

Limitation Period and Immunity in the Czech Republic

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Accompanying phenomenon of the creation of the parliaments, as the power limiting the power of the monarchs, is the immunity of its deputies. The purpose of this immunity has always been the protection of the deputies from the monarchs infringement. The protection is, however, targeted to the parliament as a whole, not to the individual deputies. The deputy is only the holder of this benefaction. That is why the deputy is not entitled to renounce on his immunity – this is to be decided by the whole parliament or its chamber.

The criminal immunity has developed in two forms which we know also in the legal order of the Bohemia, Moravia and the Silesia.¹ Aside I let the liability for the misdemeanours where the immunity is implied only on the deputy s request.² Neither do I discuss the civil liability.

1. Material immunity

Criminal material immunity (indemnity) excludes the possibility to charge a particular behaviour as an offence. Regarding to the deputies the material immunity is targeted to the following official acts:

1. voting in the Chamber of Deputies or voting in its organs; here the liability is completely excluded,³
2. expressions made in the Chamber of Deputies; here the liability is limited only to the disciplinary degree. There are particular rules dealing with the disciplinary procedure.⁴

With regard to the material immunity, the question whether or not there is a time limitation does not occur since there is, unlike the procedural immunity, not any liability at all.

2. Procedural immunity

Criminal procedural immunity enables the criminal prosecution against a deputy under the procedural condition – namely the consent of the chamber of Parliament. The Constitution forbids the prosecution unless the chamber gives this consent. If the consent is given, the prosecution is possible and the time limitation becomes relevant.

3. Limitation of time

The criminal code (Trestní zákoník) states that the time limitation does not take into account the time where the offender was not possible to be charged because of legal barrier (suspension of limitation period). The immunity is not explicit named as the

¹ JAN FILIP: *Vybrané kapitoly ke studiu ústavního práva*, 2. edition Brno 2004, p. 294-297, ISBN 80-210-2592-1.

² Art. 27 par. 3 Constitution of Bohemia, Moravia and Silesia. § 9 law No. 200/1990 Coll., Misdemeanour Act in wording of the law No. 78/2002 Coll.

³ Art. 27 par. 1 Constitution of Bohemia, Moravia and Silesia No. 1/1993 Coll. (hereinafter only Constitution).

⁴ Art. 27 par. 2 Constitution. § 13-20 law No. 90/1995 Coll., Standing order of the Chamber of Deputies.

legal barrier.⁵ In the doctrine has been, however, published the opinion that the deputy's immunity is just such a barrier.⁶

This opinion rises, however, counterarguments. The procedural immunity is, unlike the material immunity, not an absolute barrier of the criminal procedure. It makes the criminal procedure conditional – the criminal procedure is possible only once the chamber of the Parliament gives consent. There have been already several deputies who have been prosecuted. Thus I consider that **the procedural immunity** which occurs with the mandate of the deputy **does not alone suspend the limitation period of the criminal procedure**. For this opinion I give following arguments:

3.1. Teleological argument

Not suspending limitation period corresponds to the original reason of the immunity as a measure of the protection of the deputies from the arbitrariness of the monarch or the executive. This is a privilege of the deputies which privileged them from other people. Should the merely fact that somebody became a deputy suspend the limitation period so the position of the deputies would contrarily worsen. Let's take an example – while by an murderer the criminal liability lapses in 20 years, by repeatedly elected deputy the liability would still exist even for a minor criminal act after 20 years. The deputies, who were originally the object of the protection, would finally be exposed to the arbitrariness of the police organs who would save the information “in the drawer” to use them once the deputy is no more in charge. The purpose of the immunity would be negated.

