

THE PRINCIPLE OF THE PUBLIC OF CRIMINAL PROCEEDINGS AS AN ATTRIBUTE OF THE RIGHT TO A FAIR TRIAL

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Abstracts: *This paper deals with one of the basic principles of criminal proceedings - the principle of the public, which is an important guarantee of the fairness of criminal proceedings. This fundamental principle of the criminal process is viewed by doctrinal, normative and judiciary views. Firstly, the principle of the public is discussed in general. There are three important components of the principle of the public, namely public participation in the court hearing, the requirement for public declaration of merit decision and finally the right of the public to information about criminal proceedings.*

Keywords: *principle of the public, basic principles of criminal proceedings, right of the public to information, exclusion of the public, public announcement of the decision*

I. INTRODUCTION TO THE PRINCIPLE OF THE PUBLIC

The principle of the public is one of a number of general principles determining both the nature and value-qualitative aspects of criminal proceedings in their modern concepts. This principle is applied in continental as well as Anglo-American criminal proceedings. The main task of this principle is to ensure transparency of a criminal trial by means of embedding a possibility of its public control, and this way to contribute to the maintaining of necessary public confidence in the judicial system (or law), to the protection of procedural rights of those charged with a criminal offence (“the accused”), to educational effects on the public and also to prevention of criminal activities. It is, however, not possible to ignore that the principle of the public supports legal awareness of the general public, whereby it increases also the degree of legal certainty of the addressees of legal standards specifying the types of conduct establishing a criminal offence and the types of criminal penalties realistically associated with commission of such offences. The principle of the public, as a certain objective category, is used in the science for the deriving of the subjective right to the public hearing of the case, including a subjective right to public announcement of the final decision. Although this subjective right is sometimes *expressis verbis* granted to the accused only,¹ it does not mean that it could not be successfully claimed by other procedural parties too (e.g., the aggrieved party).²

In my opinion, it is possible to identify three fundamental reasons for restriction or exclusion of the public in criminal proceedings. These reasons are a justified interest of procedural parties, a justified interest in the criminal proceedings of nonparticipating (third) parties, and finally a public interest, when the exercising of any reason is conditioned by

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¹ Cf. Article 6(1) of the European Convention on Human Rights (“ECHR”).

² Cf. Article 38(2) of the Charter of Fundamental Rights and Freedoms.

fulfilment of two cumulative criteria (requirements), which are lawfulness (legality) and proportionality. Lawfulness, as a formal criterion, in the given case means that legislation explicitly admits exceptions from the principle of the public (the so-called general empowerment) and also regulates specific cases for exclusion of the public. Proportionality, as a material criterion, in this context means a mutual relation between the interest in the exercising of any of the exceptions supposed by legal regulations (with regard to the circumstances of a particular case) and the interest in the respecting of the principle of the public.

According to Repík, active as a judge at the European Court of Human Rights (“ECtHR”) and the author of a fundamental monograph relating not only to the right to a fair trial, the requirement of public hearing has “*a double function and does not serve to the individual interest of the accused only*,”³ or only to the interests of individual parties to criminal proceedings. The truth is that the principle of the public must be interpreted from the point of view of its proportion to the principle of ascertainment of facts of the case without reasonable doubts (substantive truth), when the content of the principle of substantive truth must be fulfilled not by means of exercising secret, but open justice (*open justice*). For these reasons, the breakthrough into the principle of the public in the form of the parties’ right to public hearing of the case can be justified primarily by a public interest (*public interest*). By the way, also according to the decision-making practice of the ECtHR, the accused can effectively waive their right to public hearing of the case if it is not in collision with an important general interest.⁴ It is, however, necessary to state that the participants’ option to waive their subjective right to public hearing of the case is their exclusive procedural right. In other words, the private interest in exclusion of the public⁵ can be exercised by the accused, not by the state against their will.⁶ Also according to Kmec, this principle fulfils especially two functions, when it enables citizens (“*the public*”) to control the exercising of criminal justice on the one hand, and at the same time it provides an important guarantee to the accused that the exercising of justice will run properly in their case. At the same time, it is stated that it may serve also as an important tool of general crime prevention.⁷ Expressed with the help of other words, the mission of the principle of the public consists in particular of control, guarantee, preventive and educational functions.⁸ It is possible to see the importance of public main hearing also in their transparency, i.e., that everybody can verify that the courts make decisions only on the basis of the evidence that were presented in the main hearing, that the judge does not act and does not decide under visible pressure or other inadmissible interventions. The reverse side of this principle may be possible (and inadmissible) pressure on the part of the media and public developed on justice authorities so that they decide in a “desirable” way. In this context, it is no surprise that this principle is closely associated e.g., with the principle of prosecution

³ REPÍK, B. *European Convention on Human Rights and criminal law*. Prague: Orac, 2002, p. 136.

⁴ Decision of the ECtHR in the case Pauger versus Austria of 28th May 1997, complaint no. 16717/90.

⁵ E.g., for the reason of a private interest in the protection of private life.

⁶ REPÍK, B. *European Convention on Human Rights and criminal law*. Prague: Orac, 2002, p. 138.

⁷ FENYK, J., DRAŠTÍK, A. et al. *Code of Criminal Procedure. Comments. Part I*. Prague: Wolters Kluwer, 2017, p. 17.

