

THE CONTRADICTORY PRINCIPLE IN THE CZECH CRIMINAL PROCESS AND ITS MANIFESTATIONS BEFORE COURT

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Abstract: This paper deals with the manifestations of the contradictory principle in Czech criminal proceedings, especially in proceedings before court. First, the contradictory principle is discussed in general. Czech criminal proceedings belong to states where the so-called continental model of criminal proceedings is applied. In this model, the contradictory principle has a different application than in the common law model. The main attention is paid to the role of the court (judge), public prosecutor and defendant in the main trial.

Keywords: contradictory principle, the right to a fair trial, accusatory principle, basic principles of criminal procedure

I. INTRODUCTION

One of basic principles of modern criminal proceedings is the rule establishing the right to adversarial proceedings (contradictory principle). Adversarial nature of proceedings is a notion set out by decision-making practices of the European Court of Human Rights and is an integral part of the so-called *fair trial* according to Article 6 of the European Convention on Human Rights, nevertheless the text of that document does not contain the term “adversarial proceedings”. In this context it is appropriate to explain at first the content of the principle of adversarial nature in criminal proceedings, because elements of this principle in continental proceedings can be seen already at the end of the 19th century in the French Rules of Criminal Procedure and its fundamental amendment (*loi Constans* – 1897), where the modifications concerned the accused person’s right to a lawyer and the lawyer’s right to ask questions concerning the evidence presented.

II. NOTIONAL DEFINITIONS

The contradictory in the most general meaning of the word is usually perceived in science as a rule of natural law controlling all judicial proceedings,² which provides a logical basis for identifying the principle of adversarial approach³ as one of fundamental and immanent principles of court trials at all, or as one of “*main guarantees of judicial proceedings*.”⁴ It has

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² Cf. REPÍK, B. *Evropská úmluva o lidských právech a trestní právo* [European Convention on Human Rights and Criminal Law]. Prague: Orac, 2002, p. 147.

³ In German “*Grundsatz des kontradiktorischen Verfahrens*”, in French “*le principe du contradictoire*”, in English also “*the right to adversarial proceedings*” or “*the principle of proceedings which are contradictoire*”.

⁴ Decision of the European Court of Human Rights in the case: *Feldbrugge v. the Netherlands* of 29 May 1986, Application no. 8562/79.

its historical roots in the classical principle “*audiatur et altera pars*”. According to Repík, without this principle “*it is not possible to speak about a trial at all, when the essence of the trial is confrontation of two parties, and each of them must have an opportunity of expressing their views, deny proposals, arguments and evidence of the other party and of presenting their own ones.*”⁵ If this approach is considered as a basis, it is possible to perceive the adversarial approach as a notional feature of a modern court trial, as a typified and legally formalised method of solution of social or legal conflicts, and in no case is it appropriate to associate it with a certain legal culture or a system, such as the *common law* system.⁶

The principle of adversarial proceedings can furthermore be perceived as a direct expression of discursivity in the procedural area, because it is based on the idea that disputed facts are presented during proceedings in the form of polemics (controversy).⁷ A necessary presumption for the principle of adversarial proceedings is the equal position of both the parties to the trial, which have the same possibilities of defending their positions before an impartial court. It is just the procedural equality that is the best warranty ensuring that the judge will manage the facts in the best possible way and will provide the most appropriate interpretation of applicable law. The equality of the parties to the proceedings is established on the presumption stating that equitable treatment of people means to treat all people in the same way and not to provide either of the parties with any unjustifiable advantages. It is a fact that the parties to the trial are not just passive objects, but conversely – they have a possibility of taking an active part in creation of the final decision. The court decision-making process remains authoritative, it is true, but it abandons its authoritarian nature by not silencing the parties to the proceedings and by not remaining closed in its law concepts, but conversely, it takes into consideration all the arguments raised by the parties, provides its decision with necessary legitimacy, which is not based just on the judge’s authority, but is moreover supported by rationality of judicial decisions and their justifications. It has already been indicated that the principle of adversarial proceedings is one of fundamental presumptions of existence of the right to a fair trial, and in its essence it means that both the parties to the proceedings have the right to get acquainted with all the evidence or opinions having an influence on decisions in the case in question,⁸ regardless of the fact whether the evidence was submitted to the court by the other party or whether it was requested (searched for) by the court itself.⁹

⁵ REPÍK, B. *Evropská úmluva o lidských právech a trestní právo* [European Convention on Human Rights and Criminal Law], p. 147.

⁶ Decision of the European Court of Human Rights in the case: Brandstetter v. Austria of 28 August 1991, Applications no. 11170/84, 12876/87, 13468/87.

⁷ This means that all facts must be subject to a debate, both the parties have a possibility of expressing their views thereon, and it is just this conflict of opposite views that gradually leads to a true image of the disputed facts. In this concept, the parties have a direct influence on creation of a resulting decision which is therefore not only a unilateral act of the judge anymore, but is dynamically created by the process of raising arguments of the parties to the proceedings.

⁸ Decision of the European Court of Human Rights in the case: Brandstetter v. Austria of 28 August 1991, Applications no. 11170/84, 12876/87, 13468/87, or Mantovanelli v. France of 18 March 1997, Application no. 21497/93, or Milatová and others v. the Czech Republic of 21 June 2005, Application no. 61811/00.

⁹ Decision of the European Court of Human Rights in the case: Nideröst-Huber v. Switzerland of 18 February 1997, Application no. 18990/91; Krčmář v. the Czech Republic of 3 March 2000, Application no. 35376/97.

III. PRINCIPLE OF CONTRADICTORY IN CRIMINAL PROCEEDINGS

The principle of contradictory in criminal proceedings has been a frequently discussed issue in the recent period, which is, however, conditioned by different views of the professional public (both science and application practice) not only on possibilities of interpretation of individual procedural institutes in connection with this principle, but also on application issues during the effort (especially on the defence part) of applying the elements of adversarial proceedings at acts of criminal proceedings. The principle of adversarial approach in criminal proceedings and its application (fostering) belong among important issues of the reform of the Rules of Criminal Procedure prepared on a long-term basis. There is, however, no consensus in determination of the basic concept of the Czech criminal trial, which leads to many misunderstandings.¹⁰ The principle of adversarial proceedings, or the request for the fostering of elements of adversarial proceedings, has appeared in the Czech legal theory quite regularly since the 1990s. Since this time it has been possible to observe both domestic¹¹ and EU¹² legislative efforts whose aim is to foster adversarial elements of criminal proceedings, but according to some sources they do not lead to desirable effects, i.e. in particular to the activity of parties to the proceedings.¹³ At the same time, they have never led to the denial of the searching principle.¹⁴ Although the principle of adversarial proceedings finds full application in the *common law* system, it also belongs to the standards of continental trials, especially thanks to the European Court of Human Rights case law. In the continental perception, this principle has a slightly different dimension than in the *common law* system, where the principle of adversarial proceedings is perceived especially as a possibility of the defence to conduct the hearing and to subject the prosecution witness to cross-examination. According to the European Court of Human Rights case law, the fulfilment of the condition of a fair trial in the issue of the principle of adversarial proceedings necessitates that each of the Parties has a possibility of submitting their evidence and arguments and also a possibility of expressing their opinions on the evidence of the other party. In particular for witness statements it is desirable for the other party to be present at the hearing (or to have a possibility of being present) and to express their opinion on the content of the statement.¹⁵

Notional outlining of adversarial proceedings in legal science is not unambiguous, which is given in particular by the absence of a legal definition and by a different point of view of the possibilities of its application in basic legal systems (i.e. adversarial and inquisitorial).

¹⁰ For example, it is required that a future trial should be adversarial within the meaning of fully adversary proceedings, this requirement does, however, not imply from the principle of adversarial proceedings because it implies from the adversary trial.

¹¹ In particular, amendments to the Rules of Criminal Procedure no. 292/1993 Coll. and no. 265/2001 Coll.

¹² Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

¹³ KALVODOVÁ, V., HRUŠÁKOVÁ, M., et al. *Evidence in criminal proceedings – legal, criminological and criminalistic aspects*. Brno: Masaryk University, 2015, p. 52 et seq.

¹⁴ ŽILA, J. *Principle to search in criminal proceedings (in Czechoslovak socialist law)*. Prague: Academia, 1983.

