

PUBLICITY AS ONE OF THE SAFEGUARDS OF FAIR TRIAL IN CRIMINAL PROCEDURE

Tamás HÁGER*

ABSTRACT: *The primary aim of my paper is to examine the questions related to the institute of public hearing. As we know, publicity is one of the most important safeguards of fair trial in criminal procedure. In my opinion, it is necessary to examine these procedural questions in a scientific depth in the light of both the case decisions of the High Courts and the practice of the European Court of Human Rights. The study examines one of the important pledges of a fair trial, the effectiveness of the basic principle of publicity in the criminal procedure. It explores the principle from a dogmatic point of view, and also in the light of both the European standards and the regulations currently in force. It mentions the limitation and exclusion of publicity, and the legal consequences of violating publicity in a great detail. Classic legal institutes are shifted into new dimensions by the technical improvements of the modern world and the media broadcasts from courts, and the paper points it out that for the sake of having an undisturbed court hearing and verification, some modifications on certain legal regulations may be justified. The study also mentions the standpoints of legal literature regarding the notion of publicity in detail, and by summarizing them it attempts to define the notion of the given basic principle as per aspects of law science, considering the characteristics of the 21st century. After the establishment of law theory principles, besides introducing the regulation in force and touching upon court practice, my paper analyzes questions that are more and more current, especially due to the reports by the electronic media, which sometimes cannot only disturb the order of the court, but also the procedure of verification. So, after the examination of basic hypotheses and the legal institute, it draws the conclusion that the development of the legal institute justifies the modification of the procedural law in the future, especially in connection with informing the press.*

KEYWORDS: *criminal procedure, public hearing, publicity, basic principle, fair trial, decisions of High Courts, European Court of Human Rights, guarantees, violation of publicity, informing the press, electronic media, procedural offences*

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1. INTRODUCTION

Publicity is one of the basic principles in criminal procedure, which is also an essential element of the bundle of rights of a fair trial. It secures the transparency of jurisdiction, by making the functioning of the judicial power controllable, and it also provides a right for the accused person to an impartial and well-controlled judgment on their case. A fair trial

*High court judge at the criminal department, High Court of Justice of Debrecen, university lecturer, The Faculty of Law at the University of Debrecen, Institute of the Law of Criminal Procedure, HUNGARY.

includes many partial rights. Some of these rights can be connected to all types of procedures, while others are only valid in relation to the criminal procedure. (Halmai & Tóth, 2008) The right of publicity is not exclusive to the criminal case, but this paper primarily analyzes the publicity of a criminal trial, on a dogmatic basis, mentioning practical problems as well.

The demand for the possibility to have an effective social control over jurisdiction originates from the independence of judicial power, as there is no particular control system, which would monitor the functioning of this authority from the outside. (Navratil, 2011) In the modern law of the 21st century, the international agreements, the European standards, the constitutional rules and the legal norms of criminal trials all order, that as a main regulation, the court must judge the charges in a criminal case at a public hearing. Publicity is asserted on a global, and thus, obviously, on the European regional level as well, regardless of the fact that the way partial rights of the principle are defined is different from state to state. One must note that publicity is not a new principle in criminal trials, it already appeared in the law of ancient Rome, then in the German law of the Middle Ages (Angyal, 1915)¹, then it was also asserted in the penal procedures of the Kingdom of Hungary (Angyal, 1915)², before being accomplished in the law of the Modern Age, from the 19th century. The publicity of criminal trials raises such complex and diverging questions that have a significant actuality today, especially in connection with the presence of electronic media. In my paper, I examine the notion of the principle of publicity, its main dimensions, characteristics and certain practical questions, mentioning also the practice of making judgments.

2. FUNDAMENTAL ASPECTS OF PUBLICITY

According to what we cited above, the basic principle of publicity is secured by cardinal regulations. Ever since its ratification, the European Convention of Human Rights³ is part of our national law, its rules must be considered during a criminal procedure, which might limit or deny fundamental, constitutional, human rights. According to Paragraph 1 of Article 6 of the Convention, everyone is entitled to a fair and *public* hearing within a reasonable time and to a decision regarding the merits of the penal charges against them by an independent and impartial tribunal established by law. The right to a public hearing is declared, similar to the Convention, by the Fundamental Law of Hungary in Article XXVIII of its chapter "Freedom and responsibility." Although Law XIX of 1998 on criminal procedure (from now on CP) does not include publicity as a basic provision – as opposed to Law I of 1973 –, but in chapter XI, in the general rules of court procedure, in paragraph (1) of Section 237, it declares public hearing undoubtedly as a main regulation. Regardless of the way the law is drafted, we may conclude that the quality of publicity as a basic principle remains unchanged.