⁸ JELÍNEK, J. et al. *Criminal procedural law*. Prague: Leges, 2016, pp. 161 et seq.

for legal reasons only (Section 2(1) of the Code of Criminal Procedure), the principle of the presumption of innocence (Section 2(2) of the Code of Criminal Procedure),⁹ the principle of substantive truth (Section 2(5) of the Code of Criminal Procedure), the principle of the accused person's right to defence (Section 2(13) of the Code of Criminal Procedure), with the principle of oral proceedings (Section 2(11) of the Code of Criminal Procedure) and immediacy (Section 2(12) of the Code of Criminal Procedure). The above-stated list just confirms conditionality and interconnection of fundamental principles of criminal proceedings.¹⁰ The principles of the right to defence and oral proceedings are reflected in the fact that the defendant has the right to be present at the court hearing personally and to orally defend their position before the court. The sense of the right to public hearing of the case in connection with the right to express views on all evidence presented is to provide the defendant in a criminal trial with a possibility of verification of evidence directed against them, in the presence of the public.¹¹ This is then associated with the principle of examination of the facts without reasonable doubts (ascertainment of substantive truth), because this principle must be fulfilled not by means of exercising secret, but open justice.¹²

II. PRINCIPLE OF THE PUBLIC AND ITS APPLICATION IN THE CODE OF CRIMINAL PROCEDURE

The principle of the public is expressed at both the constitutional and legal (statute) levels. According to Article 96(2) of the Constitution of the Czech Republic, proceedings before court are oral and public, any possible exceptions having to be provided for by statute. Judgements are always pronounced publicly.¹³ Likewise, Article 38(2) of the Charter of Fundamental Rights and Freedoms states that “*Everyone has the right to have their case considered in public [...]. The public may be excluded only in cases specified by law.*”¹⁴ In this context it is not possible to disregard provisions of Section 6 of the Act on courts and judges (“ZSS”), according to which proceedings before courts are oral and public, when possible exceptions are specified by statute (paragraph 1); judgements are declared in the name of the Republic and always publicly (paragraph 2) and an important safety measure

⁹ ŠABATA, K. Principle of the presumption of innocence, principle of the public criminal proceedings. In: *Státní zastupitelství*. 2007, No. 10, pp. 12 et seq.

¹⁰ MULÁK, J. *Fundamental principles of criminal proceedings and right to a fair trial*. Prague: Leges, 2019, pp. 66 et seq.

¹¹ Findings of the Constitutional Court of the Czech Republic, file ref. no. I. ÚS 32/95 of 21st May 1996 and file ref. no. Pl. ÚS 4/94 of 12th October 1994.

¹² ŠÁMAL, P., MUSIL, J., KUČHTA, J. et al. *Criminal procedural law*. Prague: C. H. Beck, 2013, pp. 125–126.

¹³ The constitutional order, Article 96(2) of the Constitution of the Czech Republic concerning the obligation of public announcement of the judgement is unconditional, and therefore it is not possible to apply, to announcement of the judgement, exceptions specified in Article 14(1) of the International Covenant on Civil and Political Rights when the publishing of the judgement is prevented by the interest of juveniles or when the proceedings concern marital disputes and custody of children.

¹⁴ An identical constitutional stipulation can be found also in Article 48(2) and Article 142(3) of the Constitution of the Slovak Republic, and this principle is then regulated at the statute level in Section 2(17) of the Criminal Procedure Code.

is given by the provision stipulating that it is only possible to carry out audio or video transmissions and make audio recordings in the course of judicial proceedings with the prior consent of the presiding judge or the single judge. With the informing of the presiding judge or the single judge it is possible to make audio recordings; if the method of their production could distort the course or dignity of the hearing, the presiding judge or the single judge can forbid their production (paragraph 3). Finally, Section 2(10) of the Code of Criminal Procedure stipulates that “*Criminal cases are heard before the court in public in such a way that citizens may attend and observe the hearing. The public may be precluded from attending a trial and a public session only in cases explicitly provided for by this Code or by a special Act*”.

In our criminal proceedings, the public is admitted to participation in the proceedings to a very broad extent, because the principle of the public applies to the main hearing (trial) as the most important stage (Section 199(1), Section 200(2) of the Code of Criminal Procedure) and based on the nature of the case also to public sessions (Section 236 of the Code of Criminal Procedure, Section 238 of the Code of Criminal Procedure), conversely it will not be applied to closed (“non-public”) session (Section 240 et seq. of the Code of Criminal Procedure) and to a custodial session (Section 73d et seq. of the Code of Criminal Procedure). It is typical of all these statements that they connect this principle, whether explicitly or implicitly, with the hearing before court. By the way, pre-trial proceedings are, in terms of their nature, documentary and closed.¹⁵ It is worth noting also the fact that this principle is not perceived absolutely or rigidly but that it admits exceptions. In this context, it is significant that the standards of the constitutional order (Constitution of the Czech Republic, Charter of Fundamental Rights and Freedoms) do not specify any limits for possible exclusion of the public and leaves the issue of exclusion of the public up to the statute (subject to law); nevertheless, the legislator is limited by international undertakings which are respected by legislative regulations of procedural codes.¹⁶ That is why it is possible to speak about a partial flexibility of this principle.¹⁷

The principle of the public is, as already indicated above, very closely related to the principles of oral proceedings and immediacy (Section 2(11), (12) of the Code of Criminal Procedure).¹⁸ If the court decided only on the basis of evidence presented directly within the framework of the main hearing or public session concerning a remedial measure, the presence of non-participating people at the court would be absolutely useless. In the same way, if a non-participating member of the audience did not have a possibility of creating their view of trustworthiness of a witness or demonstrativeness of other evidence as immediately as the judge or the parties to the proceedings, individual functions of the principle of the public would not be fulfilled. Exceptions from the principle of the public are formed of a criminal warrant and an agreement on the guilt and punishment (plea bargain) at which, however, suppression of this principle is given by their specific nature as

¹⁵ Cf. exceptions following from Section 165 of the Code of Criminal Procedure.

¹⁶ Section 116(2) of the Code of Civil Procedure, Section 49(2) of the Code of Administrative Procedure.

¹⁷ ROXIN, C. *Strafverfahrensrecht*. München: C. H. Beck, 1991, p. 59.

¹⁸ MULÁK, J. *Fundamental principles of criminal proceedings and right to a fair trial*. Prague: Leges, 2019, pp. 252 et seq.

simplified proceedings (so-called diversions), because other fundamental principles are emphasised in that case - in particular the principle of the speed.