¹⁵ KMEC, J. Principle of adversarial proceedings as one of the aspects of the right to a fair trial. In: *Restatement of procedural criminal law – current issues*. Prague: Faculty of Law, Charles University, 2008, p. 56.

This non-uniformity is also a consequence of different understanding of functions of this principle. Emmanuelle Jouanett emphasises that just “*functions ascribed to this principle are what complicates its understanding and leads to its different application in individual European or international jurisdictions (...) functions of the principle of adversarial proceedings need not be inevitably in opposition to each other; conversely, they may be complementary, but they may confuse us as well (...) It is, however, true that one of them is preferred to the detriment of other ones, and therefore this imbalance can be perceived as an obstacle for the correct understanding of this principle and its effects because the issue of definition of adversarial proceedings is a reflection of its actual nature*”.¹⁶ According to its nature, it is possible to identify, depending on functions of the principle of adversarial proceedings, three of its forms (as a way to search for truth; as the parties’ right to defence and as a court trial criterion).¹⁷ As far as the first form of the principle of adversarial proceedings (*as a way to search for truth*) is concerned, this principle is necessarily connected with the principle of finding the facts without reasonable doubt, presumption of innocence, principles of searching, promptness, cost-efficiency and adequacy. The second form (*as the parties’ right to defence*) is predominantly or even exclusively associated with the principle of the right to defence. The third form (*as a court trial criterion*) is connected with the principle of equality of the parties, immediacy, verbatim and publicity.¹⁸ For these reasons, the principle of adversarial proceedings is then called as the so-called “super-principle”, i.e. a principle which is able to concentrate several basic principles in itself.

An issue consists in the fact that some theoreticians connect the principle of adversarial approach specifically with the adversary model of criminal proceedings, or they derive this principle from such a model or even identify it with that model, i.e. in the model where the adversarial approach represents a way to search for the truth in the dispute of the parties to the proceedings (defence and prosecution) with the use of equal procedural rules, when the decision is a result of their confrontation. Such straightforward identification of adversarial proceedings with an adversary criminal trial only is not right, because it is possible to meet the principle of adversarial proceedings in both the basic systems, since the gradual mutual influencing and takeover of criminal procedure institutes lead to approximation of these systems.¹⁹ Also, continental trials (originally purely inquisitorial) have developed into a combination of the examination and accusation principles (enlightened inquisition).

¹⁶ JOUANNET, E. *Le principe du contradictoire devant les juridictions internationales*. Université Paris 1 Panthéon-Sorbonne; Copyright (c) Université Paris 1 Panthéon-Sorbonne. In: *Université Paris I Panthéon-Sorbonne* [online]. [2021-01-31]. Available at: <http://www.univ-paris1.fr/fileadmin/IREDI/Contributions_en_ligne/E_JOUANNET/Principe_du_contradictoire-Jouanet.pdf>.

¹⁷ As above.

¹⁸ OLEJ, J., KOLCUNOVÁ, M., KOLCUN, J. *Kontradiktórnosť v trestnom konaní* [Adversarial approach in criminal proceedings]. Bratislava: C. H. Beck, 2014, pp. 49–67.

¹⁹ KRISTKOVÁ, A. Adverzární, inkviziční a smíšený trestní proces – koncepce a širší souvislosti [Adversarial inquisitorial and combined criminal trials – concepts and broad contexts]. *Časopis pro právní vědu a praxi*. 2013, Vol. 21, No. 3, pp. 370-379; TOMÁŠEK, M. Prorůstání adversárních a inkvizičních prvků při europeizaci trestního procesu [Intergrowth of adversarial and inquisitorial elements at Europeanisation of criminal trials]. *Právník*. 2009, Vol. 148, No. 5, pp. 467–480.

In the Czech environment it is possible to identify two main concepts of this principle. In the first concept it is understood as a contrast to the inquisitorial principle, and fulfilment of the principle of adversarial proceedings, as associated with adversary (accusation) proceedings based on the procedural activity of the parties and with a court in the role of a fully independent and impartial arbitrator of their dispute. This concept theoretically elaborated in particular by Šámal has been accepted with a great support among counsels for defence,²⁰ who often consider just adversary proceedings without intervention of the court in evidence to be the sole proceedings corresponding to requirements for a fair trial. Šámal defines an adversarial trial as “*a trial based on an accusatorial principle (...), in which the parties not only suggest evidence, but also obtain it and present it in the proceedings before court, including the interrogation of witnesses, when the other party has the right of “cross-examination”. The trial takes the form of a dispute (competition, contradiction) between the prosecutor and the accused person (and their lawyer), who have the position of basically equal parties to the proceedings (the principle of equality of the parties). The task of an independent and impartial court is then to manage the dispute and to decide the controversial issue – whether the crime was committed by the accused person or not*”.²¹ From the adversarial proceedings defined this way it is possible to identify several attributes (equality of the parties, their evidence initiative and activity in implementation of the evidence, the accusation principle and specific position and task of the impartial and independent court (judge). The accusation principle as well as equality of the parties are fulfilled, without any doubts, already in the existing Rules of Criminal Procedure, and in a similar way, also the framework for activities of the parties in implementation of the evidence as well as their evidence initiative are involved. The remaining controversial issue is the position and task of the court.²²

The second concept outlines the principle of adversarial proceedings in a different way, namely in congruence with case law of the European Court of Human Rights as the right to getting familiar with all documents, opinions, evidence with a view to influencing the court decision and the right to discuss, or possibility of discussing about them. Such a perception of the notion of the right to adversarial proceedings on the part of the European Court of Human Rights is based on the French model and does not require creation of fully adversarial systems (accusatorial systems in the area of criminal law) similar to those

²⁰ SOKOL, T. Soudním aktivismem ke ztrátě nezávislosti [Through a judicial activism to the loss of independence]. *Soudce*. 2017, No. 4; SOKOL, T. Acoustic record (cited from 2:27:40) from the seminar of the Committee on Constitutional and Legal Affairs of the Chamber of Deputies of the Czech Republic focused on the topic: New Rules of Criminal Procedure as viewed by the professional public, held on 10 June 2016. In: *Poslanecká sněmovna Parlamentu ČR* [online]. 10. 6. 2016 [2021-01-31]. Available at: <<http://www.psp.cz/sqw/hp.sqw?-k=4006&td=19&cu=28>>; VEVERKA, V. Budoucnost zásady kontradiktornosti v českém právním procesu a rekodifikace trestního řádu [Future of the principle of adversarial proceedings in a Czech criminal trial and restatement of the Rules of Criminal Procedure]. *Trestní právo*. 2017, No. 3.

²¹ HENDRYCH, D., et al. *Právní slovník [Legal Dictionary]*. Prague: C. H. Beck, 2009.

²² MIČKAL, M. Úloha soudce a aktivita stran při provádění výslechu svědka v řízení před soudem [Task of the judge and activity of parties at conducting the examination of a witness in court proceedings]. *Trestní právo*. 2018, No. 1, pp. 13–20.

existing in countries with *common law*.²³ Such concepts correspond more to old specialised literature as well.²⁴

A recent supporter of this concept is in particular Fenyk, who refers to its perception in the *Corpus Iuris* project. According to this definition, a trial is adversarial if it is ensured, while respecting the principle of equality of arms defined by the European Court of Human Rights, that the parties have access to any evidence and notes which are submitted to the court and which affect the discussion of the case and the court decision. That is why this approach expresses the concept of *equality of arms* based on the right to be informed about all evidence or circumstances that are submitted to the court and that can affect its decision. At the same time, Fenyk points out that it is not possible to combine the notion “principle of adversarial proceedings” with the competition of the parties in criminal proceedings as it is usual in the *common law* system, and therefore with the fostering of the adversary nature of criminal proceedings. Conversely, it is necessary to interpret this notion in connection with the European Court of Human Rights case law, according to which the principle of adversarial proceedings affects all the moments of an equitable criminal trial, all the tools enabling equitable participation of both the parties to the trial in submission of evidence, and this way it cooperates on creation of the conditions of a fair trial according to Article 6 of the European Convention on Human Rights.²⁵ He has insisted on this position (the right to access to the information obtained in criminal proceedings by the other party or by the court and the right to response thereto), which is generally shared,²⁶ up to now.²⁷ In a similar way, Kmec defined the principle of adversarial proceedings with a reference to the European Court of Human Rights (“ECHR”) case law as a possibility of both the parties to the proceedings, concerning getting oneself familiar with the opinions and evidence submitted to the court with a view to influencing its decision, whether these positions and evidence were submitted by the other party or by another entity from which the court has requested an opinion or evidence, and familiarisation with such evidence is closely associated with the possibility of providing one’s own opinion thereon.²⁸

²³ VITKAUSKAS, D., DIKOV, G. *Protecting the right to a fair trial under the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 2013, p. 45.

