílem mělo být, aby do funkce soudce nevstupovali v podstatě čerství absolventi právnických fakult bez větší životní a pracovní zkušenosti bezprostředně po tříleté praxi absolvované jako justiční čekatelé či asistenti soudce.

S odstupem času je zjevné, že samo posunutí věkové hranice, respektive posunutí věkové hranice tak, jak bylo provedeno, nebylo a nemohlo být pro dosažení tohoto cíle dostatečné. Důvod je relativně prostý a lze se k němu snadno dopočítat při zohlednění následujících fakt.

Věková hranice pro výkon funkce soudce se v roce 1991 zákonem č. 335/1991 Sb., o soudech a soudcích, zvedla z 24 let na 25 let. Povinná devítiletá školní docházka byla pro všechny žáky zavedena až od školního roku 1996/1997; od roku 1990 sice bylo možné ab-

[12] V této souvislosti v podrobnostech viz například MORÁVEK, J. Ústavněprávní aspekty pracovněprávního soudnictví. In: J. KUDRNA, ed. *Ústava v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2022, s. 301-322. ISBN 978-80-7676-587-0.

[13] Viz Sněmovní tisk 299/0, část č. 1/2: Novela zákona o soudech, soudcích, přísedících. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 2003-04-23 [cit. 2024-09-30]. Dostupné z: https://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=299&CT1=0.

[14] Viz Sněmovní tisk 299/1, část č. 1/2: Usnesení ústavně právního výboru k tisku 299/0. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 2003-04-25 [cit. 2024-09-30]. Dostupné z: https://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=299&ct1=1.

solvovat devět tříd základní školy, nicméně na střední školu bylo možné nastoupit již po absolvování osmé třídy.

Ve srovnání se stávajícím stavem byl podstatný rozdíl v počtu odkladů nástupu povinné školní docházky.[15]

V 90. letech byly činěny teprve první nesmělé kroky v zahraniční mobilitě vysokoškolských studentů.

Podtrženo, sečteno, i když necháme stranou, že po určitou dobu byl magisterský studijní program v oboru právo veden jako čtyřletý, pokud dítě na přelomu 80. a 90. let nastoupilo povinnou školní docházku v 6 letech a postupovalo kontinuálně, bylo reálné, aby magisterský studijní program absolvovalo ve 22 letech. Následovat mohla 3letá praxe na soudu a v 25 letech bylo možné být ustaven do funkce soudce. V dnešní perspektivě (a stejně jako řadu let nazpět) je ukončení vysokoškolského magisterského studijního programu v oboru právo ve 22 letech v podstatě nereálné.

Pokud dítě nastoupí povinnou školní docházku s ročním odkladem, absolvuje oproti 90. letům o rok delší povinnou školní docházku a protáhne si dobu studia na vysoké škole, byť jen o rok, kvůli zahraničnímu studijnímu pobytu (nebo z jiného důvodu), absolvuje magisterský studijní program v lepším případě v 25 letech, respektive v 26 letech. Připočteme-li 3letou praxi, je výsledek stran předchozí pracovní zkušenosti před ustavením do funkce soudce oproti dřívější úpravě v podstatě zanedbatelný.

Měla-li by být věková hranice prostředkem zajišťujícím větší životní a pracovní zkušenost, musela by se pohybovat nejméně o 5 let výše, tj. na 35 letech. Osobně bychom plédovali spíše za 40 let. Životní zkušenosti nelze zákonem garantovat ani měřit, a věk sám o sobě není garancí životní a ani profesní zkušenosti.

Právní úpravou, a to by se zdálo žádoucí, by však bylo vhodné alespoň vyžadovat předchozí pestřejší pracovní zkušenosti, jejichž prostřednictvím může soudce získat lepší představu o přístupu k řešení právních otázek ze strany jednotlivých účastníků řízení, kterou může později promítnout do vnímání jejich působení před soudem.

[15] Viz *Statistický informační systém Ministerstva školství, mládeže a tělovýchovy* [online]. 2024 [cit. 2024-09-30]. Dostupné z: https://statis.msmt.gov.cz/data/.

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Uvedeným se v žádném případě nemíní návrat k úpravě zavedené v 50. letech minulého století, kdy se dle ustanovení § 4 odst. 1 zákona č. 67/1950 Sb., o pracovních a platových poměrech soudců z povolání, prokurátorů a soudcovských čekatelů, pro ustavení do funkce soudce vyžadovalo, aby uchazeč pracoval přiměřenou dobu stanovenou ministrem spravedlnosti ve výrobě. Předchozí pestřejší pracovní zkušeností je míněno působení v jiných právnických povoláních. Konkrétní délka a případně i obsahová náplň je k diskusi.

b) *specializace* – právní řád České republiky posledních 20 let stále více hypertrofuje. Nemalou zásluhu na této tendenci má evropská legislativa. Jelikož nelze předpokládat, že by se trend v dohledné době otočil, zdá se rozumné uvažovat o specializaci, neboť jedině ta nabízí možnost se v podrobnostech a v patřičné hloubce seznámit s právní úpravou, k ní se vztahující odbornou literaturou, doktrinálními názory a se související judikaturou.

