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**(VENICE COMMISSION)**

in co-operation with  
**THE CONSTITUTIONAL COURT OF BELARUS  
AND  
THE SLOVAK EMBASSY IN MINSK**

in the framework of  
**THE SLOVAK PRESIDENCY  
OF THE COMMITTEE OF MINISTERS**

**SEMINAR ON  
“The use of international instruments for protecting  
individual rights, freedoms and legitimate interests  
through national legislation and the right to legal  
defence in Belarus: challenges and outlook”**

**Minsk, Belarus  
24 April 2008**

**REPORT**

**“Realising the constitutional right to legal defence in the Slovak  
Republic with respect to the European Convention for the protection  
of human rights and fundamental freedoms”**

by

**Mr Alexander Bröstl  
Professor, Pavol Jozef Šafárik University, Košice, Slovakia**

## **1. The Right to Defence in Criminal Trial in the Legal Order of the Slovak Republic**

The right to defence is belonging to fundamental principles, and it concerns all the necessary guarantees for it. (Art. 11.1. of the Universal Declaration of Human Rights 1948, Art. 14. 3. of the International Covenant on Civil and Political Rights 1966, Art. 6. 3. of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 – later on “Convention”).

### **1. 1. Constitution of the Slovak Republic**

According to Article 50, Section 3 of the Constitution of the Slovak Republic (later on just “Constitution”) *“Any person charged with an offence shall have the possibility to prepare his or her defence during such time as may be deemed necessary and shall have the right to defend the case by himself or herself and by a counsel.”*

### **1. 2. Criminal Procedure Code**

The Criminal Procedure Code (CPC) is also in the legal order of the Slovak Republic the law, which guarantees the respective right during the stages of the criminal proceedings.

The right to defence means the necessity to safeguard the rights of the accused in the way allowing within the proceedings to clarify all the facts witnessing in favour of the accused. It should secure that no innocent person should be sentenced and on the other hand, that the offender should be punished only for what s/he committed.

The right to defence is a set of rights given to the person challenged with a criminal prosecution. It covers the whole criminal procedure and includes beside the right to clarify also facts in favour of the accused (§ 2 Section 10 CPC) and the obligation to instruct (§ 34 Section 4 CPC) first of all:

1. the right of the accused to know what s/he is accused from (§ 34, § 206 CPC),
2. the right to defend himself in person (§ 34 CPC), which he can make use of actively (participation, proposals of evidence) or passively (to make use of the right to remain silent.
3. the right to choose a defence lawyer and to make use of it by this person (§ 34, § 36 CPC etc.)
4. the right to necessary defence (§ 37, § 38 CPC), respectively the right to appoint a defence lawyer in case when the accused does not have sufficient means to pay for his defence.

## **2. Right to defence: protection at the level of the Constitutional Court of the Slovak Republic – preliminary remarks**

It is not possible to dive into the jurisprudence of the Constitutional Court of the Slovak Republic (further only “Constitutional Court”) concerning the protection of the rights to defence, without any preliminary explanation, at least of basic facts.

The Constitutional Court is an independent judicial body to protect the constitutionality (Article 124 of the Constitution). It also decides on complaints of individuals objecting violations of their fundamental rights or freedoms or human rights in the Constitution or human rights and fundamental freedoms included into international treaties ratified and declared by the Slovak Republic, by decisions of authorities of public power. It acts upon the principle of subsidiarity, when no other court is deciding upon their protection. It means, that the system of ordinary

courts is taking priority in guaranteeing the protection of rights and freedoms of citizens. Just when all the legal measures are exhausted the competence of the Constitutional Court is given to decide upon cases of objected violations of fundamental rights or freedoms (Article 127 Section 1 of the Constitution).

Two periods can be seen in the development of the constitutional complaint in the Slovak Republic as an instrument protecting fundamental rights or freedoms in the Constitution. During the first one (1993-2001) the complaint has had merely a symbolic impact to declare that one's fundamental right or freedom has been violated. Since 2002 through the Amendments of the Constitution a fully effective complaint linked with a possibility to overrule a decision which is violating fundamental rights or freedoms and also with a proper satisfaction has been introduced. The Amendments of the Constitution from 2001 also have changed the international law doctrine so far: they substituted former Article 11 and introduced a newly shaped Article 7 concerning international treaties which are directly applicable (not like before only conditionally). These changes have generally strengthened the constitutional complaint as an instrument of protection of fundamental rights and freedoms of the individual.