3.2 Historical argument

A historical argument supports this opinion. The suspension of limitation period has never been used with regard to the deputies. Though there were several opportunities to do so – there were several representatives of the communist regime until 1989 who were simultaneously deputies. E.g. Vasil Biľak was deputy of the Slovak National Council 1954-64, National Assembly 1960-68 and Federal Assembly 1969-89. Milouš Jakeš was a deputy of the Federal Assembly 1971-89, Jozef Lenárt was deputy of the National Assembly 1960-69 and Federal Assembly 1969-89. It would have enabled to start criminal procedure against e.g. Jozef Lenárt after 1989 for an offence committed in 1960 which is the year he became a deputy. Nevertheless, such an interpretation has never been used. As far as there was a criminal prosecution against some representatives of the communist regime, another law suspending the limitation period was used – namely the provision that the time until 29. 12. 1989 is not relevant for the limitation if the criminal procedure has not been started because of the political reasons.⁷

3.3 Argument of effectiveness and advisability

The essential purpose of the statute of the limitation is to ensure the criminal procedure within a reasonable time after committing the crime. On one hand the access to the evidence is smaller (failed memory of the witnesses, destroyed traces), on the other hand the interest of the society on the punishment of the offender is

⁵ § 34 par. 3 letter a) of the Criminal Code No. 40/2009 Coll.

⁶ František Půry in PAVEL ŠÁMAL a kol.: *Trestní zákoník I – komentář*, Prague 2009, p. 391, ISBN 978-80-7400-109-3 and PAVEL ŠÁMAL, FRANTIŠEK PŮRY, STANISLAV RIZMAN: *Trestní zákon I – komentář*, 6. edition Prague 2004, p. 596-597, ISBN 80-7179-896-7.

⁷ § 5 law No. 198/1993 Coll., Law on a illegality of the communist regime.

lower where the crime was committed long time ago. Thus suspension of limitation period ought to be an exemption which is not to be extensively enlarged. The narrow interpretation which does not suspend the limitation period by the mere existence of immunity keeps argument of the effectiveness and advisability of the law. There are some deputies today, who have been deputies since 1990. However, they are not likely to be deputies for the whole their professional life. A criminal procedure of an ex-deputy of age 65 who might have e.g. caused a traffic accident at the age of 25 is neither effective nor advisable.

3.4 Running and suspension of limitation period

Once a deputy commits a crime the limitation period starts to run. If the police authority finds out that the deputy has committed a crime, it is its duty to ask without undue delay the Chamber of Deputies for the consent to start criminal proceedings. The police authority must not act tactically and keep such an information “in the drawer”. The Chamber of Deputies decides about the request after discussing it in the Mandate and Immunity Committee of the Chamber of Deputies.⁸ The Chamber of Deputies is not bound by any legal period of time. **Thus, we can link the suspension of limitation period to:**

1. request of the police authority for the consent to start criminal proceedings.⁹

In this case the police authority knows the facts justifying criminal proceedings against a deputy and due to this situation the police authority would start the criminal proceedings if it did not need the consent of the Chamber of deputies. Nevertheless, it is not quite sure if the criminal proceedings start after the consent of the Chamber of Deputies is given because some new facts can occur. In addition, it is a mere request, not a decision on consent with the criminal proceedings of a deputy because such a decision belongs to the Chamber of Deputies. The Constitution links the impossibility of criminal proceedings to the disagreement of the Chamber of Deputies.

2. disagreement of the Chamber of Deputies with criminal proceedings. Once the Chamber of Deputies does not agree with the criminal proceedings, the legal barrier of prosecution occurs which is connected with the suspension of limitation period. This fact is without any significance in the Czech legal order because the criminal proceedings are in such cases excluded forever. Suspension of limitation period by disagreement of the Chamber of Deputies with criminal proceedings would gain significance on the condition that the constitutional regulation would change in that way that the disagreement of the Chamber of Deputies with criminal proceedings of a deputy for a concrete deed excludes the criminal prosecution only within the period of the mandate. The criminal prosecution would be possible once the period of the mandate terminates. Such a legal regulation exists in Slovakia where the constitution states that the limitation period does not run when the Parliament does not give the consent with criminal prosecution.¹⁰ This regulation was repeatedly unsuccessfully suggested also in the Czech Republic.¹¹ If such a provision is

⁸ § 12, § 45 par. 1 letter c) law No. 90/1995 Coll., Standing order of the Chamber of Deputies.