Není možné (obrazně řečeno), aby soudce, který ráno soudí sousedský spor, v poledne řeší péči o děti, po obědě rozhoduje spor dvou obchodních korporací z nájmu nebytového prostoru a večer posuzuje platnost rozvázání pracovního poměru výpovědí, byl v potřebné míře v každé jedné oblasti práva v právě uvedeném smyslu odpovídajícím způsobem orientován.

Jelikož není reálné uvažovat o samostatném pracovním soudnictví, zdá se být vhodným řešením ustavení specializovaných úseků pro pracovněprávní spory po vzoru správních soudů. S ohledem na roční nápad pracovněprávních věcí[16] se rovněž nabízí uvažovat o spádovosti soudů pro pracovněprávní spory.

c) *vzdělávání* – se specializací úzce souvisí vzdělávání a se vzděláváním nutný související předpoklad, jímž je otevřená mysl.

Být soudcem je práce jako každá jiná. Ustavením do funkce se z průměrného středoškoláka a podprůměrného vysokoškoláka, který ve výběru uspěl, nestane *lucerna juris*. Funkce nepřidává rozum, moudrost, znalosti, dává jen moc prosadit svůj názor a ten může být z řady důvodů nesprávný, stejně jako je tomu u výkonu jiných právnických povolání. U soudce je však problém v tom, že oproti jiným

[16] Viz Statistiky z oblasti justice. In: *Ministerstvo spravedlnosti České republiky* [online]. 2024 [cit. 2024-09-30]. Dostupné z: https://msp.gov.cz/web/msp/statisticke-udaje-z-oblasti-justice.

právnickým povoláním, jako například advokacii nebo korporátní sféře, zde nefunguje selekce trhem, v jejímž důsledku dobří prosperují a špatní končí. Existuje sice možnost kárného postihu, to je však běh na dlouhou trať.

Předpokladem dobrého (nejen) pracovněprávního soudnictví je tedy komplexní systém soustavného vzdělávání zahrnující seznamování se s judikaturou vysokých soudů mimo jiné za účasti soudců vysokých soudů (včetně otevřené diskuse o rozhodovací praxi vysokých soudů), průběžné seznamování se s novou právní úpravou a s doktrinálními poznatky a názory k ní.

Do značné míry za jednu z komponent vzdělávacího procesu lze považovat i zapojení soudců před jejich přidělením ke konkrétnímu okresnímu nebo obvodnímu soudu do rozhodování senátů vyšších soudů v pozici přísedících; na okresní soud by měl být soudce jako samosoudce nebo jako předseda senátu přidělen až po získání potřebných zkušeností, respektive po uplynutí předepsané doby působení v senátu vyššího soudu. Jinak řečeno, jde do značné míry o otočení dosavadního schématu, kdy nově ustavený soudce je přidělen na konkrétní okresní nebo obvodní soud, aniž by předtím měl možnost získat potřebnou míru zkušeností se samostatným rozhodováním, vedením řízení a řízením jednání, a až následně je mu umožněna stáž na vyšším soudu, na nějž pak, nikoli výjimečně, směřuje natrvalo.

d) *zapojení laického prvku* – nikoli náhodou je napříč příbuznými právními řády zapojení laického prvku do rozhodování pracovněprávních věcí běžné. Má to prostý důvod. Vynecháme-li obskurnosti, jakože si soudce před ustanovením do funkce musí odsloužit pár let prací ve výrobě (viz shora), soudce má mít odborné znalosti a na základě zkušenosti schopnost racionálně nahlédnout na tvrzení účastníků a prováděné důkazy. Z povahy věci však nemůže mít zkušenost a podrobnou představu o významu všech možných skutkových dějů v kontextu konkrétního provozu či alespoň typu provozu. Stejně tak nemůže mít potřebné znalosti či zkušenosti s jednotlivými procesy, činnostmi, a tak dále. A právě to má být hlavní význam a přínos laického prvku, který by měl do řízení přinášet pohled (odbornou způsobilost) na pro rozhodnutí ve věci rozhodující momenty, o nichž není soudce pro neznalost prostředí schopen si učinit komplexní názor.

Způsobů, jak zapojit laický prvek, je řada.

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I s ohledem na dosavadní právní úpravu a tradici se zdá stále inspirativní a vhodné vyjít ze zákona č. 131/1931 Sb., o soudnictví ve sporech z poměru pracovního, služebního a učebního, tedy ustavit seznamy přísedících nominovaných zástupci zaměstnanců a zástupci zaměstnavatelů, kdy u každého bude deklarována jeho odbornost, s tím, že soudní senát bude složen ze soudce a po jednom z přísedících s příslušnou odborností z každého seznamu.

Dalšími inspiračními zdroji v tomto směru mohou být rakouský Arbeits- und Sozialgerichtsgesetz z roku 1985 nebo německý Arbeitsgerichtsgesetz z roku 1953.

Spravedlnost však neznamená pouze věcně správné a přesvědčivě zdůvodněné rozhodnutí. Spravedlnost znamená i dosažení rozhodnutí v rozumné době a za rozumnou cenu.

