

Certain Aspects of the Right to Human Dignity in the Light of the New Code of Criminal Procedure

I The Right to Human Dignity in the Legal System

The title of my lecture provides a wide opportunity for the analysis of the rules of criminal procedure, because the right to human dignity appears in the practice of the Constitutional Court in two forms,¹ on the one hand, as an absolute right protecting the whole of human life, a foundation of the system of fundamental rights, and, on the other hand, as a relative right protecting the development of personality.² According to the interpretation of the Constitutional Court, the right to human dignity is a ‘mother-right’, a subsidiary fundamental right that may be relied upon at any time by both the Constitutional Court and other courts for the protection of an individual’s autonomy when none of the concrete, named fundamental rights are applicable for a particular set of facts. Without going into detailed constitutional law analysis, I will examine certain provisions of the new Code of criminal procedure (hereinafter ‘the new Code’) from the aspects of the right to privacy, originating from this mother-right and the right of informational self-determination.

Article VI. of the Fundamental Law declares that: ‘Everyone shall have the right to have his or her private and family life, home, communications and reputation respected. Everyone shall have the right to the protection of his or her personal data.’ Certain aspects of the protection of privacy also appear in instruments of international law. From this approach, the most sensitive field of the new Code is the use of secret surveillance methods because covert information gathering necessarily means intervention in the privacy of the individ-

* Katalin Holé (PhD) is senior lecturer at at Eötvös Loránd University (ELTE), Budapest, Faculty of Law, Department of Criminal Procedures and Correction (e-mail: holekata@ajk.elte.hu).

¹ According to Deli and Kukorelli, in the former practice of the Constitutional Court related to the Constitution, human dignity formed a three-level system. On the first level there was the untouchable human dignity, which was interpreted by the Constitutional Court as an ‘undefinable notion’, and defined certain points of reference only on the second level, along certain basic functions, from which it derived the specific fundamental rights on the third level. Deli Gergely, Kukorelli István, ‘Az emberi méltóság alapjoga Magyarországon’ (2015) (7–8) *Jogtudományi Közlöny* 341–343, 347.

² Balogh states that the right to human dignity is present in two dimensions: first, as a right grounding the dogmatic system of fundamental rights (a kind of abstraction, which still has fundamental right features), and second, in the form of rights originating in the right to human dignity (subjective rights). See Balogh Zsolt, ‘Az emberi méltóság: Jogi absztrakció vagy alanyi jog’ (2010) (4) *Iustum Aequum Salutare* 38.

ual; as such, it is of crucial importance that the application of such means shall be possible only in line with legal rules providing proper protection within a constitutional framework. According to the reasoning of the new Code, this set of provisions takes a step forward compared to the previous regulation and makes prosecution more effective. It is debated, however, whether all rules of the Code comply with the fundamental right requirements of the right to privacy, which is declared in several international human rights instruments. Other means of criminal procedure also have a significant effect on privacy. In my lecture, I touch upon some sensitive issues that may challenge the new Code.

II The Constitutional Problems of the Preliminary Phase of Criminal Procedure

One of the main novelties of the new Code is that it integrates the rules of secret surveillance available for the inquiry and investigation of crimes in the system of criminal procedure, and thus in the future the present division between covert information-gathering and covert data-gathering will disappear. According to the general reasoning of the Code, this reduces the risk of the loss of evidence, which has made the evidentiary procedure unsuccessful in several cases. According to the experiences of practitioners, the results of covert information-gathering are excluded from evidence in the court proceedings quite often due to the failure to start an investigation without delay in relation to the given crime or to not immediately filing charges. The reason for this is often that the members of the authority performing the preliminary investigation, in line with the valid rules, become involved in the gathering of facts way beyond the level that would be necessary to start a criminal investigation or to establish the necessary suspicion for an accusation, therefore – or due to negligence – they do not meet the requirements specified in section 170 (1) or (2) of the Code of Criminal Procedure, in light of section 206/A of the same. Even though the authority acted lawfully when performing the covert information-gathering and made its efforts in order to reveal evidence in line with section 63 paragraph (1) of the act on the Police, the result will however not be admissible as evidence because the surveillance should have been performed within the framework of covert data-gathering following the start of an investigation. According to the legislator, the other problem is that the previous code failed to define precisely which time period shall be interpreted as ‘without delay’, in relation to the obligation to report the crime.³ (Unfortunately, I could mention several cases into the contrary in which accusation happened only months or even a year later, which cannot be considered to be ‘without delay’ in any way. Moreover, the state could be condemned for crimes performed ‘with state approval’ and the authority failing to perform its obligations could be obliged to pay damages. Let us think about the recent major case, in which

³ Miskolczi Barna, ‘Titkos információgyűjtés és adatszerzés helyett titkos nyomozás’ (2016) <<http://jogaszvilag.hu/rovatok/szakma/titkos-informaciogyujtes-es-adatszerzes-helyett-titkos-nyomozas>> accessed 15 January 2017.