¹In the Roman law, primarily at the time of the Republic, the trials led by the questions were public, and this remained asserted in the German public law, in the Schöffen-courts and in the Rüge-procedure as well.

²The trials of the noblemen had already been public at the time of the kings of the House of Arpad, and King Bela III ordered the materials of trials to be recorded in writing.

³Officially: The European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome, on 4th November 1950 (from now on: ECHR or Convention). Enacted by Law XXXI of 1993 on 7th April 1993.

The importance of the principle of publicity is also reflected in the practice of the European Court of Human Rights (ECHR). Although in the below cases, cited as per the thoughts of Mihály Tóth, publicity has not been violated specifically during the criminal trial, but the trial had been preceded by a criminal procedure and, according to common sense, the principled nature of those decisions is a guideline for criminal court practice. In the *Case of Szűcs v. Austria* (judgment of 24th November 1997, ECHR, 20602/92.), the Court established the violation of Paragraph 1 of Article 6 of the Convention due to the unjustified preclusion of the public, as the court judgment – in the settlement procedure in connection with an initiated, then dismissed charge against the Hungarian accused of the primary procedure on the basis of a suspicion of the use of a stolen credit card – had not been pronounced to the public and publicity had not been secured by any other means either. The same decision had been made in the *Case of Werner v. Austria* (judgment of 24th November 1997, ECHR, 21853/93.) as well. (Tóth, 2001)

What does publicity mean, what are its main content elements, and how is it asserted in judicature and in the functioning of the court organization? Pál Angyal lists publicity among the general procedural principles, and defines its main point generally in that at the different tribunal actions conducted during the criminal procedure, anyone may be present without restriction. Based on Law XXXIII of 1896, he differentiates between four stages of publicity, common publicity, representational or indirect publicity, client publicity and secrecy. (Angyal, 1915)

According to the argumentation of Rusztem Vámbéry, publicity has two meanings in light of the rules of court: on the one hand, it refers to the right of the parties to be present at the court procedures, on the other hand, to the license for anybody to be present at the court hearings as part of the audience. The thoughts of the author point out the dominant tribunal nature of the principle in a faithful way. (Vámbéry, 1916)

Tibor Király points it out that publicity had been a slogan of the movements requesting the modification of the criminal procedure, the people striving for the reformation of the criminal procedure set up a claim for public hearings as early as the 1840s. They considered a public hearing namely as something that would ensure that no illegal means were used against the accused during a trial. (Király, 2003) I agree with his statement, the main content element of publicity is the establishment of social control over the functioning of jurisdiction.

Ervin Cséka notes that the publicity of criminal trials was one of the first topics in the schedule of the French Assemblée constituante assembled in 1789, and has been accepted as a basic principle in states founded on the rule of law ever since. Furthermore, he also mentions that publicity, as a general procedural principle, also has disadvantages beside the obvious advantage of social control, as it can cause damage to someone accused falsely, or, as a result of certain personal information being made available to the wide public, to the injured or the witnesses. But progress is irreversible – the justification of the principle of publicity in the criminal trial is indisputable. (Cséka, 1998) Publicity, as a safeguard of social control, means that anyone can be present at the trial, unless otherwise provided by statute. (Cséka, et al., 2007)

According to the standpoint of Mihály Tóth, similar to directness and making a decision within a reasonable time, publicity is not an absolute and unlimited principle either. He considers it the greatest challenge for the constitutional criminal procedure to

unveil the balances and assurances that enable the narrowing down of the scope of above mentioned principles for the sake of conducting the procedure with a reasonable deadline and easing the burdens of the authorities. (Tóth, 2001) In present day, legislation continuously strives for the acceleration and simplification of criminal procedures, which is an international obligation of the member states. (Pápai-Tarr, 2012) At certain procedural forms, like for example at the trial-omitting penal order, where the court may decide about the criminal responsibility of the accused and may impose penalty on them without a trial, in camera, publicity is not effective. But the special norms making a separate procedure possible undoubtedly assure a fair procedure, as the prosecution or the defense may request for a trial in case of an unfavorable decision, and on such a request, the court would have a public hearing as per the usual procedure. (Elek, et al., 2014) (Kóhalmi, 2014)

We must mention, that alongside the modifications of the CP currently in force (Kóhalmi, 2002) (Gellér & Csige, 2002), the conceptual preparation of the new law of criminal procedure have also started. It goes without saying that it is going to be the task of the new procedural code to reasonably simplify the verification procedure and to enable timely judicature, in a way that principles of guarantee are asserted, meeting the Strasbourg requirements as well.