Délka řízení a složitost právní úpravy úzce souvisí s náklady řízení. Do nákladů řízení je přitom třeba počítat nikoli pouze soudní poplatky a případné náhrady nákladů státu. Do nákladů je třeba zahrnout i náklady na právní zastoupení a případnou povinnost uhradit náhradu nákladů řízení protistraně, neboť i tyto potenciální výdaje jsou před vstupem do řízení oprávněným zvažovány a mají vliv na rozhodnutí, zda řízení zahájit, či nikoli.

V tomto směru v České republice existují významné překážky přístupu ke spravedlnosti.[17] Z tohoto hlediska můžeme fakticky společnost rozdělit do dvou skupin.

Jednu skupinu tvoří ti, kterým nárok formálně svědčí; náklady, respektive potenciální náklady soudního řízení však pro ně představují kvůli majetkovým poměrům nepřekonatelnou překážku přístupu ke spravedlnosti (ochraně svých práv).[18] Z tohoto hlediska tak jde fakticky o bezprávné osoby.

[17] Dobře je tato skutečnost patrná při srovnání ročních nápadů pracovněprávních sporů, viz Statistiky z oblasti justice. In: *Ministerstvo spravedlnosti České republiky* [online]. 2024 [cit. 2024-09-30]. Dostupné z: https://msp.gov.cz/web/msp/statisticke-udaje-z-oblasti-justice, případně PICHRT, J., M. ŠTEFKO a J. MORÁVEK. *Analýza alternativních způsobů řešení sporů v pracovněprávních vztazích*. 1. vyd. Praha: Wolters Kluwer, 2016. 407 s. ISBN 978-80-7552-137-8.

[18] Možnost osvobození od soudních poplatků a bezplatná právní pomoc jsou v rámci tohoto hodnocení bez významu, neboť soudní řízení je z finančního hlediska neakceptovatelným rizikem často i pro středně příjmové zaměstnance.

Druhou skupinu tvoří ti, kdož nemají nárok pouze formálně, nýbrž se svých práv jsou schopni domoci i fakticky, když riziko možných nákladů, které bude třeba vydat v souvislosti s domožením se svých práv, pro ně s ohledem na jejich majetkové poměry nepředstavuje zásadní překážku pro přístup k soudní ochraně.

Není třeba zvlášť zdůrazňovat, zejména pokud vezmeme v patrnost, že v rovině pracovněprávních vztahů do prvé ze skupin spadá většina zaměstnanců, že takový stav je z hlediska principů demokratického právního státu zásadním problémem a není dlouhodobě udržitelný.[19]

I ve vztahu k těmto aspektům a předpokladům dobrého soudnictví je již několik let vedena akademická debata, v níž je po vzoru zahraničních právních úprav, zejména po vzoru Spolkové republiky Německo a Rakouska, poukazováno na možná řešení.[20]

Za všechny lze zmínit například:[21]

a) osvobození pracovněprávních sporů od soudních poplatků, je-li navrhovatelem zaměstnanec;
b) vyloučení povinnosti zaměstnance při neúspěchu ve věci před soudem prvého stupně k náhradě nákladů řízení mimo případy zjevně bezúčelného uplatňování práva;
c) podá-li zaměstnanec proti rozhodnutí soudu prvého stupně, který jeho návrhu nevyhověl, odvolání či dále mimořádný opravný prostředek, mělo by být možné uložit mu povinnost uhradit náhradu nákladů řízení za řízení před soudy všech stupňů.

[19] Bez významu není, že soudu často v podstatě nijak zvlášť nezáleží na nákladech, které s sebou počet jednání a průběh řízení na straně účastníka, zejména fyzické osoby nese. Na příklad ve věci sp. zn. 14 C 24/2021, v níž je řešena standardní a skutkově nijak zvlášť složitá otázka platnosti odvolání z funkce a výpovědi z pracovního poměru, Obvodní soud pro Prahu 6 od zahájení řízení počátkem roku 2021 po nařízení mediace, aniž by bylo z postojů účastníků jakkoli rozumné se domnívat, že bude dosaženo mimosoudního řešení, ve věci konal celkem 13 jednání, z nichž valná většina z hlediska předmětu řízení nebyla nijak přínosná, když v jejich rámci soud buďto předčítal listinné důkazy nebo četl části odůvodnění jiných rozhodnutí.

[20] Viz PICHRT, J., M. ŠTEFKO a J. MORÁVEK. *Analýza alternativních způsobů řešení sporů v pracovněprávních vztazích*. 1. vyd. Praha: Wolters Kluwer, 2016. 407 s. ISBN 978-80-7552-137-8.

[21] V podrobnostech viz MORÁVEK, J. Ústavněprávní aspekty pracovněprávního soudnictví. In: J. KUDRNA, ed. *Ústava v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2022, s. 301-322. ISBN 978-80-7676-587-0.