²⁴ E.g. the concept of Glaser stating that “*adversarial court proceedings require provision of the same rights and the same possibility of convincing the judge to the opposing parties.*” Even older Czech authors were convinced that already in the Rules of Criminal Procedure from 1873 the proceedings before court were adversarial within this meaning, they only polemised about the fact whether also the pre-court stage should be adversarial, where they arrived at an opinion that preparatory proceedings should not be adversarial; KALLAB, J. Několik poznámek o postavení soudce vyšetřujícího a státního zástupce v trestním řízení přípravném [Several remarks on the position of investigation judges and prosecutors in preparatory criminal proceedings]. *Právník*. 1903, Vol. 42, No. 1, pp. 693–707; SOLNAR, V. [What guarantees should be provided to accused persons during preparatory proceedings?]. *Official Journal of the Czechoslovak Society for Criminal Law*. 1937, No. 2, pp. 21–27.

²⁵ FENYK, J. (ed.). *Pocta Dagmar Cisařové k 75 narozeninám [Honour to Dagmar Cisařová on the occasion of her 75th birthday]*. Prague: LexisNexis, 2007, p. 16.

²⁶ JELÍNEK, J. (ed.). *Základní zásady trestního řízení – vůdčí ideje českého trestního procesu [Basic principles of criminal proceedings: Leading ideas of Czech criminal trials]*. Prague: Leges, 2016, p. 14.

²⁷ FENYK, J., DRAŠTÍK, A., et al. *Trestní řád. Komentář. II. díl [Rules of Criminal Procedure. Comments. Part II]*. Prague: Wolters Kluwer, 2017, p. 223.

²⁸ Cf. KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *Evropská úmluva o lidských právech [European Convention on Human Rights Comment]*. Prague: C. H. Beck, 2012, p. 740.

The content ambiguity is a logical consequence of different views of the function of the principle of adversarial proceedings. With regard to the decision-making activity of the European Convention on Human Rights, the principle of adversarial proceedings has the nature of a subjective right to defence, which logically suppresses its second basic function, i.e. searching for material truth. Incomprehensibility of the principle of adversarial proceedings is confirmed also by opinions of Slovak science, when various authors associate it with different provisions of the Slovak Rules of Criminal Procedure.²⁹ The principle of adversarial proceedings at the same time means that both the parties to the proceedings can provide their opinions on all the evidence and facts used in the proceedings, and at the same time they can challenge the same.³⁰ The possibility of the parties to conduct equitable confrontation at the same time applies also to the evidence concerning adversary facts relating to a partial aspect of proceedings (so-called “*point of procedure*”)³¹ or legal qualification of the fact.³² For the purpose of conducting this confrontation, both the parties to the proceedings must be authorised to propose and submit evidence for the support of their statements. An integral part of the adversarial trial is also the right to be present at judicial proceedings and the possibility of taking an active part in the course thereof.³³

IV. PRINCIPLE OF ADVERSARIAL PROCEEDINGS IN A CZECH CRIMINAL TRIAL AND ITS MANIFESTATIONS IN PROCEEDINGS BEFORE COURT

The point of criminal proceedings, or of their court phase is to get to the truth in a fair manner.³⁴ This is associated just with the main hearing, as probably the most important, even though facultative, stage of the criminal proceedings. The phases of the criminal proceedings, which precede that stage, should be, in terms of their nature and mission, especially preparatory phases. At the same time, the phases that immediately follow are especially corrective (review) phases and executive phases. It is therefore possible to state that these phases of criminal proceedings are characterised by an essentially lower rate of adversarial proceedings in comparison with the main hearing. The way to search for the truth by the court in the course of the main hearing naturally depends on the principle(s) by which the court is bound during this activity. Czech criminal trial is still bound by the principle of material truth, and in the science this principle is used in the manner in which it was historically formulated in particular at Storch,³⁵ when a relatively great influence during genesis of this principle was represented also by the Marxist idea that peo-

²⁹ OLEJ, J., KOLCUNOVÁ, M., KOLCUN, J. *Kontradiktórnosť v trestnom konaní* [Adversarial approach in criminal proceedings]. pp. 44–45.

³⁰ Decision in the ECHR case: Mantovanelli v. France of 18 March 1997, Application no. 21497/93.

³¹ Decision in the ECHR case: Kamasinski v. Austria of 19. 12. 1989, Application no. 9783/82.

³² Decision in the ECHR case: Pélistier and Sassi v. France of 25 March 1999, Application no. 25444/94.

³³ Decision in the ECHR case: Andreescu v. Romania of 8 June 2010, Application no. 19452/02.

³⁴ KANDOVÁ, K. Pojem pravdy (nejen) v trestním řízení a některé související instituty [The notion of truth (not only) in criminal proceedings and certain associated instruments]. *Právník*. 2017, Vol. 156, No. 10, pp. 842–857.

³⁵ STORCH, F. *Austrian criminal proceedings. Part 1*. Prague: Wolters Kluwer, 2011 (reprint), p. 8.

ple are always able to find objective truth, which formed criminal proceedings in times of totalitarianism.³⁶ In consequence of this fact, the role of the court during the search for the truth is still prevalingly controlled by the searching (instructional) principle, with which this principle is organically connected, because the so-called *enlightened inquisition* is built upon three basic principles in the area of the taking of evidence (principle of material truth, searching principle and principle of free assessment of evidence), as emphasised in this paper several times.

In preparatory proceedings, the adversarial principle in the form of fair confrontation is limited to some areas only (e.g. taking the accused person into custody).³⁷ Adversarial elements, within the meaning of an increased activity of the parties can naturally be found also in the rights of the defence (or of the aggrieved party), during interrogations of witnesses or experts in preparatory proceedings, when this principle of adversarial proceedings is a precondition for usability of such interrogations before court. By applying the principle of adversarial proceedings already in preparatory proceedings (and obviously also by introducing formal/subjective burden of evidence) at the same time the principle of adversarial approach is less intensive in the proceedings before court. It is, however, true that preparatory proceedings are, in terms of their nature, inquisitorial proceedings, when their purpose is to collect necessary quantity of information for indictment or for proceedings before court through targeted activities of one law enforcement authority (police authority) under supervision of another authority (public prosecutor). In other words, during execution of acts in preparatory proceedings it is not possible to fully apply this principle if it denied other legitimate interests, in particular the state's interest in effectiveness of prosecution. Appeal proceedings also feature a certain rate of an adversarial approach (depending on application of the appeal and cassation principles), nevertheless, the core mission of these proceedings is basically review of activities of a lower-instance authority by a higher-instance authority which may (but not necessarily) have its origin in argumentation of the opposing parties. The least adversarial types of proceedings are naturally enforcement proceedings. The main hearing is, in comparison to these phases, or even must be due to the very essence of the issue, the most adversarial stage of criminal proceedings. The parties to criminal proceedings submit their statements together with supporting evidence to the court for assessment, in consequence of which the court may be relieved from the searching principle to a significant extent. Basically, it is possible to state that now it is already quite usual to perceive properties of the stages of criminal proceedings in such a way that a prevailing opinion is (at least as far as properties of the main hearing are concerned) that fairness of criminal proceedings increases with increasing adversarial nature of this stage of proceedings. This is, by the way, in line with the reforms performed and prepared, which are inspired by the effort of intensification of the adversarial nature of the main hearing.

³⁶ GRIVNA, T., GRIVNOVÁ, P. Trestní právo procesní [Procedural criminal law]. In: M. Bobek – P. Molek – V. Šimíček (eds.). *Komunistické právo v Československu* [Communist law in Czechoslovakia]. Brno: Masaryk University, 2009, pp. 597–605.

³⁷ Decision of the Constitutional Court of the Czech Republic, file ref. no. I. ÚS 2208/13 of 11 December 2013, I. ÚS 3109/13 of 18 March 2014, I. ÚS 3326/13 of 15 January 2014.