In the case of a criminal warrant (Section 314e of the Code of Criminal Procedure) which has the nature of a judgement of conviction and which is (unlike the judgement) not declared, but only drawn up and delivered, the right of the accused to hearing of the case publicly before court is maintained through the fact that the accused person can submit a statement of opposition which need not be substantiated either, because the criminal warrant is cancelled through its timely submission by a person authorised in virtue of the statute and the single judge shall order (is obliged to order) the main hearing.¹⁹ If, however, no remedial measure is submitted, the entire criminal proceedings are organised in a closed manner and the control by the public, as well as the generally preventative effect of conviction, are rather limited. Another exception from the principle of the public consists in an agreement on the guilt and punishment,²⁰ at which this principle is distorted especially by the fact that the bargaining of this agreement between the public prosecutor and the accused person takes place in a closed way. By accepting the agreement on the guilt and punishment, the accused waves their right to hearing of the case in a public session, when another consequence of acceptance of the agreement on the guilt and punishment is the narrowing of legal reasons for an appeal against a judgement of conviction (the second sentence of Section 245(1) of the Code of Criminal Procedure). The right of the accused to the hearing of the case publicly before court is, however, maintained by interventions of the court approving the agreement made, within the framework of a public session (Section 314q of the Code of Criminal Procedure), even though its role is reduced only to approval through a judgement of conviction or disapproval in justified cases, but it is not authorised to change the agreement. The general principle of the public is not homogeneous but it consists of three components (i.e., guarantees). These guarantees are factual possibility of personal participation of representatives of the public at court hearings, followed by factual possibility of the representatives of the public to get themselves familiar with the content and main reasons for the final decision (i.e., to be present when the judgement on the merit is announced), and finally, the third guarantee is the right of the public to provision of information on the ongoing criminal proceedings, to the extent corresponding to the current stage of the criminal proceedings.

III. PARTICIPATION OF THE PUBLIC IN JUDICIAL HEARING OF THE CASE AND POSSIBILITY OF EXCLUSION OF THE PUBLIC

Both science and legislative practice pay appropriate attention to the possibility of passive participation of the public in judicial hearing of the case. This is probably a con-

¹⁹ Finding of the Constitutional Court of the Czech Republic, file ref. no. III. ÚS 39/09 of 10th December 2009.

²⁰ Conciliation procedure has two phases. In the first phase, i.e., in the pre-trial proceedings, the public prosecutor, at possible participation of the aggrieved party, conducts bargaining with the accused person focused on a particular agreement on the guilt and punishment (Section 175a, Section 175b of the Code of Criminal Procedure). In the second phase, the court approves the agreement proposed (Section 314o to 314s of the Code of Criminal Procedure).

sequence of the fact that the substance and the purpose of this principle are expressed in a concentrated form only in the judicial stage that is the central point of a criminal trial, which is reflected by applicable legislation as well (Section 2(10) of the Code of Criminal Procedure). In other phases it is the principle of closed sessions (secrecy) that either dominates or is partially applied as well.²¹ Participation of the public can, however, be excluded also in some stages of judicial hearings which follow up to the main hearing and appeal proceedings and which serve for the hearing concerning extraordinary remedial measures, because the issues that are to be resolved within the framework of proceedings relating to extraordinary remedial measures (especially extraordinary appeal and complaint about a breach of law) are prevalingly of legal nature. It is of course logical that in the cases when decisions are adopted in a closed session,²² the restriction of participation of the public without other conditions is not in contradiction with the right to fair criminal proceedings.

Appropriate attention is naturally paid to public aspects of judicial proceedings also by case law of the ECtHR which considers it to be an instrument for achievement of the objective of Article 6(1) of the ECHR. Any real limitation of the right to public judicial proceedings must be proportional with the purpose of limitations and with the interest of justice. Such an interest may be, for example, protection of the parties or security of witnesses or protection of professional secret, state security or morality. According to the ECtHR, it is possible to accept the lack of the public nature of judicial hearing at courts of second or third instance provided that the hearing at the court of first instance was public.²³ Repík agrees to such a conclusion as well when he adds, in this context, that *“generally it is possible to state that the more limited role of remedy instances, the more it is possible to desist from public hearing of the case. From this point of view, there is a difference between the appeal and cassation instances, as the latter deals with legal issues only.”*²⁴

Since the substance of participation of the public in judicial hearing consists in a guarantee of the possibility for any person to arrive at the main hearing or public session and to personally watch the course of the hearing, the method of execution of the proceedings on the part of the court and speeches of individual parties to criminal proceedings, all exceptions must be specified exactly and unambiguously by the law or by a standard of a

²¹ It is applied especially in pre-trial proceedings, where it is required by the special nature of that stage consisting in the screening (general inquisition) and investigation of criminal activities (special inquisition).

²² Decisions are made in a closed session where it is expressly determined or admitted by the law or where no form of court proceedings is expressly specified (main hearing or public session); the matter concerns, for example, preliminary hearing of the charge (indictment)–the law leaves it up to the presiding judge’s consideration whether the case is to be heard in a public or closed session (Section 187 of the Code of Criminal Procedure); suspension of criminal prosecution or discontinuation of criminal prosecution out of the main hearing, all complaints and in some cases also other remedial measures, both ordinary (e.g., pursuant to Section 263(1), second sentence, of the Code of Criminal Procedure) and extraordinary (Section 265r, Section 274, Section 286(2)), calculation of the custody and punishment (setting off of the custody) (Section 334 of the Code of Criminal Procedure) and other issues in execution proceedings (cf. Section 327, Section 344, Section 347 of the Code of Criminal Procedure), expungement of the conviction (Section 364, Section 365 of the Code of Criminal Procedure), application of amnesty (Section 368 of the Code of Criminal Procedure).

²³ Decision of the ECtHR *Ekbatani versus Sweden* of 26th May 1988, complaint no. 10563/83.