I would like to try to present the scope of the application of the respective Articles of the Constitution and of the Convention on a handful of chosen cases before the Constitutional Court possibly representing also the variety of situations and belonging to various periods of time.

## **2. 1. Legal Opinions from Rulings of the Constitutional Court**

### **2. 1. 1. Resolution No. I. ÚS 35/98 <sup>1</sup>**

The petitioner objected that in the public session proceedings of the Supreme Court, initiated by a complaint of the breach of law by the Prosecutor General, the Supreme Court had appointed a defence lawyer to the deceased sentenced person, without consulting this question with the petitioner (the son of the deceased). There is no doubt about the need of defense in such a kind of proceedings (according to § 30 Section 2 of the Act No. 119/1990 Coll. on Judicial Rehabilitation).

In the view of the petitioner the Supreme Court did not secure the judicial protection in accordance with law, without asking him to choose within a time limit a defence lawyer for the proceedings of his father, and it set a defence lawyer itself.

The right of third parties to "choose a defence lawyer" for the accused is granted only under the CPC, and so far it is not a part of the fundamental right of the accused to a defence lawyer of his choice guaranteed by Article 50 Section 3 of the Constitution.

This respective fundamental right is violated if the accused is denied the possibility to choose his defence lawyer. The right of third parties to choose a defence lawyer for the accused is violated if a state authority (judicial body) violates the provision of § 37 Section 1 of the CPC, i. e. if it does not offer the relatives or the entitled persons the possibility to choose a defence lawyer for the accused, if the latter did not choose a defence lawyer himself.

The Constitutional Court has stated that although the petitioner had objected the violation of the fundamental right according to Article 50 Section 3 of the Constitution, in the proceedings before the Supreme Court he did not act as an accused. Despite this fact he objected the violation of such a right which the Constitution gives only to an accused person. Nevertheless, the Constitutional Court does not exclude that by and within the proceedings of the Supreme

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<sup>1</sup> Published in the Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic 1998. Košice 1999, Ref.No. 55/98, pp. 525-531.

Court of the Slovak Republic legality could be violated (respective provisions of the CPC); anyway, its proceedings did not touch the fundamental right of the accused according to Article 50 Section 3 of the Constitution.

The Constitutional Court rejected the petition as ill-founded.

## **Case No. 2**

### **Finding No. II. ÚS 52/98 <sup>2</sup>**

The obligation to serve the parties in criminal proceedings with documents containing information on the procedural acts carried out in their case and enable them to respond to such documents must be considered as part of their right to defence, just like other legal procedures conducted in the course of criminal proceedings (presence during the interrogation of the accused, witnesses, victims, in the cross-examination, etc-).

If all the aspects and all legal manifestations of the right to defence have not been implemented, it is not possible to affirm that justice has been served.

In the above mentioned case the Constitutional Court ruled that Article 50 Section 3 has been violated, and so also Article 6 Section 3 of the Convention. The petitioner objected that the District Court did not proceed pursuant § 251 of the CPC, because it did not deliver neither the accused, nor his defendant the appeal of the Prosecutor against its decision.

The Regional Court could do away with this violation by delivering the document concerned to the accused and his defence counsel, and it could set an appropriate time limit for the respond. Both Courts did not proceed in this manner and they did not guarantee the right to defence to its full extent.

Already this one breach meant a violation of the respective right. The Constitutional Court declared that Article 50 Section 3 of the Constitution and Article 6 Section 3, letter c/ has been violated.

## **Case No. 3**

### **Finding of the Constitutional Court of the Slovak Republic No. III. ÚS 6/00 of July 13, 2000 <sup>3</sup>**

The provision of § 36 CPC determines the pre-conditions of necessary defence as stated above. According to this provision, due to special circumstances, the accused should have a defence already in the pre-trial stage.