IV.1. Role of the court at the main hearing

It has already been stated above that the only mission of the main hearing is finding the truth about commitment of a criminal offence and to punish offenders of this criminal activity (if they are identified). This is, with regard to constitutional principles and in particular at existence of the principle of presumption of innocence, naturally reserved for the criminal court.³⁸ I believe that the possibility of the court to enter into the taking of evidence, whether in favour or in disfavour of the accused person, represents an important protection for clarification of the facts of the case (material truth). The connection with the principle of free assessment of evidence is without any doubt. That is to say that provisions of Section 2(5) of the Rules of Criminal Procedure orders all law enforcement authorities to proceed, at cooperation of the parties, in such a way that it can be possible to clarify the facts of the case, about which there are not any reasonable doubts, in the extent which is necessary for their decision, and the court is moreover ordered to complete, by itself, the taking of evidence (to find further evidence) in the extent necessary for its decision, even though it states at the same time that it is the public prosecutor that is obliged to prove guilt of the accused person in the proceedings before court. Therefore, it is true that even after the legislator's attempts whose objective was to foster the adversarial nature of the main hearing, the court is not exempted from its responsibility for the right and complete finding of the facts. The current wording of Section 2(5) of the Rules of Criminal Procedure can therefore seem contradictory, when it confirms the binding nature of some basic principles (material truth, searching and officialities) on the one hand, while indicating a certain shift from the material (objective) burden of evidence in favour of a formal (subjective) burden of evidence on the other hand.

In any case it is obvious that it is the court that bears responsibility for completeness and comprehensiveness of taking evidence, i.e. that Czech criminal proceedings are still, in terms of their nature, an inquisitorial trial with non-negligible adversarial elements: inquisitorially indicting trial (so-called enlightened inquisition). The position of the court (judge) at the main hearing is currently still rather predominating, nevertheless their role within the framework of taking evidence is, however, not exclusive. That is why the court has, within the framework of the main hearing, still a long series of authorisations corresponding to the continental nature of criminal proceedings. The matter concerns in particular the authorisation to take part in taking evidence in a proactive way, because it is clear that the right to interrogation of the accused person relating to the indictment is reserved for the court only (Section 207(1) of the Rules of Criminal Procedure). The taking of evidence through interrogation of a witness, expert or by reading a document should be reserved, according to the current legislation, to the parties, nevertheless the parties

³⁸ The above-mentioned ideas were reflected by the Constitutional Court of the Czech Republic in another decision in which it stated that *"it is competent to assess the issue whether the presumption of innocence was not breached during clarification of the case within the framework of criminal proceedings (and in particular during evidence assessment) (...) Presumption of innocence is one of the most important constitutional-law principles of criminal proceedings in a democratic legal state (...) it requires the state to bear specific burden of evidence, and at the end it is an ordinary court that bears responsibility for appropriate clarification of the case (Cf. Section 2(5) "in fine" of the Rules of Criminal Procedure)."* – Finding of the Constitutional Court of the Czech Republic, file ref. no. I. ÚS 3235/15 of 26 April 2016.

to the criminal proceedings have the right to ask questions addressed to interrogated persons with the consent of the presiding judge, basically at the moment when the presiding judge has finished asking questions and when members of the panel do not have any questions either (Cf. Section 215(1) of the Rules of Criminal Procedure), whereby there may be a collision with Section 180(3) of the Rules of Criminal Procedure, which is based on the fact that the evidence should be taken in particular by the parties. The above-indicated responsibility of the court for the result of taking evidence has naturally a psychological effect, because the boundedness of the court by the searching principle is established quite firmly. While in the pre-judicial stage the law enforcement authorities must evidence facts both in favour and in disfavour of the accused person, at the main hearing the public prosecutor is obliged to prove guilt of the accused person. In the main hearing the order of objectivity of taking evidence is valid only for the court.

In this context it is possible to ask a question whether this phenomenon could affect also the court which has been made familiar with the investigation file in a detailed way and which bears responsibility for completeness of taking evidence and for the content of the decision. It implies from the legal requirement of clarification of the facts without reasonable doubts that in further reference to the evidence activity of the parties the court must, without a proposal – i.e. also in the case when the parties do not deem it important, implement important evidence necessary for decision. On the other hand, the court can only refuse a proposal for taking evidence if it is sure that such evidence cannot be useful for clarification of the facts (for finding the material truth).³⁹

The proactive role of judges (i.e. the searching principle in relation to courts) is often subject to criticism, usually from the defence. A general objection is that it endangers objectiveness of decision making of judges, because the judge who is obliged to search for and take evidence can only hardly maintain a detached view which is necessary for impartial (objective) assessment, and is little critical of the evidence which they themselves obtain. Probably the most frequently applied objection is the fact that evidence activity is not inherent for judges at all, because judges should not be responsible for clarification of material truth, and conversely, they should be just an impartial arbitrator of two competing parties (i.e. prosecution, when conviction of the offender is a matter primarily of the public prosecutor, and the defence which must be proactive as well) and any of their intervention in taking evidence in disfavour of the accused person is to raise an impression that their role is to be another competitor of the accused person, whose aim is to prove the accused person guilty and not to decide the case objectively and according to law. In other words, the court should not be considered a law enforcement authority at all, because inclusion of courts among law enforcement authorities is a demonstration (and a relict) of a totalitarian state, not of a democratic state. Nevertheless, even such a solution, i.e. formal exclusion may not be a panacea either.⁴⁰

³⁹ In this context there may arise a question whether the court is authorised to refuse a proposal of a party for taking evidence if such evidence could be useful, but the facts already imply from the taking of evidence carried out upon the proposal of the other party (e.g. the court will interrogate, upon the public prosecutor's proposal, four witnesses of an affray and the accused person proposes interrogation of the fifth witness).

⁴⁰ ZÁHORA, J., et al. *Dokazovanie v trestnom konaní* [Taking evidence in criminal proceedings]. Prague: Leges, 2013, p. 56.

Another objection is the fact that the judge works only with the version of the prosecution and through previous study of the investigation file containing in fact just the evidence against the accused person, and therefore the judge's impartiality could be endangered in the course of the main hearing, the judge may lose open-mindedness and detachedness from the case and in their opinion created in advance they may try to conduct the proceedings in such a way that the accused person is either convicted, or conversely, exonerated. In order that inner belief of the court (Section 2(6) of the Rules of Criminal Procedure), formally embedded into their decision, can be based on results of the confrontation of the dispute parties taking place before court, the judge must separate the result of preparatory proceedings (investigation) from the result of proceedings before court (the main hearing), because the judgement can be based only on the facts that were the subject matter of the main hearing (Section 2(11), (12) of the Rules of Criminal Procedure). Science furthermore refers to two decisions of the Constitutional Court of the Czech Republic,⁴¹ whose aim is to document certain necessity of limitation of the searching principle in relation to courts. The conclusions made there were, however, both convincingly challenged in science⁴² and later on reviewed by the Constitutional Court of the Czech Republic itself.⁴³ For completeness it is appropriate to stress that Šámal, who currently proposes an increase in the public prosecutor's activity (through embedment of the public prosecutor's burden of evidence), or at least a limitation of the searching principle in such a direction that the judge could not search for evidence in disfavour of the accused person, in the past stated that "*the judge's task would therefore be especially to manage the trial and to decide the controversial question whether the concerned criminal offence was committed and whether it was the accused person that committed it, and if the parties failed to fully fulfil their tasks at the trial management and taking of evidence at the court hearing, it would be up to the judge to complete the taking of evidence on the basis of the judge's own initiative as well.*"⁴⁴ The rate of adversarial approach at the main hearing is naturally closely connected with the issue of the relation between preparatory proceedings and proceedings before court.⁴⁵

⁴¹ Findings of the Constitutional Court of the Czech Republic, file ref. no. I. ÚS 670/05, of 24 April 2006, and file ref. no. II. ÚS 2014/07, of 14 May 2008.