²⁴ REPÍK, B. *European Convention on Human Rights and criminal law*. Prague: Orac, p. 137.

higher legal force. For example, Article 38(2), the second sentence of the Charter of Fundamental Rights and Freedoms states that “*the public may be excluded only in cases specified by law,*” whereby it leaves the determination of the exceptions up to statutory legal regulations only, or according to Article 6(1), the second sentence of the ECHR, the participation of the public can be excluded in accordance with the following approach: “*public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*”²⁵

The Constitutional Court of the Czech Republic insists, while assessing fulfilment of the principle of the public, on the position that the principle of the public is not limited to the sole access of the public to the court room,²⁶ but a form of publicity of judicial hearings is, at a general level, also the making of video or audio recordings of the hearing, whose production cannot be categorically excluded without the existence of a relevant reason for it. If a relevant reason was missing, it would be wilfulness. A fundamental limit is, in the opinion of the Constitutional Court of the Czech Republic, the possibility of proper and dignified course of hearing.²⁷ This means that the public can be present at the judicial hearing either directly in the court room or indirectly through video and audio transmissions or recordings.²⁸ It is necessary to consistently differ between public disclosure of information and the authorisation to publicly disseminate this information. In this context, it is necessary to remind that execution of video or audio transmissions and production of video recordings in the course of the main hearing or public session is therefore only possible with the prior consent of the presiding judge or the single judge,²⁹ on the other hand – it is possible to make audio recordings also without the consent of the presiding judge or the single judge, but with their awareness. Nevertheless, if the method of their execution could disturb the course or dignity of the hearing, the presiding judge or the single judge can also forbid production of such recordings. This ban does not establish any breach of the principle of the public at the proceedings, because the public could take

²⁵ It follows also from the decision-making practice of the ECtHR that a reason for exclusion of the public can be both the interests of procedural parties and the interest of third persons, even including the state itself – REPÍK, B. *European Convention on Human Rights and criminal law*. Prague: Orac, 2002, p. 138.

²⁶ The public, however, must respect also a search of persons on entry into the court building – Finding of the Constitutional Court of the Czech Republic, file ref. no. III. ÚS 627/01 of 4th April 2002.

²⁷ Finding of the Constitutional Court of the Czech Republic, file ref. no. II. ÚS 2672/07 of 14 February 2008.

²⁸ The principle of the public main hearing and public session, however, does not establish an authorisation or obligation of a live television or radio (or Internet-based) transmission.

²⁹ This decision does not have the nature of measures at the organisation of the proceedings, and therefore it is not possible to claim, by using the procedure pursuant to Section 203(3) of the Code of Criminal Procedure, that the consent to production of the above-mentioned recordings should be issued by a panel (or chamber). Even though the presiding judge decides that it is possible to make a live transmission from the hearing by way of a radio or television broadcast, they can, within the framework of their powers pursuant to Section 203(1) of the Code of Criminal Procedure, specify e.g., the place for recording, number of cameras, illumination in such a way that the transmission shall not disturb the course of the hearing and shall not endanger the purpose of the hearing.

part, regardless of such a ban, in the course of the proceedings.³⁰ The decision-making power of the presiding judge is territorially limited to the court room and in terms of time for the time period of the hearing.³¹ Provisions of Section 199(1) of the Code of Criminal Procedure stating that the court holds the trial on principle publicly shall not apply to the proceedings against juveniles, in which the opposite principle applies, i.e., that the main hearing and public session are held on principle with exclusion of the public (Section 54 of the Act on liability of juveniles for illegal acts and on juvenile justice). With regard to the non-public nature of the proceedings then Section 54(1) of the Act on liability of juveniles for illegal acts and on juvenile justice specifies, in a comprehensive way, the persons who are authorised to be present in the court room. The main hearing and public session can only be attended by the juvenile defendant, two of their confidants, their defence counsel, legal representative and direct-line relatives, siblings, spouse, the aggrieved party, their proxy and confidant, a person involved and their proxy, legal representatives of the aggrieved party and of the person involved, witnesses, experts, interpreters, competent body of the social-law protection of children, officials of probation and mediation services and a representative of the school or educational facility. It is only possible to organise the hearing publicly on an exceptional basis, upon the motion of the juvenile person, about which the juvenile court decides, by means of a resolution, and it is not admissible to file a complaint against such a resolution.³²

Exceptions from the principle of the public are defined at a more detailed level by provisions of Section 200(1) of the Code of Criminal Procedure, according to which “[*the*] public may be excluded from the trial, if public session of the case could endanger confidential information protected by a special Act, morality, or undisturbed course of the proceedings, or the safety or other important interests of the witnesses; the presiding judge may also take other appropriate measures for such purposes. The public may also be excluded only for a part of the trial.” The cited provision of Section 200(1) of the Code of Criminal Procedure is an exception from this principle of the public, if the interest in public hearing of the case is in the particular case in conflict with other protected interests.³³ It is, of course, a question whether provisions of Section 200(1) of the Code of Criminal Procedure is not

³⁰ If a person does not respect the decision of the presiding judge (or of the single judge) regarding production of recordings or transmissions from the hearing, they can be punished by a disciplinary fine (Section 66 of the Code of Criminal Procedure), expelled from the court room (Section 204 of the Code of Criminal Procedure) and (as an *ultima ratio*) they can be criminally liable for the offence of contempt of court (Section 336 of the Criminal Code).

³¹ Production of video and audio transmissions and recordings out of the court room in the court building can be regulated by the presiding judge through organisational measures.

³² The Act does not specify directly the conditions on which the juvenile court is obliged to satisfy the motion. The main criterion, however, remains protection of interests of the juvenile person. The publishing of the information on the course of the main hearing or public session, which would lead to identification of the juvenile person in public means or in another way is forbidden. In the same way, it is forbidden to publish any text or any picture or illustration concerning the identity of the juvenile person.