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Další neodmyslitelnou komponentou pro lepší zajištění přístupu zaměstnanců ke spravedlnosti a soudní ochraně nabytých práv představuje odpovídající zapojení zástupců zaměstnanců, což je svébytné a rozsáhlé téma, kterému, jak již bylo řečeno, byla opakovaně věnována pozornost na jiných místech, na která se lze odkázat.[22]

3 Návrh na zrušení přísedících v pracovněprávních věcech

V kontextu dosavadního výkladu se nabízí otázka, nakolik může být cestou ze stávajícího marasmu zrušení institutu přísedících bez náhrady, jak je navrhováno Ministerstvem spravedlnosti České republiky.[23]

Jelikož jde z komparativního hlediska o atypický krok (laický prvek se účastní na rozhodování o pracovněprávních věcech například v Rakousku, v Německu, ve Velké Británii, na Slovensku, ve Slovinsku, v Portugalsku, ve Španělsku, v Itálii, ve Francii) a navrhuje se zrušení institutu s více jak stoletou tradicí, měla by odpověď v podobě dostatečně pádných, racionálních a přesvědčivých argumentů, v jejichž světle změna obstojí v testu proporcionality, obsahovat důvodová zpráva k návrhu změnového zákona. V ní se však dozvíme pouze toto:

- cílem předkládaného návrhu zákona je *zefektivnění soudního rozhodování*, na kterém se podílí přísedící;
- *provedení revize stávající právní úpravy institutu přísedících a reakce na praktické problémy*, které současná právní úprava přináší, jsou nezbytné;
- je nutné legislativní cestou reagovat na související administrativní zátěž soudů, na *obvykle nedostatečnou participaci přísedících na samotném projednání a rozhodování* v rámci řízení, na *komplikace spojené se sestavováním soudního senátu* tvořeného soudcem a přísedícími pro celé řízení před soudem i na související často *nepřiměřenou délku soudních řízení*;

[22] Dále viz MORÁVEK, J. Odborové sdružování v 21. století. In: J. KUDRNA, ed. *Listina v kontextu společenských změn: K 30. výročí jejího přijetí*. 1. vyd. Praha: Wolters Kluwer, 2021, s. 135-144. ISBN 978-80-7552-076-0, nebo MORÁVEK, J. Princip majority v odborovém sdružování. In: A. OLŠOVSKÁ, ed. *Est naturalis favor pro laborantibus: Pocta prof. JUDr. Helene Barancovej, DrSc.* 1. vyd. Trnava: Typi Universitatis Tyrnaviensis, 2024, s. 130-142. ISBN 978-80-568-0659-3.

[23] Viz Sněmovní tisk 598/0: Novela zákona o soudech a soudcích – EU. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. 2023-12-13 [cit. 2024-09-30]. Dostupné z: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=598&CT1=0.

- návrhem je sledována jednak *potřeba vyhovět požadavkům aplikační praxe* na omezení účasti laického prvku;
- … v současné době považováno za *optimální řešení aktuálního stavu*;
- … existující problémy by přetrvávaly nebo by se dále prohloubily;
- *návrh zrušit přísedící v určitém rozsahu je rovněž jedním z opatření tzv. Antibyrokratického balíčku*.

Necháme-li stranou bezvýznamná tvrzení:

- *jde o jedno z opatření směřujících ke konsolidaci veřejných rozpočtů*. Takové tvrzení, co by důvod pro změnu právní úpravy, nelze brát vážně, pakliže se současně uvádí, že úspora ve státním rozpočtu bude činit cca. 8 000 000 Kč.

  Pro připomenutí, výdaje státního rozpočtu České republiky podle státního závěrečného účtu za rok 2023 činily 2 202,6 miliard Kč. Potenciálně ušetřená částka 8 000 000 Kč tak činí cca. 0,000343 % celkových výdajů;

- *jde o reflexi potřeb aplikační praxe*. Krom toho, že není zřejmé, kdo měl takový požadavek vznést (jakáže aplikační praxe si takovou změnu žádá), jde o neurčité a nesmyslné tvrzení, vezmeme-li v patrnost, že nejde o změnu hmotněprávní úpravy či procesního institutu, ale o *de facto* změnu institucionálního uspořádání;

zůstává tak pouze *„zefektivnění soudního rozhodování, odstranění praktických problémů, komplikace při sestavování senátů, snížení administrativní zátěže soudů a nedostatečná participace přísedících na projednání a rozhodování.“*

Uvedené lze číst také jinak jako:

- je snazší, má-li se na termínu jednání domluvit soudce a účastníci řízení, případně jejich právní zástupci, než pokud se mají na termínu jednání domluvit soudce, účastníci řízení, případně jejich právní zástupci a dva přísedící; a
- přísedící se většinově neorientují v rozhodné právní úpravě a ani v rozhodných okolnostech věci a jsou tak často pasivní a k rozhodnutí o věci příliš nepřispívají.

Ani jedno není relevantní důvod a v žádném případě z hlediska principu proporcionality neodůvodňuje navrhovanou změnu.

Že se na společném termínu hůře dohodne pět lidí než tři, je sice fakt, ale jde o fakt, který je přítomný od počátku zapojení přísedících. Je-li

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laický prvek zapojen do rozhodování efektivně a je-li využit jeho potenciál, jde o cenu, kterou stojí za to zaplatit.