⁴² Musil and Hořák, however, believe that by this decision the Constitutional Court of the Czech Republic uselessly weakened the searching principle as one of traditional principles of the continental criminal trial, by trying to newly redefine "distribution of roles of individual participants of criminal proceedings", whilst it is clear that it is an obvious concept inspired by the Anglo-Saxon type of the so-called adversarial trial, and they stress that "*it is surely possible to imagine introduction of such a model of criminal proceedings also in our country, it would, however, be absolutely necessary to carry out, after a profound analysis and discussion, a radical change of the paradigm of the criminal-law policy and to completely change dozens of related provisions of the Rules of Criminal Procedure; and such a radical review of the rules is surely not a task of the Constitutional Court, but of the legislator.*" MUSIL, J., HOŘÁK, J. Criminal-law judicature of the Constitutional Court of the Czech Republic. In: V. Göttinger (ed.). *Collection of papers from the Memorial Conference on the occasion of the 20th anniversary of the Constitutional Court of the Czech Republic*. Brno: Constitutional Court, 2014, p. 68; JELÍNEK, J. (ed.). *Základní zásady trestního řízení – vůdčí ideje českého trestního procesu* [Basic principles of criminal proceedings: Leading ideas of Czech criminal trials]. pp. 81–83.

⁴³ Cf. Resolution of the Constitutional Court of the Czech Republic, file ref. no. I. ÚS 1299/15 of 9 February 2016 and findings, file ref. no. I. ÚS 3235/15 of 26 April 2016, and file ref. no. III. ÚS 3579/17 of 3 April 2018.

⁴⁴ ŠÁMAL, P. [On the discussion about guarantees of a fair trial and fair result of such a trial and clarification of true facts]. *Trestní právo*. 1996, No. 6, p. 2.

⁴⁵ FRYŠTÁK, M. *Dokazování v přípravném řízení* [Taking evidence in preparatory proceedings]. Brno: Masaryk University, 2015.

IV.2. Public prosecutor's task at proceedings before court

At the moment when the public prosecutor applies the accusatorial principle (and accusatorial component of the principle of legality), i.e. when they issue an indictment in the case, their position is undergoing an essential change because they are losing their supervisory and review powers (*dominus litis* of the preparatory proceedings) and become a party to criminal proceedings, with regard to which equality of arms should apply. The procedural position of the public prosecutor in proceedings before court should be principally equal with the accused person (possibly represented by their lawyer), and this arrangement of the criminal trial makes it possible to perform general and complete clarification of the matter, whereby it helps to arrive at a fair decision as well.⁴⁶ In relation to how the principle of adversarial proceedings is reflected in the public prosecutor's activity at the issuance of the indictment (when the public prosecutor's position is undergoing an essential change), it is necessary to state that sometimes it is criticised in science that since the amendment to the Rules of Criminal Procedure⁴⁷ the public prosecutor has not been obliged anymore to state positions of the defence in justification of the indictment issued and to deal therewith, and therefore the current state is perceived by Vantuch as contradictory with the principle of equality of the parties.⁴⁸ It is, however, not possible to agree with this reservation because if adversarial proceedings are to be held before court, then it is not possible to require the prosecution party to obligatorily and preventively state and disprove arguments of the opposite party in its claim statement. If the defence deems it suitable for its argumentation to be markedly reflected in the files in accordance with the principle of written forms and immediacy, it is possible to prepare a written position on the indictment,⁴⁹ when contradiction can already occur during the main hearing and at a full exercise of the principle of verbality and immediacy. *De lege ferenda* it is possible to consider that the court should be obliged to deliver the indictment to the defence party within the prescribed term (in a magnitude within several days) after the lodging thereof at the court for possible comments. Nevertheless, unlike the accused person (or the aggrieved party) who has a possibility of remaining passive (after the issuance of the indictment and after the ordering of the main hearing), the Rules of Criminal Procedure imposes activity at the main hearing on the state prosecutor, when the latter is obliged to act in such a way that it can be possible to clarify all essential facts decisive from the viewpoint of the indictment issued, and for this purpose to obtain, on their own initiative or at the request of the presiding judge, also other evidence, which has not been implemented yet (Section 180(2) of the Rules of Criminal Procedure), and at the same time they are obliged to propose taking evidence and with the consent or upon a request of the presiding judge basically to implement the evidence supporting the prosecution (Section 180(3) of the Rules of Criminal Procedure).

⁴⁶ ŠÁMAL, P., MUSIL, J., KUČHTA, J., et al. *Trestní právo procesní [Procedural criminal law]*. Prague: C. H. Beck, 2013, p. 107.

⁴⁷ Implemented by the Act no. 283/1993 Coll.

⁴⁸ VANTUCH, P. *Obhajoba obviněného [Defence of an accused person]*. Prague: C. H. Beck, 2010, p. 398.

⁴⁹ KALVODOVÁ, V., HRUŠÁKOVÁ, M., et al. *Dokazování v trestním řízení. Právní, kriminologické a kriminalistické aspekty [Taking evidence in criminal proceedings – Legal, criminological and criminalistic aspects]*. Brno: Masaryk University, 2015, pp. 41–42.

Public prosecutor's activity implies also from principles of officiality and legality (Section 2(3), (4) of the Rules of Criminal Procedure).⁵⁰ As it has already been stated, a provision of Section 2(5) (fourth sentence) of the Rules of Criminal Procedure at the same time explicitly imposes, on the public prosecutor, the obligation to prove guilt of the accused person, nevertheless, at the same time it states that this fact does not release the court from the obligation according to which the court itself should complete the taking of evidence in the extent necessary for its (fair) decision. It is not possible to say that the public prosecutor would bear (formal) burden of evidence, because the system is missing a standard sanction in the form of a "loss of dispute" in the case that the public prosecutor fails to prove guilt. While in the pre-judicial stage the public prosecutor was obliged to clarify, even without a proposal, with the same care the circumstances being in favour as well as in disfavour of the accused person (the principle of assurance of the right to defence), in the proceedings before court the public prosecutor is the party which exclusively deals with proving guilt of the accused person, which is a consequence of the accusation principle. At the same time, also in proceedings before court the public prosecutor is a protector of a public interest.⁵¹ The above-mentioned obligations in relation to the public prosecutor therefore have (or should have) an essential influence on the adversarial nature of the main hearing, i.e. that the formulated public prosecutor's obligation to prove guilt of the accused person should therefore lead the court to reduction of the feeling of responsibility for the result of proceedings. If either of the parties to criminal proceedings is obliged to prove certain facts (and has a position of the entity acting for the state – representing the public prosecution), it is clear that a logical (however simplified) consequence should be certain liberation for the court, which could focus its effort on what is the most important for fairness of the main hearing, i.e. solution of the issues whether e.g. the proposed evidence is legal (admissible) and sufficient for conviction. The public (state) prosecutor's activity is naturally associated with the principle of legality (Section 2(3) of the Rules of Criminal Procedure), which *de facto* imposes on them, as a follow-up to their responsibility for maintaining the legal state,⁵² an obligation to initiate prosecution (initiation component) and an obligation to issue an indictment at a criminal court (accusation component). There arises also an issue whether it is possible to consider the strict application of the principle of legality as congruent with the strengthening emphasis on the adversarial nature of taking evidence.

That is to say, if the public prosecutor is entrusted with the obligation to prove guilt of the accused person in proceedings before court and if this "material" burden is removed from the court, then there is no logical reason for which there should not be fostered opportune considerations of the public prosecutor about their ability to fulfil their evidence

⁵⁰ MULÁK, J. Zásada legality a opportunity v českém trestním řízení [Principle of legality and opportunity in Czech criminal proceedings]. In: J. Jelínek (ed.). *Základní zásady trestního řízení – vůdčí ideje českého trestního procesu* [Basic principles of criminal proceedings: Leading ideas of Czech criminal trials]. Prague: Leges, 2016, pp. 44–59.

⁵¹ FENYK, J. Zásady veřejné žaloby v trestním řízení [Principles of public action in criminal proceedings]. *Policajná teória a prax*. 2002, No. 3, p. 65 et seq.