³³ For example, interests protected in Article 10 of the Charter of Fundamental Rights and Freedoms and Article 8 of the ECHR (Right to respect for private and family life), Article 36 of the Charter of Fundamental Rights and Freedoms and Article 6(1) of the ECHR (fair trial), Article 40(2) of the Charter of Fundamental Rights and Freedoms and Article 6(2) of the ECHR (presumption of innocence) or the interest in the protection of confidential information or the interest in a proper, dignified and undisturbed course of the hearing.

too restrictive and whether e.g., a future restatement should not consider possible extension of the range of legal reasons according to Article 6(1) ECHR (e.g., the interest in maintaining the public order or the interest in the protection of national security), in spite of the fact that this Article is directly applicable.³⁴

According to the decision-making practice of the Constitutional Court of the Czech Republic it is necessary to interpret exceptions from the principle of the public in a restrictive way,³⁵ and it is therefore up to the judge to assess, in such cases, whether the interest in assurance of the widest possible publicity of the proceedings should be overridden by any of the above-mentioned interests or not, and if yes, then to what extent it should be so.³⁶ With regard to the fact, that closed (non-public) proceedings are an exceptional step, it is necessary to decide in doubts to the favour of public proceedings. The term “public” shall denote, from the viewpoint of Section 200(1) of the Code of Criminal Procedure, persons other than parties to the trial and procedural entities, on whom the Code of Criminal Procedure or another Act³⁷ imposes obligatory participation in the main hearing or public session. The only special Act protecting confidential information is currently the Act on the protection of classified information and security eligibility.³⁸ The reason for exclusion of the public therefore obviously cannot be a reference to the fact that the main hearing or public session should be associated with discussion of the information which is subject to the obligation of non-disclosure, although it does not have the nature of classified information.³⁹ The persons who must, in spite of the decision about the exclusion of the public, take part in the main hearing or public session where classified information is to be disclosed, must furthermore be instructed by the presiding judge or the single judge (who is obliged to do so) about their obligations in the area of protection of the classified information and must be rendered familiar with consequences of a breach of such an obligation (Section 51b of the Code of Criminal Procedure).⁴⁰

Endangerment of morality through public hearing of a case can be supposed in connection with criminal offences against human dignity in sexual area.⁴¹ Nevertheless, in these criminal cases the court should be very careful while deciding about the exclusion of the public, and it should only decide for exclusion if it is not sufficient for the achievement of the objective in question to apply e.g., denial of access to the main hearing or public session for people under eighteen years of age or not granting of the consent to

³⁴ From decision-making activities, it is clear that the ECtHR, while considering the case of exclusion of the public, reviews also whether appropriate attention was paid (besides protection of interests of participants in the proceedings) also to the possibility of the control of execution of judicial powers on the part of the society in individual cases of challenged breaches of Article 6(1) of the ECHR.

³⁵ Finding of the Constitutional Court of the Czech Republic, file ref. no. II.ÚS 180/96 of 18th June 1997.

³⁶ Findings of the Constitutional Court of the Czech Republic, file ref. no. Pl. ÚS 28/04 of 8th November 2005, IV. ÚS 3114/07 of 19th June 2008, II. ÚS 2672/07 of 14th February 2008, Pl. ÚS 2/10 of 30th March 2010, IV. ÚS 1418/12 of 31st May 2012, I. ÚS 3046/14 of 27th February 2015.

³⁷ Cf. Act no. 555/1992 Coll., on the prison service and judicial guard of the Czech Republic.

³⁸ Act no. 412/2005 Coll.

³⁹ E.g., according to the Tax Code, Enforcement Code or if the matter concerns business and trade secrets.

⁴⁰ Cf. also Section 8(4), Sections 8a–8d, Section 65(5) of the Code of Criminal Procedure.

⁴¹ JELÍNEK, J. et al. *Substantive criminal law. General part. Special part*. Prague: Leges, 2017, pp. 595 et seq.

video or audio transmissions and production of video recordings in the course of the main hearing or public session (Section 201(1) of the Code of Criminal Procedure).

As far as the interest in an undisturbed course of proceedings is concerned, then it is appropriate to decide about exclusion of the public also in the case that it is not sufficient for the purpose of assurance of silence and order, in cooperation with the judicial guard, to expel those persons from the court room who behave unsuitably (Section 204(1) of the Code of Criminal Procedure), or to deny access to the main hearing or public session for such persons (Section 201(1) of the Code of Criminal Procedure). Unlike this, the public will be usually excluded, at least for a certain part of the main hearing or public session, if it is necessary for the protection of witnesses and persons related to them, who are exposed to threats concerning health, death or another serious danger in connection with their witness statements. It is the fact that the Code of Criminal Procedure explicitly specifies, in case of these endangered witnesses, the presiding judge's obligation to take care of their protection and to adopt all necessary measures for this purpose (Section 183a(4) of the Code of Criminal Procedure). Obligatory exclusion of the public from the main hearing or public session is then appropriate, if a person who is a servant active in a law enforcement authority or is a staff member of a law enforcement authority of another country and was used in the criminal proceedings as an agent and/or performed an imitated transfer or immediately took part in the use of an agent or execution of an imitated transfer (Section 102a(1) of the Code of Criminal Procedure) acts before court as a witness without concealment of their identity or likeness. From the point of view of the guarantee of procedural steps during the decision making about exclusion of participation of the public, it is quite important to mention the provisions of Section 200(3) of the Code of Criminal Procedure, according to which "[shall decide to] *exclude the public after hearing all parties by a resolution which it shall pronounce publicly*". In this regard, the above-mentioned requirement is connected with the principle *audiatur et altera pars* (principle of procedural equality). The chamber, or the single judge, respectively, decides about exclusion of the public in the main hearing through a resolution which they pronounce publicly and against which it is not admissible to file a complaint (Section 141(2) of the Code of Criminal Procedure).⁴² The previous hearing concerns just the named persons who are present at the main hearing or public session. The purpose of this hearing is here the finding out of the opinions of the parties on exclusion of the public considered by the court or proposed by one of the parties, including the arguments specifying for what part of the main hearing or public session it is necessary to exclude the public. This means that the factual exclusion of the public can take place after the public announcement of this resolution in the main hearing or public session. If the public is excluded from the hearing before court, the decision of the chamber shall be visibly announced on the door of the court room together with the ban on entry for unauthorised persons. Finally, it is necessary to state that it is not admissible to issue a decision about exclusion of the public before the ordered hearing (in a non-public session).