Že jsou přísedící převážně pasivní a jejich přínos pro projednávání věci je většinou minimální, není obecným znakem zapojení laického prvku, nýbrž důsledkem nesprávného nastavení systému, konkrétně požadavků na kvalifikaci přísedících.

Z praktické zkušenosti, kdy jednou z přísedících byla advokátka, která se dlouhodobě věnuje pracovnímu právu a má tak přehled o judikatuře vysokých soudů a doktrinálních názorech, či kdy přísedícím v pracovněprávním sporu, který se týkal náhrady škody vzniklé při stavební činnosti, byl stavební inženýr, lze jednoznačně konstatovat, že je-li přísedící kvalifikovaný, je jeho přínos znatelný v plné škále aspektů, tj. od průběhu řízení, přes dokazování až po rozhodnutí ve věci a délku řízení (postupuje-li soud efektivně, dosáhne výsledku rychleji).

Za předpokladu, že kvalifikovaný přísedící má naznačené pozitivní efekty, není řešením většinové nefunkčnosti institutu jeho zrušení, nýbrž oprava, což je směr, který by měl zvolit racionální zákonodárce.

Závěrečné poznámky

Shora uvedeným se materie v žádném případě nevyčerpává. Jejím dalším neoddělitelným, zde nezmíněným svébytným a komplexním prvkem jsou alternativní metody řešení pracovněprávních sporů. Jejich vhodné zapojení, ať již například v podobě smírčích komisí nebo specializovaných kvalifikovaných rozhodců po vzoru rozhodců podle zákona č. 2/1991 Sb., o kolektivním vyjednávání, respektive po vzoru dřívější právní úpravy rozhodčího řízení ve spotřebitelských vztazích, by mohlo nabídnout rozumný, efektivní, rychlý a finančně dostupný způsob přístupu k ochraně nabytých práv.

Byť je na tento potenciál dlouhodobě poukazováno, zůstává z legislativního hlediska nevyužit.[24]

Problém je v tom, že jsme si v legislativě zvykli volit buďto nejjednodušší a nejméně pracné řešení, což při složitosti řešených problémů zpravidla znamená také řešení, které nepovede k dosažení kýženého cíle, nebo řešení neozkoušená, neobvyklá a v jiných zemích neznámá, což je

[24] V podrobnostech viz zejména PICHRT, J., M. ŠTEFKO a J. MORÁVEK. *Analýza alternativních způsobů řešení sporů v pracovněprávních vztazích.* 1. vyd. Praha: Wolters Kluwer, 2016. 407 s. ISBN 978-80-7552-137-8.

zpravidla podobně nevhodné, neboť, vybočujete-li ve srovnání s příbuznými právními řády kulturně blízkých společností významně z řady, s vysokou pravděpodobností jste šlápli vedle.

Co říci na závěr?

Perspektiva pracovněprávního soudnictví je, mírně řečeno, nejistá.

Bude-li institut přísedících zrušen, je velmi nepravděpodobné, že by v dohledné době došlo k jeho obnovení v jiné a lepší formě.

Tento závěr staví mimo jiné na předpokladu, že ze strany předkladatele bude správnost zvoleného postupu s vysokou mírou pravděpodobnosti dodatečně zdůvodňována a ospravedlňována dílčím zrychlením řízení, jelikož, jak již bylo řečeno, tři se dohodnou na společném termínu lépe než pět.

To je však jediný rozumně předpokládatelný pozitivní efekt. Absence kvalifikace soudců v technických a jiných otázkách, absence vhledu do skutečného fungování řešených vztahů, na tom se nic nezmění, respektive vymizí i těch několik málo případů, kdy scházející kompetenci soudce v tomto směru doplňoval přísedící.

Zrušení institutu přísedících tak v žádném případě není lékem na neduhy pracovněprávního soudnictví, nýbrž, alespoň se tak v tuto chvíli zdá, promarněnou příležitostí.

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Doc. JUDr. Jakub Morávek, Ph.D.

Právnická fakulta
Univerzita Karlova v Praze

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Náměstí Curieových 901/7
116 40 Praha 1
Česká republika
moravek@prf.cuni.cz
Scopus Author ID: 57224566624
https://orcid.org/0000-0003-4261-0432

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Abstract in English:

- prosíme uviesť abstrakt v anglickom jazyku, cca 10 riadkov *nevyžaduje sa v prípade angličtiny ako pôvodného jazyka*;

Key Words in English:

- prosíme uviesť kľúčové slová v anglickom jazyku, cca 10 výrazov *nevyžaduje sa v prípade angličtiny ako pôvodného jazyka*;

Abstrakt v pôvodnom jazyku:

- prosíme uviesť abstrakt v pôvodnom jazyku, cca 10 riadkov;

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- prosíme uviesť kľúčové slová v pôvodnom jazyku, cca 10 výrazov;

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Kontakt na autora:

- prosíme dodržať nižšie uvedenú vzorovú štruktúru informácie o kontakte na autora príspevku:

Ing. Jana Koprlová, PhD.
Právnická fakulta

Trnavská univerzita v Trnave
Kollárova 10
917 01 Trnava
Slovenská republika
jana.koprlova@gmail.com
https://orcid.org/0000-0002-2082-1450

Texty príspevkov je možné prijímať výhradne v elektronickej podobe vo formáte dokumentu textového editora MS Word. V textoch príspevkoch odporúčame použiť štandardizované typy a veľkosti písma, riadkovania, ako aj formátovania textu.