70 people died in a closed truck, for which, in my opinion, the European Court of Human Rights could condemn Hungary for the violation of the right to life.)

The goal of the new regulation of covert information gathering is probably to allow ‘preliminary inquiry’ in order to develop suspicion about major crimes within the criminal procedure, but before the start of the investigation. The new Code calls this new phase a ‘preliminary phase’, which is followed by an investigation cut into two parts – inquiry and prosecution. Further novelties are that, in the process of covert information-gathering performed for law enforcement purposes, the prosecutor receives a special role, and that, for law enforcement purposes, covert information-gathering requiring a judicial permit cannot be performed for an unlimited period of time if it is conducted against a specific person. (However, let us not forget that not all means of secret collection of information require a judicial permit.)

The legislator often claims that the new system meets the criteria of the rule of law much more than the previous rules did. However, before becoming too optimistic, is it worth examining in detail the application of unveiled devices regulated in part 6 of the new Code. Without analysing the regulations in detail, let me focus on some issues relevant for the protection of privacy. According to section 214 paragraph (1) of the new Code,

The use of concealed devices is a special criminal procedural activity performed by the authorised bodies without the knowledge of the concerned person, which results in the restriction of the fundamental right of inviolability of private home and of the protection of private secrets, correspondence and personal data.

The new Code lists the concealed devices in three groups based on the rules of their authorization. The first group (chapter XXXVI) lists those that are not subject to court or prosecutorial authorisation; the second group (chapter XXXVII) contains those that are subject to prosecutorial authorisation; while the third (chapter XXXVIII) collects those, the application of which requires judicial permit. Section 214 paragraph (5) lists three conjunctive conditions of the application of concealed devices. Therefore, these means may be used only if

a) there are reasonable grounds to believe that the information or evidence to be acquired is essential for the success of the criminal procedure and cannot be acquired in any other way,

b) and its application does not result in a disproportionate limitation of the fundamental right of the concerned person or other persons, compared to the investigation goals, and

c) there is reasonable ground to believe that, with the application of these devices, crime-related information and evidence may be acquired.

This is in fact a step forward compared to the previous code because it requires comparison with the restricted fundamental rights. This complies with the practice of the European Court of Human Rights, which held that

the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to take any such measures. As minimum safeguards, they shall include a definition of the categories of people liable (...)

Moreover,

it is essential that the intervention of the state shall be performed upon significant public interest, and it shall be proportionate to the emerging threat and the disadvantages caused. The examination of this is not limited to the performance of the necessity-proportionality test regarding the conditions prescribed in law, but also cover the necessity of the actual application of law.⁴

Upon returning to the above described groups of concealed devices, we may see that with those requiring a judicial permit the new Code exhaustively lists those crimes in relation to which concealed devices tied to a judicial permit may be applied. This meets the constitutional requirements but, due to legislative techniques, it is feared that this list may be extended freely, upon the mere will of the legislator. In relation to this I would like to stress Decision 2/2007 of the Constitutional Court, in which the it held that 'it considers the use of covert methods and means exceptional. They shall not be generally available in investigations, but shall be used only for the investigation of major (qualified), properly-defined criminal acts.'

In the light of this decision of the Constitutional Court, section 215 of the new Code which regulates the use of concealed devices not subject to court or prosecutorial authorisation may raise concerns. According to the new Code the authority using such devices may:

- apply secret contributor(s);
- collect and confirm information about crimes without revealing the real purpose of the procedure;
- apply traps for the confirmation of evidence that shall not cause injury or damage to health;
- replace the victim or any other party concerned in order to protect their life and physical integrity with the aim of interrupting a criminal act, of identifying a perpetrator of crime and of confirmation of evidence.