⁴² This matter concerns a decision regulating the course of the proceedings, and therefore its content is just noted in the report but it is not necessary to elaborate it [Section 55(1)(d), Section 136 of the Code of Criminal Procedure].

If the main hearing took place with exclusion of the public without the legal conditions for such a procedure being complied with, it could be considered, in certain circumstances, as an essential deficiency of the proceedings, reasoning cancellation of the judgement of the court of first instance by an appeal court [Section 258(1)(a) of the Code of Criminal Procedure]. If the public was excluded for endangerment of classified information protected by a special Act, the presiding judge shall draw attention of the present people, pursuant to Section 201(3) of the Code of Criminal Procedure, to the fact that they expose themselves to a danger of criminal prosecution for the criminal offences of espionage (Section 316 of the Criminal Code) or endangering classified information (Section 317 and Section 318 of the Criminal Code), if they disclose the secret information learnt during the hearing before court to unauthorised persons. At the same time, the presiding judge can forbid them to make documentary notes, and any breach of this ban can be punished by a disciplinary fine (Section 66 of the Code of Criminal Procedure) or by denial of further participation in the main hearing or public session.⁴³

Even if the public was not excluded pursuant to Section 200 of the Code of Criminal Procedure, the court can deny access to the main hearing for minors⁴⁴ and for those people at whom there are concerns that they could disrupt the dignified course of the main hearing.⁴⁵ In case that the public was excluded, the court can,⁴⁶ pursuant to Section 201(2), first sentence of the Code of Criminal Procedure, permit individual persons to have access to the main hearing or public session for important reasons. Such reasons may cover study reasons,⁴⁷ or performance of professional practice of judicial trainees or activities of assistant judges.⁴⁸ Conversely, pursuant to Section 201(2), second sentence of the Code of Criminal Procedure, the court must permit access to the main hearing, or to the public session, at least to two confidants of the defendant, if the defendant asks for it. The permission of access of the defendant's confidants to the hearing before court is obligatory and independent of the reason for exclusion of the public.⁴⁹ Publicity of the main hearing

⁴³ The content of the warning and the ban pursuant to Section 201(3) of the Code of Criminal Procedure shall be noted in the Report on the main hearing [Section 55(1)(d) of the Code of Criminal Procedure].

⁴⁴ The term “minor” denotes persons under eighteen years of age. Only on an exceptional basis it is possible to consider a person under 18 to be a person “of full age”, even in the case that such a person has entered into marriage (Section 30 and Section 31 of the New Civil Code).

⁴⁵ These are especially persons under an influence of alcohol, narcotics and psychotropic substances or persons who have, according to the previous experience of the court, inclinations to disturbances, to disruption of the court procedures or to failures to respect measures issued by the presiding judge (the so-called “familiar faces”).

⁴⁶ This is therefore an optional procedure.

⁴⁷ HERCZEG, J. *Media and criminal proceedings*. Prague: Leges, 2013, p. 18.

⁴⁸ FENYK, J., DRAŠTÍK, A. et al. *Code of Criminal Procedure. Comments. Part II*. Prague: Wolters Kluwer, 2017, p. 162.

⁴⁹ If the selection of confidants is carried out by the court pursuant to Section 201(2), fourth sentence of the Code of Criminal Procedure, it should take account of the fact that each of the defendants could exercise their right to at least one of their confidants, and if it is not possible, with regard to the number of defendants, it should prefer their majority opinion. If there are more defendants, each of them has the right to an election of a confidant. If the total number of confidants rose by this measure to more than six and the defendants failed to make an agreement between themselves, as far as the selection is concerned, the choice shall be carried out by the court. If the public was excluded for endangerment of classified information protected by a special Act, or security or another important interest of witnesses, then only such persons against whom the court does not have any objections can be selected as confidants.

or public session can be limited also factually by the court room capacity, and therefore the court can adopt necessary measures against overcrowding of the court room. If the number of people interested in the watching of the judicial hearing exceeds the court room capacity, the court can restrict the access to the court room, on the basis of clear and predefined rules. If it is, however, possible to expect the public to have a major interest in watching the hearing concerning a particular case, the presiding judge should, in cooperation with the court administration and court spokesperson, take appropriate measures to ensure a dignified course of the proceedings, e.g., by directing the hearing of the case to a suitable court room with regard to the extent and supposed interest as well as the possibilities available to the court, and/or the access to the court room shall be regulated by issuing the entrance tickets.