Texty príspevkov zasielajte, prosím, na e-mailovú adresu redakcie časopisu sei.journal@gmail.com.

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Tešíme sa na Váš príspevok!

S úctou,

redakcia SOCIETAS ET IURISPRUDENTIA

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2024, Volume XII., Issue 4, Pages 100-104
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Information for Authors

Basic Information

The journal SOCIETAS ET IURISPRUDENTIA thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal SOCIETAS ET IURISPRUDENTIA offers a platform for publication of contributions in the form of:

- separate papers and scientific studies as well as scientific studies in cycles
  the expected minimum extent related to one study covers 10 standard pages, the maximum extent is not limited;
- essays on current social topics or events
  the expected minimum extent related to one essay covers 5 standard pages, the maximum extent is not limited;
- reviews on publications related to the main orientation of the journal
  the expected minimum extent related to one review covers 3 standard pages, the maximum extent is not limited; it is recommendable to deliver also the front cover picture of the reviewed publication in the sufficient largeness;
- information as well as reports connected with the inherent mission of the journal
  the expected minimum extent related to one information or report covers 2 standard pages, the maximum extent is not limited; it is recommendable to deliver also photo documents or other picture material of accompanying character in the sufficient largeness.

The journal SOCIETAS ET IURISPRUDENTIA is issued in an electronic on-line version four times a year, regularly on:

- March 31st – spring edition;
- June 30th – summer edition;
- September 30th – autumn edition;
- December 31st – winter edition.

The journal SOCIETAS ET IURISPRUDENTIA accepts and publishes exclusively only original, hitherto unpublished contributions written as the own work by authors those are submitting the contributions for publication in the journal SOCIETAS ET IURISPRUDENTIA.

Responsibility for compliance with all prerequisites and requirements laid on contributions published in the journal SOCIETAS ET IURISPRUDENTIA have:

- special supervisors within the journal's editorial board responsible for specific interdisciplinary sections in relation to the scientific aspects of contributions;
- editor in chief in relation to the formal aspects of contributions;
- executive editor in relation to the application of methodological, analytical and statistical questions in contributions.

Review Procedure

Reviewing the contributions for publication in the journal SOCIETAS ET IURISPRUDENTIA follows with a mutually anonymous (double-blind) review procedure realized by members of journal's editorial board and in well-founded cases also by recognized experts working in corresponding areas.

Only contributions containing all mandatory parts in accordance with the prescribed structure of the contribution may be submitted for review procedure. Before the contributions are submitted for review procedure, the originality of the texts is formally checked by checking randomly selected strings of the texts of the contributions through the Internet search engines.

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Comprehensive information on results of the review procedure, together with guidance on how to proceed with submitted contributions, will contribution's submitters receive through an e-mail answer immediately after receiving the reviewers' written opinions by the journal's editorial office and final judging the results of the review procedure by the editorial board.

Publication of Contributions

Publication of contributions in the journal SOCIETAS ET IURISPRUDENTIA is realized exclusively without any contributor's claim for author's fee (royalty). Also, the processes of receiving, reviewing and publishing of contributions in the journal are carried out exclusively free of charge. Submission of contributions for publication understands the editorial office of the journal SOCIETAS ET IURISPRUDENTIA as a manifestation of the will of the authors, through which the authors all at once knowingly and voluntarily:

- express their own agreement with publication of submitted contribution in the journal;
- declare that the contribution presents their original, hitherto unpublished work;
- declare their own agreement with specifying their workplace and contact e-mail address in the section "Authors' Contact List".

Accepted can be only texts submitted for publication sent by their authors/co-authors directly and with their written permission for publication; text submissions sent mediated through non-authors or non-co-authors of a submitted text delivered to the editorial office of the journal SOCIETAS ET IURISPRUDENTIA cannot be accepted for the following review procedure due to the absence of the author's/co-authors' consent.

Contributions are accepted in the English, Slovak and Czech languages. Favouring the English language in contributions is welcome.

Publication of the contribution texts will be provided exclusively in the bilingual Slovak-English standardized letterhead template of the journal SOCIETAS ET IURISPRUDENTIA, synchronously in the form of complete versions of individual journal numbers as well as in the form of single authors' contributions. Publication process follows in corresponding sections on the journal's official website: https://sei.iuridica.truni.sk/international-scientific-journal/.