Árpád Erdei defines publicity among the functional basic principles, as one of the basic principles of trials beside directness and oral procedure, which is essentially a safeguard against judicial arbitrariness. Furthermore, he fittingly mentions, that the trial-publicity of the 21st century exposes the courtroom to a direct danger, thus, the advantages of the basic principle have begun to fade. This is intensified by the presence of the electronic media and the problems that arise in connection with reporting. (Erdei, 2011) (Erdei, 1993) Emphasizing the tribunal nature of the principle is by all means justified, considering that publicity, as opposed to the reserved nature of the investigation, is asserted during the trial. I also agree with the standpoint of Erdei in that publicity, beside the evident advantages, has its disadvantages as well, as it may reveal such information to the wide public, which could violate the legitimate private interests of certain participants of the trial.

Ákos Farkas and Érika Róth define publicity as a basic principle that is impeccably constitutional in a dogmatic sense, referring to Paragraph 1 of Article 6 of the Convention. (Farkas & Róth, 2012) The constitutional nature of the principle is beyond doubt, but it is necessary to emphasize its way of functioning, which is the most pronounced during a trial.

Csongor Herke, Csaba Fenyvesi and Flórián Tremmel, following Mihály Tóth, regard publicity as a basic principle differentiated based on the relation between the accused and the state. (Herke, et al., 2012) I agree with this definition of the notion, with the addition that the nature of the principle is obviously constitutional, and is connected partly to the functioning of the court, primarily to the trial. These authors record separately – after comparing the two procedural stages, investigation and the trial – when publicity is asserted as a main regulation, and when it is an exception. At a trial, publicity is a main regulation, while investigation is fundamentally kept away from the public. The limitation of publicity during a trial period is an exception, whereas its assertion is considered the same during an investigation. (Fenyvesi, et al., 2004)

Károly Bárd points it out fittingly, that, as opposed to the other basic principles, the connection between the democratic system and a fair procedure, and as part of that, the publicity – which is bound to control the practice of authority –, is very close. (Bárd, 2008) It is beyond doubt that the sharing of procedural tasks, or the right to defense or legal remedy are directly related to a state based on the rules of law, but publicity is indisputably one of the most important measures of democracy.

In her comparative analysis already cited, Szonja Navratil differentiates many dimensions of publicity – with a new approach, in my opinion –, while taking today's technical accomplishments and the development of informatics into consideration. She distinguishes between institutional-organizational publicity and procedural publicity. She divides the latter into the categories of momentary and electronic publicity. According to her conclusions, the scope of the electronic institutional-organizational publicity includes the budget and organizational structure of the court, the way judges are chosen and appointed, and the information on the disciplinary procedures. In the scope of the procedural publicity, the publicity of the trial and the pronouncing of the verdict are momentary, while the tribunal records, decisions, and the courtroom presence of the media provide information to the public electronically. (Navratil, 2011) The author formulates general principles, with comparative legal methods, establishing axioms for the Hungarian criminal procedure that are decisively valid. However, we need to point out in connection with the organizational publicity, that in the Hungarian law, the disciplinary cases of the judges are not public, and we can basically talk about a procedure that is not open for the general public, and that only provides client publicity for those involved in the case.⁴ One may dispute the validity of this regulation, as in many cases the media does object to the secrecy of the procedure. As I see it, it would not be unfeasible for the court to open toward society in this topic, to demonstrate that the disciplinary violations of judges are not glossed over or belittled either.

In connection with the notion of publicity, and with the essentials of its content, it is reasonable to examine the practice of the Constitutional Court. The Constitutional Court expressed it nearly in point of principle that the publicity of the procedure belongs to the basic constitutional principles of modern criminal procedures, and it primarily refers to the requirement of a public hearing and of the pronouncing of the court decision to the public.⁵ And in another case, the Court established on the one hand that the publicity of procedure secures the control over the functioning of jurisdiction for the society, and on the other hand, that criminal impeachment is one way for the orders and prohibitions of penal law to reach the members of the community.⁶ In these decisions, we can witness the manifestation of the constitutional, functional, but primarily, the tribunal nature of the basic principle.