⁹ František Vondruška from the Supreme Public Prosecutor's Office stands on this opinion and I thank him for his remarks.

¹⁰ Art. 78 par. 3 Constitution of the Slovak Republic No. 460/1992 Coll. in wording of the constitutional act no. 90/2001 Coll.

¹¹ Art. I of the deputies' drafts of the constitutional statute which change the Constitution – press of the Chamber of Deputies 20 and 317, 3. election period. Point 2 of the art. I of the governmental draft of a constitutional statute which change the Constitution – press of the Chamber of Deputies 349, 4.

anchored, then the deputy, whose prosecution was disagreed, will be possibly extradited on condition that the newly elected Chamber of Deputies gives consent with the prosecution. If the newly elected Chamber of Deputies does not agree, then the legal barrier occurs again but only for the further election period of the Chamber of Deputies.

The Criminal Procedure Code does not connect the impossibility of criminal prosecution of a person with immunity with the existence of procedural immunity or with a request of depriving of procedural immunity but with disagreement of concrete state authority.¹² **It is correct to connect the suspension of limitation period to such disagreement with criminal proceedings.**

4. Senators and the judges of the Constitutional court

The above mentioned conclusions can be applied similarly with regard towards senators and the judges of the Constitutional court. The only distinction would be, however, the impossibility to request for a new consent with the criminal prosecution in the situation where the senator is repeatedly elected. The requested chamber regarding to the criminal act of the senators and the judges of the Constitutional court is the Senate. Since this is a permanent body of the Parliament (where every two years one third of the senators is elected), the repeated request is impossible.

5. President

President of the republic has both material and procedural immunity for criminal offences and misdemeanour.¹³ The only responsibility he takes is for a high treason which is a judged by the Constitutional Court. High treason in this sense is, however, not a criminal offence and can be committed exclusively by the president. A criminal procedure against president for the crimes committed during his office is excluded forever. Thus the question about the suspension of limitation period does not occur. It is, however, possible that president has committed a crime before he was boarded the office. In such a case the criminal procedure can be started once president leaves the office. Since during the period of his office, the criminal procedure against president is banned by the Constitution, the suspension of limitation period occurs during the presidential period.

6. Ombudsman

Consent of the Chamber of Deputies is required to start criminal proceedings against the ombudsman. In contrast with deputies, by disagreeing is the criminal prosecution excluded only for the functional period of the ombudsman.¹⁴ By disagreeing with the criminal prosecution occurs the suspension of limitation period. The limitation period continues to run after the end of the ombudsman's function when the legal barrier of criminal prosecution falls. We can demonstrate on the ombudsman's function that the mere existence of procedural immunity is not any legal barrier – the need for consent of a competent state authority, but the denied consent itself.

7. Judges

election period. Art. I of deputies' draft of constitutional statute - press of the Chamber of Deputies 980, 4. election period.

¹² § 11 par. 1 letter c) of the Criminal Procedure Code No. 141/1961 Coll.

¹³ § 65 Constitution.

¹⁴ § 7 par. 1 law No. 349/1999 Coll., Law on the Public Defender of Rights.