⁵² Maintaining the legal state (= principle of legality).

obligations before court, e.g. in a situation of the absence of evidence.⁵³ In other words, requirements for further fostering of adversarial proceedings will have to bring a change in the paradigm regarding the accusation component of the principle of legality, in particular concerning the rule stating that even in case of doubts the public prosecutor is obliged to issue an indictment at the court (Section 176(1) of the Rules of Criminal Procedure) and that it is only possible to discontinue prosecution where it is without any doubt that the act for which the prosecution is conducted did not occur or that it is not evidenced that the act was committed by the accused person (Section 172(1)(a),(c) of the Rules of Criminal Procedure). These opinions are in line with obsolete concepts of the main hearing with the court being strongly bound by the searching principle, when the public prosecutor leaves final decisions up to the court in case of doubts. On the other hand, it is necessary to state that these rules are respected by the application practice without any exceptions, in such a way that if even after exhausting all available means (including rendering oneself familiar with the files within the meaning of Section 166 of the Rules of Criminal Procedure) the investigation results remain contradictory, e.g. due to the fact that there are two groups of evidence going against each other, the public prosecutor should issue an indictment, because there is a hope that the situation of evidence may still be enriched during proceedings before court. A fact is that the principle of legality in modern concepts, as explained above, does not mean that public prosecutors are fully forced to prosecute in connection with all offences about which they have learnt because the Rules of Criminal Procedure admit a long series of exceptions from the principle of legality or opportune considerations of public prosecutors about the un(necessity) of further prosecution (Section 172(2)(c) of the Rules of Criminal Procedure). This means that within the framework of restatement work it could be appropriate to consider, with regard to the changing role of the public prosecutor in proceedings before court (principle of legality in relation to the principle of adversarial proceedings), further extension of discretionary powers of the public prosecutor. The fostering of discretionary powers will, however, probably require also an extension of the control of such powers.⁵⁴ Given the existing legislation, the public prosecutor does not have any formal burden of evidence in proceedings before court, the matter concerns just an obligation of evidence, when, however, its non-fulfilment is not subject to sanctions in any manner.⁵⁵ That is to say that this obligation of evidence does not exempt, fully in accordance with the searching principle, the court from the obligation to complete taking evidence in the necessary extent by itself. For the reason of non-existence of the formal burden of evidence of the public prosecutor it therefore implies that the person who issued the indictment against the accused person is not forced, in any manner, to fulfil their obligation of evidence, and therefore they may

⁵³ Cf. Section x25(2) of the Draft Rules of Criminal Procedure In: *Justice.cz Trestní právo procesní* [online]. [2021-01-31]. Available at: <<https://tpp.justice.cz/>>.

⁵⁴ KANDOVÁ, K. Kontrola oportunních rozhodnutí státního zástupce [Control of opportune decisions of a public prosecutor]. *Státní zastupitelství*. 2017, Vol. 15, No. 6, pp. 14–22.

⁵⁵ JÍLOVEC, M. Několik poznámek k odpovědnosti státního zástupce za neprovedení důkazů [Some remarks on public prosecutor's responsibility for a failure to take evidence]. In: T. Kyselovská – M. Chorvát – V. Kadlubiec – N. Springinsfeldová – A. Virydeková – K. Drlíčková (eds.). *Cofola 2016*. Brno: Masaryk University, 2016, pp. 740–755.

remain fully passive in the proceedings before court. It is, however, necessary to state that public prosecutor's activity in the process of taking evidence is not their only adversarial manifestation in proceedings before court. A highly fundamental role is played in this area by their powers in connection with disposal of the actual indictment, which is one of manifestations of the accusation principle.⁵⁶ In the same way as they could issue an indictment, they can take it back under certain conditions until the court of first instance retires for final deliberation (Section 182 of the Rules of Criminal Procedure).

In connection with the explicitly imposed public prosecutor's obligation to prove guilt of the accused person, the withdrawal of an indictment should be used in particular when the public prosecutor arrives at a conclusion that their evidence and procedural situation is not sufficient for fulfilment of this obligation. This will concern, in particular, the cases when an essential doubt is evidenced in proceedings before court with regard to guilt of the accused person, with which the public prosecutor identifies themselves as well. An essential consequence of such withdrawal of the indictment is the fact that the case is returned to preparatory proceedings (Section 182 of the Rules of Criminal Procedure), when the public prosecutor becomes again a supervisory (and review) authority, loses the position of a party and is bound by the requirement for prosecution in connection with all criminal offences about which they learn, and for the finding out of the facts not associated with reasonable doubts (Section 2(3), (5) of the Rules of Criminal Procedure). From the text above it implies that the public prosecutor will be very sporadically motivated to such a withdrawal of an indictment (returning the case to preparatory proceedings), if it means for them the returning to a partly more difficult position in preparatory proceedings. Just for this reason, withdrawal of indictment is very rare in the application practice, and it is possible to see that more frequent situations are when a public prosecutor who finds themselves in a lack of evidence does not withdraw the indictment, and lets the proceedings continue e.g. up to the phase of closing statements instead (Section 216 of the Rules of Criminal Procedure), in which – in spite of being obliged to prove guilt of the accused person – they propose acquittal concerning the indictment which they themselves (or their substitutable colleague) issued against the accused person, which may be associated also with the fact that the public prosecutor is a protector of variable public interest.⁵⁷ According to Vantuch it is right that the public prosecutor should, even after taking evidence, propose acquittal in their closing statement, and he criticises the position of a public prosecutor obstinately insisting on conviction of the accused person.⁵⁸ The requirement for adversarial proceedings would probably be satisfied more by a procedure when the public prosecutor should not propose, in their closing statement, the acquittal but rather they should try to withdraw the indictment and they themselves should stop prosecution, for the reason that the court should not meritoriously decide about guilt or innocence of a person, when the prosecution authority is not convinced about guilt of such a person either.

⁵⁶ JELÍNEK, J., et al. *Procedural criminal law*. Prague: Leges, 2016, pp. 156–161.

⁵⁷ FENYK, J. *Veřejná žaloba. Díl první [Public action. Part I]*. Prague: Ministry of Justice, 2001, p. 171.

⁵⁸ VANTUCH, P. *Obhajoba obviněného [Defence of an accused person]*. p. 436.

From the text above it is therefore clear that in connection with the fostering of the adversarial position of public prosecutors with simultaneous insisting on the principle of legality there arises certain tension of the two principles, which is of a practical type as well. To sum up, public prosecutors must, after they have arrived at a conclusion that there is a lack of evidence, either withdraw the indictment (and discontinue the prosecution) and by doing so at the same time give up the principle of legality (Section 2(3) of the Rules of Criminal Procedure), or conduct the criminal case in which they are not competent to prove guilt of the accused person to a decision, and they themselves shall express, in their closing statement, doubts regarding the guilt of the accused person, which they are obliged to prove (Section 2(5) of the Rules of Criminal Procedure). In my opinion it is logical that if public prosecutors are to be responsible for proving guilt of the accused person, it will be necessary to leave strict application of the principle of legality, i.e. in a certain extent to admit that they can follow also the principle of opportunity during their decision-making process. This is connected also with the fact that public prosecutors know that the discontinuation of prosecution will be followed by a review of their conduct by the supreme public prosecutor (Section 174a of the Rules of Criminal Procedure), and therefore in many cases they prefer issuing an indictment at the court, even though it would otherwise be more appropriate to discontinue the prosecution. That is to say that the *de lege lata* legislation does not provide public prosecutors with such space for consideration or personal courage to discontinue prosecution in the states of lack of evidence, because it enables them or rather orders them to issue an indictment in case of doubts (*in dubio contra reo*). This means that the decision making is left up to the court, which may have also such consequences that it is possible to bring to court for trial also such accused persons whose conviction is highly improbable, regardless of the fact that there are organised expensive judicial proceedings which are likely to end with acquittal. These negative connotations should, however, be prevented by preliminary hearing regarding the prosecution. The entire issue consists in the fact that the continental model is divided into a pre-trial stage (which is still internally subdivided into general inquisition and special inquisition) and proceedings before court (adversarial), although the relationship between these stages differing with their missions is not resolved in all consequences. The adversarial model does not resolve such issues because it does not have any formalised pre-judicial phase.