One of the concealed devices that does not require judicial permit is the process during which the authorised body may secretly observe any person, house, other premises, fenced areas, places open for the public or an audience, any vehicle or any thing amounting to physical evidence, all of which may be related to a certain crime, may collect information on events and may record its observations using technical devices. This '*covert surveillance*' is such that the authorised organisation may apply a secret contributor and, in line with its goals, by covering the sources of its information, may disclose to the person who is the subject of the concealed devices false or misleading information. Such devices, however, shall

⁴ *Valenzuela Contreras v. Spain*, no.58/1997/842/1048 ECHR 30 July 1998.

not be used during the questioning of the accused and the witness and, during the evidentiary procedure, it shall not contain any illegal promises, shall not amount to threat or aiding and abetting, and shall not lead the subject into the direction of committing more serious crime than they have been planning. It is worth comparing this provision with another new rule on the testimony of the accused, according to which, after having been advised of his rights, any oral or written statement of the accused made in front of or directed at the authority shall be considered testimony – even without a vivid imagination, this provision may be considered doubtful from the aspects of the requirements of the rule of law. Another problem may be the secret surveillance of things amounting to physical evidence, the collection of information in relation to these, and the recording of the related observations because, according to the rules of the new Code, physical evidence may include even a mobile phone or a computer.

However, the main problem with concealed devices applicable without a judicial permit is that they may be applied without practically any restrictions, in relation to any minor, supposed crime, without the suspicion of the crime, without any temporal or other restrictions. It is also doubtful that secret surveillance, regulated in section 215 of the new Code, has no de facto differences from ‘secret search’ regulated among concealed devices requiring a judicial permit. During a ‘secret search’ requiring a judicial permit, the performing authority may search, with the exception of places open to the public or an audience, any house, surrounding area, vehicle (except for means of public transport) and things used by the subject, and may record these use technical devices, just like in the case of secret surveillance. The difference is that, during a secret surveillance, the authority cannot place technical devices at the place of application (though the contributor may have one in its pocket), may not open postal deliveries and may not become familiar with the content of any communication performed through information technology systems or electronic communications services. The use of concealed devices requiring court authorisation may be performed as an urgent procedural action for 120 hours without authorisation; the authorisation shall be requested subsequently.

A problem related to the right of informational self-determination and data protection is that section 250 paragraph (1) of the new Code provides wide discretionary powers for the investigating authority regarding the notification of the subject person. Unless it endangers the success of another criminal procedure, or the interests of covert information gathering regulated by the act on police or national security services, the person subjected to the use of unveiled devices subject to judicial permit shall be informed of the fact of the application of concealed devices only if, after the completion of the preliminary phase, no investigation was initiated, or if after the completion of the investigation the accused was not interrogated or was not brought to court. The person concerned may not be informed of any other data, and any relevant requests shall be rejected in writing. The right of informational self-determination could be exercised only if in such cases the subject person was informed of the fact of monitoring and the possibilities of appeal in the procedure leading to the information permit. It is also problematic that in the case of other concerned persons the

new Code does not provide for indemnification at all. This latter provision is not better than the previous one because, according to the rules of the act on the protection of classified data, the subject person will not have the chance to resort to remedy within the procedure regulating information permit, if the investigating authority does not want to reveal the fact of the application of concealed devices in the interests of the investigation. This violates the right of appeal, among others. In addition to this, in relation to the use of concealed devices, it must be stressed that their consequences necessarily the privacy of those outside the criminal procedure, and the new Code provides them with no protection whatsoever.

III The Progressive Provisions of the Code

The new Code, however, contains several progressive provisions related to the right to human dignity. Among these, I would like to mention the procedure concerning persons requiring special treatment. The provisions allow customised handling of the concerned persons, within the limits provided by the new Code, if special, unique circumstances arise in relation to the persons concerned by the criminal procedure. Features resulting in special treatment are the age and the mental, physical, or health condition of the concerned person, the especially violent nature of the crime, and the relationship of the concerned person with any other person participating in the criminal procedure. Persons under the age of 18, disabled persons and victims of sexual offences shall automatically be considered persons requiring special treatment. One of the related rules is, for example, that the confrontation of a person under the age of 18 may be initiated only upon his/her consent, while the confrontation of persons under the age of 14 is prohibited. Victims of sexual crimes may be interrogated only by an officer of the same gender as the victim, and, at any other procedural actions conducted in the presence of the victim, an officer of the same gender as the victim on the part of the investigating authority shall be present.

IV Summary

In summary, it may be stated that if we compare the rules of the new Code on the covert gathering of evidence with the presently valid provisions, we may see no significant changes, except for the differences between the structure of the procedure. However, the gaps in the system of provisions may raise concerns, as well as the fact that information may be collected in secret, without any judicial permit, with regard to any minor offences. It is true that the process itself was basically the same before as under the new Code but now such a procedure may only be initiated upon proper grounds, and the results may only be used in the procedure with strict judicial control. This makes the balance shift to the negative, even though the protection of the rights originating from the right to human dignity is wider than in the previous code with regard to all participants in the procedure.