According to § 36a Section 2 CPC the accused must have defence counsel in proceedings on a complaint of the breach of law among others in the case, when a criminal offence for which the law foresees a punishment of deprivation of freedom with the upper limit is more than 5 years, is concerned.

In the presented case the fundamental right of the petitioner has been violated, because he had no time and facilities for the preparation of his defence and he could not defend himself neither in person, nor through legal assistance of his own choosing, because he did not know about the

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<sup>2</sup> Published in the Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic 1999. Košice 2000, No. 15/1999, pp. 208-212.

<sup>3</sup> Published in the Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic 2000, Košice 2001. No. 19/00, pp. 205-217.

complaint concerning a breach of law, and he also did not know about the term of the public hearing (session).

Although pursuant to § 274 Section 2 of the CPC the Supreme Court had a formal choice between holding a public or a non-public session, according to Article 152 Section 4 of the Constitution it could not order a non-public session, because in such a session the right of defence from the Article 50 Section 3 of the Constitution can not be guaranteed.

Article 6 Section 1 of the Convention (public hearing of the case before the court), which is safeguarding a greater extent of the fundamental law (law to defence) in comparison with § 274 Section 2 CPC (which enables also a procedure a non-public session), should be applied – with respect to Article 11 of the Constitution – prior to the provision of § 274 Section 2 of the CPC.

1. A failure to provide defence counsel in proceedings on a complaint concerning a breach of law, contrary to the provision on ex lege defence according to § 36a Section 2, letter b) of the Criminal Code, is linked with the breach of Article 50 Section 3 of the Constitution.
2. If an accused person is not informed about proceedings before the Supreme Court and has no access to such proceedings, than s/he may not enjoy the rights guaranteed by Article 50 Section 3 of the Constitution, i. e. to take advantage of the time and opportunity to prepare his/her defence and to defend him/herself or to be defended by counsel.
3. The right to defence as guaranteed in Article 6 Section 3 letter b) and c) of the Convention<sup>4</sup> has to be provided also in proceedings on a complaint concerning the breach of law.

#### **Case No. 4**

##### **Resolution No. I. ÚS 99/05<sup>5</sup>**

At the main trial the petitioner, who was accused on committing a crime of attacking a public agent according to § 155 Section 1, letter a) and Section 2, letter a) of the CC, addressed a request to the senate to allow him to sit next to his defender. The chairman of the senate rejected his request. The petitioner had then made use of § 203 CPC, and asked the senate. The senate decided to refuse the petition and the decision of the chairman entered into force. The petitioner argued that neither legal rules, nor the Declaration of the Ministry of Justice of the Slovak Republic No. 66/1992 Coll. on the Administration Order of District and Regional Courts contain any ban or prohibition in this respect. He objected also the violation of the principle of equality of parties (targeting the inferior position of the accused person) and the rights of defence.

As far as in connection with a criminal case in the stage of appeal proceedings a violation of fundamental rights or freedoms is objected, it is the Court of Appeal which is obliged to review the constitutionality and the legality of the procedure which precedes the filing of an appeal, and this particularly with regard to the maintenance of fundamental rights and freedoms. The Court of Appeal has according to the CPC a considerable number of effective procedural instruments how to ensure the remedy regarding the violation of fundamental rights and freedoms in previous proceedings, if the Court, of course, comes to a conclusion, that that the respective rights and freedoms have been infringed. Due to these reasons the Court of Appeal will be primarily entitled and obliged to decide on the protection of fundamental rights and freedoms:

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<sup>4</sup> From the Jurisprudence of the European Court of Human Rights some cases are quoted, e. g. m Axen v. Germany (1983), Campbell and Fell v. U. K.(1984), Can v, Austria,

<sup>5</sup> Published in the Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic 2005. Košice 2006, No. 88/05, pp. 897-901.

therefore in this procedural circumstances the Constitutional Court lacks of competence to act in this case.

The petition was rejected because of lack of competence of the Constitutional Court.

This was just an overview of some typical cases the Constitutional Court has to deal with, protecting constitutionally (internationally) guaranteed fundamental rights and freedoms, amongst them the right to defence, chosen as an example here, without making any extra comments to the wording of the rulings.