There is no constitutional regulation in case of judges of general courts. The law states that one condition is consent of the president of the republic with criminal prosecution if the judge committed crime in the performance of his function or in connection with his function.¹⁵ If the presidential consent is considered as a decision, then it is a decision on the base of a common law which underlies the countersignature of the prime minister.¹⁶ This process was applied in April 2003 in case of the judge Jiří Berka (judge of the County Court in Ústí nad Labem) when the president of the Czech Republic Václav Klaus granted his consent to start criminal proceedings. However, with regard to judiciary of the Constitutional Court¹⁷ it is important to interpret the concept of decision underlying the countersignature of the prime minister in the way that it has to be decision in a matter. The presidential consent is however not such a decision in a matter but decision of the police authority. Decision of the police authority cannot be issued without the previous presidential consent but the mere consent of the president does not predicate that the police authority decision will certainly be issued. President of the republic can grant the consent, is entitled to let it be or can explicitly deny the consent. In the last two cases follows the impossibility of criminal prosecution of a judge. Nevertheless, it became a constitutional convention that where the president denies the consent he does not issue a negative decision. E.g. he did not issue a negative decision where he did not granted the consent to appoint the vicepresident of the Supreme Audit Office in 2002 or he repeatedly did not grant consent to appoint generals in 2009 or denied consent to grant state awards. The president of the republic applied the same procedure when he decided not to appoint a judge (the Municipal Court in Prague, however, ordered the president to appoint the judge on the base of an unconstitutional legal opinion of the Supreme Administrative Court).¹⁸ President of the republic, nevertheless, stood on the constitutional convention and did not issue any negative decision with regard to the appointing the judge.

In contrast to the disagreement of parliament chamber in case of a deputy, by the presidential disagreement is the criminal prosecution not excluded forever. The president can grant his consent later on the base of a new request or without such a request as well if there is still the former request of the police authority and the president changes his mind. It is highly likely in the situation when the president of the republic is changed. If the president wants to prevent the criminal prosecution of a judge forever, he orders not to start the criminal proceedings.¹⁹ In case of judges is the presidential consent of the character of the procedural immunity which does not enable criminal proceedings but bounds it to another procedural condition. Due this fact the conclusions made by deputies can be applied also in this situation.

8. Principle of Speciality

¹⁵ § 76 law No. 6/2002 Coll., Law on Courts.

¹⁶ Art. 63 par. 3 Constitution.

¹⁷ The Constitutional Court stated that lodging a petition to start procedure on constitutionality of a statute does not underlie to countersignature of the primeminister although this competency of the president of the republic is anchored in § 64 par. 1 letter a) of an ordinary statute No. 182/1993 Coll., o Ústavním soudu, because the petition is no decision in a matter which underlies to the Constitutional Court in the form of judgment. Judgment No. 16/1994 of the Collection of judgments and rulings of the Constitutional Court (91/1994 Coll.).

¹⁸ ZDENĚK KOUDELKA: *Soudní kontrola aktů prezidenta republiky*, Právník 10/2008, p. 1065-1081, ISSN 0231-6625.

¹⁹ Art. 62 letter g) Constitution.

The convicted who was extradited to the territory of Bohemia, Moravia and Silesia and is to be prosecuted for another crime than for which he was extradited, is also a person who underlies to a consent of a state authority. With respect to the principle of speciality is required consent of an authority of another state.²⁰ This is also case of procedural immunity but it does not suspend the limitation period.

The principle of speciality means that the extradited person must not be prosecuted for a different crime than for which he/she was extradited. There must be granted consent of the extraditing state if there is not the consent of the extradited person.²¹ By such a person occurs the fiction of stay in foreign country for being prosecuted for some other crimes, some states require the international (European) arrest warrant although the required person is under jurisdiction of the requiring state. Next to the above mentioned arguments connected to the suspension of limitation period there can also be mentioned that stay in a foreign country does not suspend the limitation period and because of this reason it is not possible to suspend the limitation period when a person is factually under the jurisdiction of the Czech authorities. The contrary would mean that by an unextradited person runs the limitation period whereas by the extradited person would be the limitation period suspended by the crimes for which the person was not extradited. Such an interpretation would worsen legal status of a person, which is inadmissible.

²⁰ Decision of the Supreme Court No. 24/2007 Collection of decisions and opinions, criminal (11Tcu 29/2006). PŘEMYSL POLÁK, HELENA HÝBLOVÁ: *Přehled judikatury k mezinárodní justiční spolupráci v trestních věcech*, Prague 2009, p. 13, ISBN 978-80-7357-451-2.

²¹ § 389 Criminal Procedure Code.