IV. PUBLIC ANNOUNCEMENT OF THE DECISION ON THE MERITS

Provisions of Article 6(1) of the ECHR state, among other things, that judgements must always be announced publicly, and in accordance with decision-making activities of the ECtHR the notion “judgement” is assigned an autonomous meaning, and therefore it is necessary to perceive it as not only a “judgement” *stricto sensu*, but also any decision in the case in question. In other words, even though that provision speaks about “judgement”, it is necessary to interpret this notion materialistically and not formalistically, i.e., as a decision in the general meaning of the word, and not only as such types of decisions that are perceived as judgements by the national legal order.⁵⁰ The obligation to publicly announce the judgement is determined at a national level in Article 96(2) of the Constitution of the Czech Republic (“*Judgments shall always be pronounced publicly*”), Section 6(2) of the Act on courts and judges (“*Judgments shall be pronounced in the name of the Republic and always publicly*”) and Section 200(2) of the Code of Criminal Procedure (“*The judgement must always be pronounced publicly*”). Important provisions in this context are those of Section 128 of the Code of Criminal Procedure, regulating the announcement of the judgement, when it is worth paying attention to the fact that the introductory words “In the name of the Republic” are pronounced, followed by the full wording of the statement, at least an essential part of justification and instruction on a remedial measure (paragraph 2).⁵¹ In the application practice, a medialised case was registered when the presiding judge did not reason an acquittal verdict, which called out a wave of criticism.⁵² In this context it is worth paying attention to the decision of the ECtHR which was satisfied, from the viewpoint of Article 6(1) of the ECHR, with the quantity of information obtained by the public on the announcement of the acquittal verdict in the criminal proceedings, although only the statement of the judgement was pronounced and not its justification. The statement of the judgement contained the definition of the act for which the accused person was blamed, statement of the opinion regarding guilt, decision about

⁵⁰ Decision of the ECtHR *Axen versus Germany* of 8 December 1983, complaint no. 8273/78.

⁵¹ In a similar way, cf. Section 16(2) of the Rules of Procedure.

⁵² See more ŠÁMAL, P. Does “public pronouncement” always mean “oral verdict”? In: *Právo jako multidimenzionální fenomén. Pocta Aleši Gerlochovi k 65. narozeninám*. Pilsen: Aleš Cenek, 2020, pp. 379–390.

the existence of aggravating circumstances and the penalty imposed.⁵³ The ECtHR admits exceptions from the public announcement of the judgement also now,⁵⁴ nevertheless it examines the scope of the decision pronounced in a material way, i.e., “*what particular information was announced by a domestic court on pronouncement to the public with regard to the contents of its decision, and therefore not formally within the meaning whether the announcement of the judgement is sufficient or not*”.⁵⁵

The Constitutional Court of the Czech Republic deduced that the principle of the public concerning announcement of judgements implies also the obligation to provide final and even also non-final judgements in the mode given by the Act on freedom access to information, due to the fact that “[public] discussion about the case resolved by a non-final judgement may contribute to independent and impartial decision making, because sometimes it may reveal the existence of inadmissible influences on judges’ decision making [...]. A legitimate objective of a public discussion is the possibility of public checks of the execution of justice, judging on broad daylight and not in the dark of non-public judicial proceedings. Conversely, judging which is not public enough could lead to a decrease in the authority of judicial power because it may generate a public suspicion that “there is something to hide” (within the meaning of execution of injustice). Proper execution of public power in a democratic state is not possible without trust. The trust element is therefore also a functional condition for execution of democratic public power, and therefore it is necessary to protect the trust in public power acts.”⁵⁶ The conclusion of the Constitutional Court of the Czech Republic is quite logical because also a non-final judgement is in fact just a documentary form of what has already been publicly announced.⁵⁷ In this context it is, however, necessary to insist on consistent observation of the principle of presumption of innocence (Section 2(2) of the Code of Criminal Procedure, Article 40(2) of the Charter). Judgements are publicly announced also in proceedings against juvenile persons (Section 54(3) of the Act on liability of juveniles for illegal acts and on juvenile justice), at presence of the juvenile person involved. In this case, however, all people present in the court room must be instructed in advance that they must not further disseminate the information learnt on the announcement of the judgement in the court room. Another modification can be seen in the fact that legislation makes it possible to publish only a final judgement of conviction⁵⁸ and it may be published in the media just without stating certain information. The presiding judge of a juvenile court has the right to make the conditions for the publishing of a judgement in public media stricter, i.e., beyond the framework of applicable legisla-

⁵³ Decision of the European Commission of Human Rights *Crociani and others versus Italy*, of 18th December 1980, complaints no. 8603/79; 8722/79; 8723/79; 8729/79.

⁵⁴ Decision of the ECtHR *Pretto and others versus Italy* of 8th December 1983, complaint no. 7984/77.

⁵⁵ KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. *European Convention on Human Rights*. Prague: C. H. Beck, 2012, p. 697.

⁵⁶ Finding of the Constitutional Court of the Czech Republic, file ref. no. Pl. ÚS 2/10 of 30th March 2010.

⁵⁷ Šimíček adds to this topic that “*if a flat ban on provision of non-final judgements should be rationally defensible for the reason of protection of independence and impartiality of judicial power, it would mean that a ban on public announcements of judgements in full would have to apply - logically - for the same reason as well*” – FILIP, J. et al. *Constitution of the Czech Republic. Comments*. Prague: Linde, 2010, p. 1311.

⁵⁸ Not any other form of decisions, and not even a judgement of acquittal either.

tion they may still further reduce the area of the information which can be used from it on the publishing thereof, but at the same time they have the right to make such conditions less strict (Section 54(4) of the Act on liability of juveniles for illegal acts and on juvenile justice).⁵⁹

V. RIGHT OF THE PUBLIC TO INFORMATION ON CRIMINAL PROCEEDINGS

The right of the public to information on criminal proceedings is based on the right to information guaranteed by the Constitution according to Article 17 of the Charter of Fundamental Rights and Freedoms.⁶⁰ It is important for citizens to be informed, in a suitable way, about what is to be the subject matter of the proceedings.⁶¹ A very important step is also the publishing of news on criminal cases (especially in mass media).⁶² In these situations, there is a conflict of the obligation of law enforcement authorities to protect this information and the obligation to inform the public on their activities.⁶³ All has, however, its own limits.⁶⁴ The wording of legal provisions of Section 8a(1) of the Code of Criminal Procedure implies that the above-mentioned information obligation of the law enforcement authorities is not *a priori* limited just to a certain stage of criminal proceedings. This means that the above-mentioned information obligation of the law enforcement authorities applies also in pre-trial proceedings, while the principle of participation of the public in the proceedings applies in the stage of the proceedings before court only. That is why it is one of the rare breakthroughs into the non-public nature of pre-trial proceedings, because this obligation is binding on all law enforcement authorities in all stages of criminal proceedings, and therefore in pre-trial proceedings as well. The law enforcement authorities are obliged to inform the public only through public media. It means that they are not obliged to inform individuals or their groups with regard to individual requests for information.⁶⁵

⁵⁹ It is therefore possible, through a decision of the juvenile court presiding judge to permit the publishing of a judgement, together with the first name(s) and surname of the juvenile person, or with other personal data concerning that person. These will, however, be exceptional cases when the society's interest exceeds the interest of the juvenile person, i.e., protection of the society from such an offender is a higher interest than the actual protection of the juvenile person. Such a requirement will be, in my opinion, satisfied e.g., in case of recidivism of a particularly serious criminal offence (e.g., recidivism of murder).