IV.3. Accused person and their lawyer at the main hearing

The accused person has a specific position to a certain extent. This is due to the fact that they are the party whose principal rights and obligations are the fundamental subject matter of criminal proceedings.⁵⁹ If the basic mission of criminal proceedings is to find the truth regarding the fact whether an act was committed or not and whether it features characteristics of a criminal offence or not, and then to identify the actual offender, when identification of the offender is associated with imposition of a sanction (punishment), it means that consequences of the decision in criminal matters, in particular in the case of

⁵⁹ Other entities and parties find themselves in analogical situation too (aggrieved party, involved party), nevertheless, decision making concerning their rights and obligations (entitlements) is rather marginal in comparison to the decision-making process regarding rights and obligations of the accused person.

a judgement of conviction, may be relatively serious for the accused person. Just for this reason, the rights of the accused person in a criminal trial (and specially at the main hearing) are very broad.⁶⁰ From the viewpoint of reflection of the principle of adversarial proceedings it is crucial for these authorisations not to be formal only, but to ensure that the accused person at the main hearing can be at least a worthy opponent of the public prosecutor. Only then can criminal proceedings before court be perceived as fair, and analogously only a decision that was made after the organised proceedings, where all elements of a fair (adversarial) trial were respected, can be perceived as a fair decision. It is possible to conclude that the most essential adversarial element of the rights of the accused person at the main hearing is their possibility of expressing personally their views concerning the indictment issued and presented (Section 207(1) of the Rules of Criminal Procedure). It is therefore possible to state that the right of the accused person to oppose the indictment presented is maintained.⁶¹ It is possible to agree with such a conclusion to a certain extent, but with the reservation that unlike their previous speakers (public prosecutor), the accused person is, in an overwhelming majority of cases, a legal layman without any rhetoric training, which results in the fact that immediately after reading the charges in the indictment they can start to defend themselves. It is, however, an issue to what extent their defence is competent to disprove the previous presentation of the justice professional. These facts usually mean that interrogation of such accused person ceases to have evidence nature (it tends to be quite comprehensive expression regarding the defence) and becomes rather a form of personally presented argumentation. The interrogation should, however, not serve for this purpose, because its purpose should be rather the finding out of the facts than identifying the procedural relation of the accused person to the issued indictment. That is why it is probably possible to doubt about the fact whether the accused person is provided with this authorisation in a sufficient extent. It is a fact that a response to the indictment issued (in the form of interrogation of the accused person) is a part of taking evidence, i.e. the subject matter of the principle of free assessment of evidence as any other admissible evidence, and not a procedural presentation of the opinion of a party to criminal proceedings, whose content is to insert a statement into the case considered or to deny a statement of the opposite party. It is possible to perceive as another partial insufficiency of legislation the fact that the right to legal aid is not provided to the accused person while commenting the content of the indictment (Article 37(2) of the Charter of Fundamental Rights and Freedoms), because they cannot respond to the prosecution in an adversarial way through their counsel for defence, as they have to make all comments which they have on the prosecution personally during their interrogation. The Czech (continental) criminal trial was therefore missing one of significant features of the adversarial trial which is known in this context as “*opening statement*”.⁶² No matter what the accused

⁶⁰ GRIVNA, T., et al. *Právo na obhajobu – Teorie a praxe 21. století [Right of defence – Theory and practice of the 21st century]*. Plzeň: Aleš Čeněk, 2016.

⁶¹ VANTUCH, P. *Obhajoba obviněného [Defence of an accused person]*. p. 436.

⁶² This lack of legislation has only recently been remedied, with effect from 1 October 2020 (amendment to the Criminal Procedure Code made by Act No. 333/2020 Coll.), which made this possible (§ 196 para. 2, 3; § 206a – 206d criminal order).

person's right to formally comment the content of the indictment is, it is possible to imagine a situation when the indictment is so complicated (in terms of facts or law) that the accused person will not be able to effectively provide their comments without any legal aid provided by their counsel for defence. It may sound somehow funny, but the first expression of the accused person during which they have a possibility of using legal aid of their lawyer is the closing statement, which belongs to the conclusion of the main hearing when the taking of evidence is already finished, the court has already created its view and the case heard is going to its decision.

The accused person who wants to comment the evidence already at the beginning of the main hearing is thus referred to their own interrogation in which they must undergo the risk that within the framework of their comments they may be subjected, on the part of the public prosecutor or on the part of the court, to questions, even though they need not respond to such questions if they deny answering. An accused person who does not wish these comments expressed by them to be assessed as evidence and would like to present their expression just as an opinion does not have such a possibility, and also such an accused person is referred to their closing statement and last word. At the same time, the Rules of Criminal Procedure do not order the presiding judge to find out at such an accused person whether they feel guilty, concerning the act stated in the indictment (admission of guilt known as *guilty plea*), which is probably connected with the existence of the principle of material truth which does not enable the court to give up finding out those factual circumstances to which the accused person agrees (an exception in this connection being formed of the so-called uncontested facts). If the court, however, already asked the accused person such a question, there is an issue whether the accused person's answer to that question is a part of the interrogation, and therefore also a part of taking evidence (subject to the principle of free assessment of evidence) as well, or whether the matter concerns an expression of the procedural position of the accused person as a party (i.e. a manifestation of the principle of adversarial proceedings within the framework of which the accused person denies a part of the statements of the prosecution). The above-mentioned distinction is important in particular in a situation, when the expression of the accused person that they feel innocent is their only statement when subsequently, after such an expression, they refuse to talk. In my opinion, such an expression of the accused person should be taken just as a procedural position of the accused person not subject to the principle of free assessment of evidence, even though in the application practice such statements are assessed as any other evidence.

An analogical situation concerns also the expression of the accused person relating to the evidence taken, which is regulated by Section 214 of the Rules of Criminal Procedure, when the accused person must be asked, after taking each piece of evidence, by the presiding judge whether they want to state their comments thereon, and their statements (if any) shall be recorded in the protocol. Not even within the framework of such an expression does the accused person have a possibility of using the right to legal aid, because, even if they can consult their lawyer before such an expression (Cf. Section 33(1), third sentence, of the Rules of Criminal Procedure), they cannot at the same time authorise their lawyer to express their view on the evidence taken at the moment instead of him. Nevertheless, the application practice is aware of this insufficiency and admits expression of the counsel for defence for the accused person regarding the evidence taken. Nonethe-

less, it is a partial insufficiency of legislation that this possibility regarding delegation of the exercising of some of their defence rights to the counsel for defence is not specifically guaranteed by the Rules of Criminal Procedure, and it is therefore fully up to consideration of the presiding judge (or sole judge), whether they admit such a “more adversarial” approach or not.

Another manifestation of the principle of adversarial proceedings in relation to the rights of the accused person is their right of cooperation during the taking of evidence (Section 215 of the Rules of Criminal Procedure). As it has already been stated, it applies in the Czech criminal proceedings that the parties to criminal proceedings can ask (with the consent of the presiding judge) the interrogated person questions, basically when the presiding judge has finished asking questions and when other members of the panel do not have any questions either (Section 215(1) of the Rules of Criminal Procedure), when this authorisation is further extended in such a way that the public prosecutor, the accused person and their counsel for defence can ask to be enabled to take evidence, in particular to conduct interrogations of witnesses or experts, when the presiding judge satisfies their wish especially if the matter concerns the evidence taken with regard to their proposal or provided and submitted by them; the presiding judge is not obliged to satisfy their wish if the matter concerns interrogation of the accused person, interrogation of a witness under eighteen, of an ill or hurt witness, and/or if the taking of evidence through any of the above-mentioned persons would not be suitable for another serious reason (Section 215(2) of the Rules of Criminal Procedure). According to Fenyk, provisions of Section 215(2) of the Rules of Criminal Procedure indicates the necessity to foster the role and activity of the parties (and by doing so also the adversarial nature of the proceedings), it is true, nevertheless this approach at the same time casts doubts on the inquisitorial nature of Czech criminal proceedings.⁶³ According to Section 215(4) of the Rules of Criminal Procedure, it is necessary to find out, after taking all evidence regarding all the parties, including the accused person, whether any of them makes a proposal for the taking of evidence, which is, by the way, included also in Section 33(1), second sentence of the Rules of Criminal Procedure. The above-mentioned circumstances are, however, regulated by the fact that the court is not obliged to take all evidence which the accused person proposes for implementation. The application practice has been stabilised in the matter of the so-called omitted evidence so that the court is obliged only to make a decision about the proposed evidence, but at the same time, if it does not satisfy their application for the taking of evidence, it should state in its justification for what reasons the evidence was not taken.⁶⁴ Therefore it applies that ordinary courts are not obliged to take all proposed

⁶³ He believes that this situation is caused by the change of the imperative of the ECHR regarding adversarial proceedings (within the meaning of the right to access to the information obtained at criminal proceedings by the opposite party and in response thereto) for contentious adversary proceedings, where parties summon and interrogate “their” witnesses and the opposite party has the right to cross examination, and stresses that no requirement for a personal right of the party before court to conduct examination witnesses implies from the ECHR case law. FENYK, J., DRAŠTÍK, A. *Trestní řád. Komentář. II. díl [Rules of Criminal Procedure. Comments. Part II]*. p. 223.