When reviewing the standpoint of the noted representatives of law science and Constitutional Court practice, we can state that publicity is a basic constitutional principle fundamentally connected to the trial and having a functional nature, defining the relation of the accused and the state as well, and providing a guarantee against judicial

⁴ See Section 119 of Law CLXII of 2011 (Bjt.) about the legal status and emoluments of judges

⁵ See Constitutional Court Provision 58/1995 (IX.15.)

⁶ Constitutional Court Provision 20/2005 (V.26.)

arbitrariness as an appropriate safeguard, as part of a fair procedure, for the sake of the transparency of judicature and judicial authority. It namely enables the presence of clients and anyone else at the trial as a general rule, just as it allows reporting for the printed and digital press as well.

Tribunal nature is undoubtedly one of the main traits of the principle. We can declare hereby, that at the court a momentary, immediately perceptible publicity is asserted, on the other hand, the electronic publicity appears due to the coverage of the television companies and Internet portals, which can also be momentary in certain cases, for example in case of the live broadcast of certain penal cases of high priority, which I myself consider quite harmful, considering that it may prevent certain basic rules of verification from being asserted.⁷

3. PROBLEMS OF THE PUBLICITY OF THE TRIAL

3.1 Assertion and restriction of publicity at the court

According to the already cited provision of law found at the general rules of court procedure (CP Paragraph (1) of Section 237), the court hearing is public. This is the main rule, and publicity can only be restricted or eliminated in cases that are defined seriatim by law. Nevertheless, the law guarantees for the presiding judge the possibility to limit the size of the audience in case of a lack of space, for the sake of conducting a trial in accordance with the rules, and of preserving its decorum. The publicity of the trial makes it possible, as per the described principles, for the people involved in the trial and for any other inquirers and for the representatives of the press to be present, according to the rules of court in force as well. However, full publicity may be limited in cases defined by law, as even client publicity may have restrictions by rules of court. The exclusion of publicity may be total, meaning that it can be extended to the whole of verification and to the pleadings, or it may be partial, concerning only certain procedural actions (e.g. the interrogation of a certain accused or witnesses). Certain legal causes require judicial evaluation, like for example the moral cause, or the establishment of the justification of the protection for the participants of the trial, while others have a nature, which entails the exclusion of the public independent from evaluation (protection of classified information, or the preclusion of a minor person from participating in the trial).

The causes that make it possible or necessary to exclude or restrict the publicity of a hearing can basically be divided into two main groups. The first group includes the causes which may lead to the restriction or exclusion of publicity in the interest of the order of the trial, or the undisturbed conduct of verification, or in connection with forbidding the presence of minors *not being* involved in the procedure. The second group includes those that are related to the subject of the cases, to moral causes, to the protection of certain classified information, and to the preservation of the interests of people taking part in the trial.

⁷ We may cite paragraph (1) of Section 292 of the CP as an example, according to which during the hearing of a witness, no witnesses to be heard can be present. During live broadcasts on the Internet, a witness to be heard could follow the course of a hearing, they may collect information on verification, which not only violates the norms of court, but can even influence the process of verification itself.

According to the norm already cited, the presiding judge can limit the size of the audience when in lack of space. Obviously, the whole general public is not excluded, even the electronic media is able to cover the event, but as a result of objective circumstances, part of the audience is not able to take part in the trial, against their own will. In their case, we may mention the restriction of publicity. So, the head of the division can limit the size of the audience, taking the size of the courtroom into consideration, after deciding how many people the courtroom can hold. Thus, publicity does not mean an unlimited, massive, but, even without restricting causes, a “courtroom-sized” publicity. (Király, 2003) In my opinion, the head of the division, in cooperation with the management of the court building, should definitely strive for holding the trials with a huge public interest in courtrooms which enable the safe and undisturbed seating of the audience. This is not possible every time however, in such cases, registration in advance can help in having a number, that is still manageable in the courtroom, without damaging the decorum of the trial, or disturbing the order. As I see it, this solution is effectively asserted in practice.