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Title of Contribution in Original Language:

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Title of Contribution in English:

- please specify title, eventually subtitle of contribution in English *not required in the case of English as the language of the original*;

Author of Contribution:

- please specify author's given name, surname and all academic degrees;

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- please specify abstract in English, circa 10 rows *not required in the case of English as the language of the original*;

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- please specify in following structure: introduction, main text, conclusions; text broken down into chapters, eventually subchapters; the contribution may include sheets, charts, figures, pictures, etc., but it is necessary to indicate their sources with all obligatory bibliographic details in the full extent; notes and references to literature, please, specify in the footnote according to current citation standard ISO 690
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the sources listed in the bibliography list placed at the end of the contribution and vice versa;

Author's Contact:

- please follow the below mentioned model structure of contact information on the author of contribution:

Ing. Jana Koprlová, PhD.
Faculty of Law
Trnava University in Trnava
Kollárova 10
917 01 Trnava
Slovak Republic
jana.koprlova@gmail.com
https://orcid.org/0000-0002-2082-1450

Contribution manuscripts can be accepted only in electronic version in the format of the text editor MS Word document. Applying the standardized types and font sizes, line spacing as well as text formatting in the contribution manuscripts is highly recommended.

Your contribution manuscripts send, please, to the e-mail address of the journal's editorial office sei.journal@gmail.com.

In the case of any uncertainty or necessity of providing additional information send your questions, please, to the e-mail address of the journal's editorial office sei.journal@gmail.com.

We are looking forward to your contribution!

Yours faithfully,

Team SOCIETAS ET IURISPRUDENTIA

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Etický kódex

Článok I. Všeobecné ustanovenia

Medzinárodný internetový vedecký časopis SOCIETAS ET IURISPRUDENTIA (ďalej len „časopis“) vydáva Právnická fakulta Trnavskej univerzity v Trnave a tematicky sa zameriava najmä na spoločensky významné prierezové súvislosti otázok verejného práva a súkromného práva na národnej, nadnárodnej, ako aj medzinárodnej úrovni. Jeho cieľom je poskytovať podnetnú a inšpiratívnu platformu pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok a ich komunikáciu na úrovni najmä odbornej právnickej, ale aj zainteresovanej širokej občianskej verejnosti v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

Redakcia časopisu sídli v priestoroch Právnickej fakulty Trnavskej univerzity v Trnave na Kollárovej ulici č. 10 v Trnave.

Časopis má charakter vedeckého recenzovaného časopisu, ktorý vychádza v on-line elektronickej podobe pravidelne štyrikrát ročne na oficiálnej webovej stránke časopisu https://sei.iuridica.truni.sk. Publikovanie textov príspevkov sa uskutočňuje v dvojjazyčnej slovensko-anglickej štandardizovanej hlavičkovej šablóne časopisu, a to súčasne v podobe kompletných verzií jednotlivých čísiel, ako i samostatných autorských separátov uverejnených v zodpovedajúcich rubrikách na webovej stránke časopisu.

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nie v časopise predkladajú. Autori príspevkov vedecky či pedagogicky pôsobia v zodpovedajúcich oblastiach zamerania časopisu a majú ukončené zodpovedajúce akademické vzdelanie na úrovni minimálne druhého stupňa vysokoškolského štúdia.

V súlade s vyššie uvedeným ustanovením sa automaticky so zodpovedajúcim odôvodnením zamietajú príspevky už preukázateľne publikované, ako aj príspevky, ktoré napĺňajú skutkovú podstatu plagiátu či neoprávneného, respektíve nezákonného zásahu do autorského práva podľa autorského zákona v platnom znení.

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Na recenzné konanie môžu byť odovzdané len príspevky obsahujúce všetky povinné súčasti v súlade s predpísanou štruktúrou príspevku. Pred odovzdaním príspevkov na recenzné konanie sa formálne preveruje pôvodnosť textov kontrolami náhodne vybraných reťazcov textov príspevkov prostredníctvom internetových vyhľadávačov.

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- príspevok preukázateľne nezodpovedá minimálnym štandardom a štandardným kritériám vedeckej etiky, ktoré sa kladú a sú všeobecne vedeckou verejnosťou a vedeckou obcou uznávané vo vzťahu k príspevkom danej kategórie (štúdie, eseje, recenzie publikácií, informácie alebo správy), či už z hľadiska rozsahu, náplne, metodologických východísk, použitej metodológie, a podobne, ako aj z hľadiska správneho, úplného a vedecky korektného uvádzania všetkých použitých bibliografických odkazov podľa platnej citačnej normy ISO 690.

Článok IV. Vyhlásenie o pristúpení ku kódexom a zásadám publikačnej etiky Komisie pre publikačnú etiku

Časopis v plnej miere uplatňuje a dodržiava kódexy a zásady publikačnej etiky Komisie pre publikačnú etiku (Committee on Publication Ethics (COPE)) zverejnené na webovej stránke Komisie pre publikačnú etiku

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https://publicationethics.org/. Uvedené zásady a pravidlá publikačnej etiky sú záväzné pre autorov príspevkov, redakčnú radu časopisu, redaktorov a redakciu časopisu, recenzentov príspevkov, ako aj vydavateľa časopisu.

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- Recenzné konanie
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Článok V. Nezávislosť a nestrannosť

Časopis je nezávislým a nestranným medzinárodným vedeckým internetovým periodikom.