⁶⁴ BARTOŇ, M., KRATOCHVÍL, J., KOPA, M., TOMOSZEK, M., JIRÁSEK, J., SVAČEK, O. *Základní práva [Fundamental rights]*. Prague: Leges, 2016, pp. 540–542.

evidence, when a core fact is that the courts should always explain for what reason they have failed to take the evidence proposed (cf. Section 125(1), second sentence of the Rules of Criminal Procedure). Besides, it is appropriate to state, in the registry of adversarial manifestations at the main hearing, the right to present the closing statements and the last word, and while doing so, the approach could involve the first possibility of providing opinion statements on the indictment issued, if the accused person makes use of their right to remain silent and to express in a partial way only (Section 214 of the Rules of Criminal Procedure). In this context it is possible to refer to the decision-making practice of the Constitutional Court of the Czech Republic, according to which the court is obliged, in justification of its decision, to deal with all argumentation of the party, which means that it is obliged to deal especially with the content of interrogation of the accused person and closing statements of the accused person, or of their counsel for defence.⁶⁵ For closing statements the matter concerns, besides expressions on individual pieces of taken evidence (Section 214 of the Rules of Criminal Procedure), the most essential adversarial manifestations of the accused person at the main hearing, when at the closing statements the right to legal aid is exercised already in a more essential way. The right to have the last word (Section 217 of the Rules of Criminal Procedure), as one of manifestations of *favor defensionis*, is then within the framework of the main hearing “the last” possibility of an adversarial response.

V. CONCLUSION

The principle of adversarial proceedings can be characterised as an element of the right to fair hearing of the case, which is, of itself, an integral part of the right to fair trial. In a certain meaning, a complement to the principle of adversarial proceedings is the principle of equality of arms, which provides both the parties to adversarial proceedings with a chance to effectively foster their authorised interests before court. These principles are absolutely fundamental, in which Repík perceived the position of the two principles “*in the very essence of fairness*”, when it is not possible, without adversarial proceedings, to speak about a trial at all.⁶⁶ Specific meaning of the two principles is determined, within the meaning of the European Convention on Human Rights, by the evolutive interpretation of the ECHR, because even there it is possible to register autonomous interpretations of the terms in the interest of assurance of uniform understanding in jurisdiction of the European Convention on Human Rights. The principle of adversarial proceedings can then be understood as a method of finding the truth or as a right of the parties to defence or as a court trial criterion, which is linked with appropriate fundamental principles of criminal proceedings (Section 2 of the Rules of Criminal Procedure). The principle of adversarial proceedings consists, in my opinion, of two inseparable components - of the right to information (i.e. the right or obligation to get oneself familiar with all the documents and evidence that can affect the decision) and the right to provide one’s own views

⁶⁵ It is possible to refer also to Section 125(1), second sentence of the Rules of Criminal Procedure.

⁶⁶ REPÍK, B. *Evropská úmluva o lidských právech a trestní právo* [European Convention on Human Rights and Criminal Law]. pp. 144, 147.

on the submitted evidence, reminding that integral parts of adversarial proceedings are, in my opinion, the elements of equality of arms, the right of the accused person to take part in the proceedings before court and to submit evidence and the right to adversarial examination of a witness. These rights are, however, not absolute rights.

As far as the existing model of the evidentiary procedure, binding the judge to complement, in the necessary extent, the taking of evidence is concerned, I do not find there any contradiction with the right to fair trial, because from the essence of criminal law, the interest is not only to prevent an innocent person from being convicted in an unfair manner, but also to ensure fair punishment for the actual offender. That is why, if it is found out in a certain phase of the proceedings that it is necessary to complement the taking of evidence, because e.g. the evidence submitted by the public prosecutor does not prove guilt of the accused person without reasonable doubt yet, it is clear that for the purpose of protection of a public interest and finding material true it may be necessary for the judge to complete the taking of evidence in the necessary extent. For this reason, it is necessary to build upon the presumption that the court is impartial and all activities which it performs are carried out with a view to arriving at a fair decision. If the legislator desires to increase the proactiveness of the parties to the proceedings, in no case should the legislator do this to detriment of the searching principle, because in such a case the finding of material truth in criminal proceedings could become an abstract ideal only. It is also necessary to take into consideration the specific position of the public prosecutor, who is a party to the proceedings, but the public prosecutor must be impartial due to the nature of their position (protector of a public interest). An issue is the fact that the public prosecutor's interest is not impartial but variable, since depending on the findings of facts made in criminal proceedings it may be consistent later on with the interest of the (original "adverse party") accused person. For this reason, the public prosecutor has also e.g. the broadest possibility regarding the right of appeal [Section 246(1)(a) of the Rules of Criminal Procedure].

Ill-considered fostering of the controversial nature of the judicial phase of criminal proceedings (e.g. through introduction of a formal burden of evidence) may lead to the breaking of some important pillars of criminal trials of a continental type, i.e. the principle of material truth, searching principle and principle of free assessment of evidence. It seems that more suitable are such approaches as transformation of the general rule (i.e. that the presiding judge performs the taking of evidence) into an exception (public prosecutor always implements the evidence in favour of prosecution regardless of the fact whether it has already been proposed in the indictment or during the main hearing unless the implementation of the evidence is reserved by the presiding judge), and also imposition of the obligation of implementing the evidence proposed by the defence upon the counsel for defence. It remains without any debate that it is necessary to observe the principles of proper legal trial, the right to defence, presumption of innocence, verballity, immediacy and publicity. The introduction of fully adversarial (adversary) criminal proceedings, associated with the complete formal public prosecutor's burden of evidence, would necessarily mean that the court could not find and implement the evidence in favour or in disfavour of the accused person, for the reason of full equality of the parties, which is, however, illusory, because the parties can be equal just in terms of their rights, but not in terms of their obligations. The factual inequality is given also by consequences of the principle of presumption of innocence. Besides, this situation may mean in fact a limitation

of the right to defence for less wealthy accused persons who are not able to afford professional defence because an accused person in the adversarial model needs rather a very good counsel for defence than an impartial and independent judge. If the way of such an adversarial trial is selected, it will be further inevitable to maintain and still foster such institutes as plea bargain, finding guilty, waiver of taking evidence regarding indisputable facts. It is not even possible to perceive a solution in the fact that the court could search for and implement evidence, out of its own initiative, exclusively in favour of the accused person, for the reasons that such a judge cannot be impartial when the Rules of Criminal Procedure constitute them as “an assistance of the defence” (possible contradiction with Article 82 of the Constitution of the Czech Republic), on the one hand, and on the other hand it may become clear that the evidence implemented by the court in good faith in favour is in terms of the contents the evidence which is (at least partly) in disfavour of the accused person, which is associated with its procedural usability.

The fostering of elements of adversarial proceedings, however, means the necessity of further weakening of the leading principle of legality, or its accusation component, in favour of the principle of opportunity, which may justify the fostering of the control of discretionary powers of the public prosecutor on the part of the aggrieved party (subsidiary action).⁶⁷ This would, however, lead to the situation when the court “controls” the protector of a public interest, which is exclusively the public prosecutor in criminal proceedings, and the court would become, indirectly, the executor of the principle of legality, which role cannot belong to it in conditions of a democratic legal state, because of validity of the adversarial principle whose essence is the division of procedural functions among the prosecuting party, defending party and deciding entity. By fostering the already existing elements of adversarial approach in the preparatory proceedings (e.g. through a broader extent of participation of the counsel for defence in investigation activities) or by introduction of a formal burden of evidence for the public prosecutor it may happen that the focal point of the taking of evidence may factually pass from proceedings before court to preparatory proceedings in spite of the declared (opposite) trend and may mean the returning to the time when the focal point of the taking of evidence was situated in preparatory proceedings and the task of the court was just the repeating of the evidence already implemented.

⁶⁷ MULÁK, J. Possibilities of Introduction of Subsidiary Prosecution in Czech Criminal Proceedings. *The Lawyer Quarterly*. 2018, Vol. 8, No. 3, pp. 306–318.