⁶⁰ Cf. especially Article 17(1) ("The freedom of expression and the right to information are guaranteed") and Article 17(5) ("State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law").

⁶¹ For more information on this topic see HERANOVÁ, S. Free access to information from criminal proceedings. In: *Constitutional-law limits of criminal law*. Prague: Leges, 2019, pp. 127 et seq.

⁶² ROMŽA, S. The principle of the public and its application execution in relation to mass media. In: Romža, S., Ferencíková, S., Michalov, L. (eds.). *Principles and fundamentals in criminal law*. Košice: UPJŠ, 2014, pp. 199 et seq.

⁶³ KMEC, J. On the issue of provision of information on criminal proceedings. *Trestní právo*. 2004, Vol. 8, No. 10, p. 2.

⁶⁴ GRIVNA, T. Possibility of imposition of a disciplinary fine on mass media for the publishing of a resolution on commencement of criminal prosecution. In: *Constitutional-law limits of criminal law*. Prague: Leges, 2019, pp. 151 et seq.

⁶⁵ Cf. Section 11(4)(a) of the Act no. 106/1999 Coll., on free access to information.

With regard to specifics of criminal proceedings, this legal information obligation cannot be absolute, and therefore the law enforcement authorities, while providing this information, ensure that they shall not endanger clarification of the facts important for assessment of the case,⁶⁶ shall not publish the data of the persons involved in the criminal proceedings that are not directly associated with criminal activities,⁶⁷ and that they shall not breach the principle of presumption of innocence.⁶⁸ If any of these reasons applies (requirement for clarification of the facts important for assessment of the case; requirement for non-publishing the data of the persons involved in the criminal proceedings that are not directly associated with criminal activities; requirement for observing the principle of presumption of innocence), they will refuse the provision of the information. Besides, in pre-trial proceedings, the law enforcement authorities must not publish the information making it possible to identify the person subject to criminal prosecution,⁶⁹ the aggrieved party, the persons involved and witnesses (Section 8a(1) of the Code of Criminal Procedure). In addition, during provision of information pursuant to Section 8a(1) of the Code of Criminal Procedure, they devote particular care to the protection of personal data and privacy of people under 18 years of age.⁷⁰ In pre-trial proceedings, the public prosecutor can reserve the right to provide information on a certain criminal case, and therefore the law enforcement authority can only provide such information with their prior consent. Section 8a of the Code of Criminal Procedure is followed up by Sections 8b–8d of the Code of Criminal Procedure regulating the obligation of third persons in relation to the protection of information on criminal proceedings and persons involved therein (Section 8b of the Code of Criminal Procedure), specific regulation regarding the information concerning monitoring or recordings of telecommunication operation (Section 8c of the Code of Criminal Procedure),⁷¹ as well as tracking individuals and things, and also exceptions from the ban on publishing (Section 8d of the Code of Criminal Procedure).

VI. CONCLUSION

The principle of the public is an important guarantee of justice, and therefore it should be reflected in the legal order at the greatest possible rate. On the other hand, in virtue of

⁶⁶ The importance of this obligation is generally inversely proportional to the progress of the criminal proceedings, because the greatest risk in this context arises at the very beginning of the criminal proceedings. This reason excludes informing e.g., about the police tactics and other steps to be taken, extent and content of individual pieces of evidence.

⁶⁷ It may concern details of the private life of these people (family situation, political orientation, links to the publicly known or publicly active persons, business activities).

⁶⁸ ŠABATA, K. Principle of the presumption of innocence, principle of the public and media interest. *Státní zastupitelství*. 2007, Vol. 4, No. 10, p. 15.

⁶⁹ VANTUCH, P. Can the law enforcement authorities inform the public on criminal proceedings against themselves if such public is not prosecuted as the accused party? *Bulletin advokacie*. 2004, Vol. 11, No. 7–8, p. 9.

⁷⁰ VÁLKOVÁ, H. Protection of privacy and personality of juveniles versus the right to information, freedom of expression and principle of the public. *Trestněprávní revue*. 2006, Vol. 5, No. 4, p. 97; HRUŠÁKOVÁ, M. Protection of privacy of juveniles and children in proceedings pursuant to the Act on liability of juveniles for illegal acts and on juvenile justice and publishing of pictures. *Trestněprávní revue*. 2007, Vol. 6, No. 6, p. 170.

⁷¹ PŮRY, F. Increasing protection of information in criminal proceedings. *Právní rozhledy*. 2009, Vol. 9, No. 7, p. 2; VANTUCH, P. Publishing of interceptions in media. *Právní rádce*. 2005, Vol. 5, No. 8, p. 4.

the nature of the issue, it is a principle which may be subject to exceptions, with limits given by both the procedural stage and private as well as public interests. That is why it will be necessary to continue to look for appropriate proportionality between application and limitation of the principle of the public. I consider the existing criteria, which are reflected in the Code of Criminal Procedure and in the Act on liability of juveniles for illegal acts and on juvenile justice, to be set up in a suitable way, and it is possible to recommend the legislator to adopt them in the text of the new Code of Criminal Procedure.