Článok VI. Rozhodný právny poriadok

Časopis a všetky s ním súvisiace právne skutočnosti a právne úkony sa riadia právnym poriadkom Slovenskej republiky.

Trnava 31. december 2013

Code of Ethics

Article I. General Provisions

International scientific online journal SOCIETAS ET IURISPRUDENTIA (hereinafter only "journal") is published by the Faculty of Law at Trnava University in Trnava, and it thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal's editorial office resides in premises of the Faculty of Law at Trnava University in Trnava in Kollárova Street No. 10 in Trnava, Slovakia.

The journal has the nature of a scientific peer-reviewed journal, which is issued in an electronic on-line version regularly four times a year on the official website of the journal https://sei.iuridica.truni.sk/international-scientific-journal/. Publication of the contribution texts will be provided exclusively in the bilingual Slovak-English standardized letterhead template of the journal, synchronously in the form of complete versions of individual journal numbers as well as in the form of single authors' contributions. Publication process follows in corresponding sections on the journal's official website.

The journal provides a stimulating and inspirational platform for communication both on the professional legal level and the level of the civic society, as well as for scientific and society-wide beneficial solutions to current issues mainly in the areas of public law and private law.

The website of the journal offers the reading public contributions in the common graphical user interface as well as in the blind-friendly interface, both parallel in the Slovak and the English languages. In all those languages the journal's editorial office provides also feedback communication.

Article II. Responsibility and Publication of Contributions

The journal accepts and publishes exclusively only original, hitherto unpublished contributions written as the own work by authors those are submitting the contributions for publication in the journal. Contributors are scientifically or pedagogically engaged in areas corresponding with the main orientation of the journal and they have completed adequate academic qualification, at least the second degree of academic education.

In accordance with the foregoing provision shall be automatically with the adequate justification rejected contributions those have been provably already published as well as contributions those constitute the merits of plagiarism or of unauthorized, respectively illegal interference with the copyright under the protection of the Copyright Act in force.

Information for authors published on the journal's website is binding. Contributions are accepted in the English, Slovak and Czech languages. Favouring the English language in contributions is welcome.

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- express their own agreement with publication of submitted contribution in the journal;
- declare that the contribution presents their original, hitherto unpublished work;
- declare their own agreement with specifying their workplace and contact e-mail address in the section "Authors' Contact List".

Accepted can be only texts submitted for publication sent by their authors/co-authors directly and with their written permission for publi-

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cation; text submissions sent mediated through non-authors or non-co-authors of a submitted text delivered to the editorial office of the journal cannot be accepted for the following review procedure due to the absence of the author's/co-authors' consent.

Article III. Review Procedure

Reviewing the contributions for publication in the journal follows with a mutually anonymous (double-blind) review procedure realized independently and impartially by members of journal's editorial board and in well-founded cases also by recognized experts working in corresponding areas.

Only contributions containing all mandatory parts in accordance with the prescribed structure of the contribution may be submitted for review procedure. Before the contributions are submitted for review procedure, the originality of the texts is formally checked by checking randomly selected strings of the texts of the contributions through the Internet search engines.

Report on results of the review procedure is made and archived on standardized forms.

Comprehensive information on results of the review procedure, together with guidance on how to proceed with submitted contributions, will contribution's submitters receive through an e-mail answer immediately after receiving the reviewers' written opinions by the journal's editorial office and final judging the results of the review procedure by the editorial board.

Contributions will be with adequate written justification automatically rejected in cases, if:

- the contributor hasn't provably completed the entire university education, i.e. the academic qualification of the second degree;
- contribution provably doesn't comply with the minimum standards and standard criteria of scientific ethics, which are imposed and generally respected by the scientific public and scientific community in relation to contributions of the given category (studies, essays, reviews on publications, information or reports), whether in terms of extent, content, methodological assumptions, applied methodology and similarly, or in terms of a proper, complete and scientifically cor-

rect indicating all the bibliographic references according to current citation standard ISO 690.

Article IV. Declaration of Accession to Codes and Principles of Publication Ethics of the Committee on Publication Ethics

The journal fully exercises and observes codes and principles of publication ethics of the Committee on Publication Ethics (COPE) published on the website of the Committee on Publication Ethics https://publication-ethics.org/. Listed principles and guidelines of publication ethics are binding for contributors, journal's editorial board, journal's editors and editorial office, contribution reviewers as well as journal's publisher.

The journal rejects and strictly condemns any scientific and publishing unethical and academically dishonest practices, which include, among others, plagiarism, manipulation of citations or falsification, alteration, selective omission and fabrication of data and sources.

The editors and the Editorial Board of the journal actively make every effort to prevent as well as to eliminate the risk of any cases of scientifically and publicationally unethical and academically dishonest behaviour of all participating subjects.

In the event that the editors, the Editorial Board or the publisher of the journal are made aware of any manifestation of scientifically and publicationally unethical and academically dishonest research practices applied in connection with a submitted or already published paper in the journal, the editors or the publisher will follow the Committee on Publication Ethics's (COPE) guidance https://publicationethics.org/guidance in dealing with and correcting the revealed state of affairs, in accordance with the accepted principles and recommendations applicable to the following areas:

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