The law declares that no person under the age of fourteen may attend a trial as part of the audience, and any person under the age of eighteen can be expelled from the audience by the head of the division.⁸ One of the reasons for this regulation is undoubtedly the defense of the development and personality of minors on the one hand, and on the other, the maintaining the order of the trial. Minors do not necessarily have a level of mental development which could guarantee the assertion of the strict rules of the criminal trial upon their participation, and on the other hand, attending the hearing of a crime may have a harmful effect on their personality. The age of juveniles and direct impressions about them can help a judge to decide whether their exclusion from the audience would be appropriate or not. Prior to starting a trial, in order to make above circumstances clear, the head of the division must, with the available means, examine the age of the audience members, who may be minors.

It is the task of the presiding judge as well to preserve the decorum of the court. For the sake of this, he or she may have those people removed from the courtroom who violate the decorum of the trial with their condition or appearance. In such cases, publicity is not asserted as far as the person who endangers the decorum of the trial is concerned, but preserving the decorum of the trial requires a stronger and greater protection than the right of the individual. A person, who appears in a drunk or intoxicated condition, be that a participant or a member of the audience, poses a threat on the order of the trial, thus, their presence cannot be assured obviously. We often see that the cited person or a member of the audience appears at the court in a garment unworthy to the trial, for example in shorts, in a sleeveless shirt or slippers, in such cases, an appropriate trial conduct cannot tolerate the presence of the given person.

The exclusion of publicity may be realized due to the assertion of the order of the trial. As per paragraph (5) of Section 245 of CP, if the audience repeatedly disturbs the order or regular course of the trial, the presiding judge may exclude it from the trial. This obviously may happen after a serious and repeated disturbance of the order of the trial. In the first case, the presiding judge has a possibility to reprimand or to impose a fine. What can we consider as such a grave disturbance of the trial order? In my opinion, continuous

⁸ See CP, Paragraph (2) of Section 237

interruptions, shouting, applause, loud expression of approval or disapproval, insulting the court or the participants, or a behavior leading to a minor offence or a crime can establish the exclusion of the public. In case of the disturbance of the order, if the person causing the disorder can be identified, the presiding judge may decide to call this person to order, or to have them removed even with a decision causing them not to return to the courtroom that day of the trial (CP paragraphs (2), (3), Section 245). One can establish based on practical experience, that the court rarely excludes the public upon the disturbance of the order, usually it finds it enough to call to order or impose a fine even in the case of more serious disturbances. Nevertheless, according to my judgment, it is wrong to allow certain groups the opportunity to create such an atmosphere with their loud and continuous expression of their opinion, which intimidates anyone or disturbs the regular course of verification.

The other main group of restrictions on publicity includes the seriatim defined legal causes written down in paragraph (3) of Section 237 of CP. *According to this law, the court may, ex officio, or at the motion of the prosecutor, the accused, the counsel for the defense, the victim or the witness, exclude the public from the entirety or a part of the trial in a decision explaining the reasons therefore (in camera trial)*

- a) *for ethical reasons,*
- b) *to protect the minor participating in the procedure,*
- c) *to protect the persons participating in the procedure (Chapter V) or the witness,*
- d) *to protect state or official secrets.*

From the four main reasons for exclusion, let us examine first the exclusion of the public for *ethical reasons*, which requires judicial discretion. For such a reason, even the Section 293 of the Code of Criminal Procedure enabled the exclusion of the public from the main trial for the protection of the “public morals.” The measure could have been established for example by a hearing of crimes against sexual morals. (Vámbéry, 1916) Besides that, based on the corresponding requests of the parties, the exclusion of the public had been obligatory in a court procedure on defamation and slander.⁹ The judicial practice based on the law in force, as Király also mentioned, usually means sexual morals, and offences against public morals by ethical reasons, but we can list here such incidents as extreme brutality and ruthlessness, the citation of which at a public hearing would offend public morals. (Király, 2003) In my opinion, such other circumstances may also establish the exclusion of publicity for the given cause, the leaking of which – usually for a private reason – may trigger a sense of shame in the participants of the procedure, or the condemnation of the public toward them. In a revisional case, the High Court of Justice established that an ethically condemnable statement of negative content attributed to the private prosecutor, regarding both the private prosecutor and his/her deceased father, fully justified the exclusion of public from the trial out of reverence.¹⁰

Nevertheless, the highest judicial forum pointed it out in a principal decision, that the exclusion of publicity on ethical grounds is not justified solely by the fact that the accused and the injured were in a homosexual relationship, as the occurrence of a same-sex relationship is something that is already acknowledged socially, and as such, it cannot

⁹ Code of Criminal Procedure, Paragraph (2) of Section 542. See also: ANGYAL: *ibid.* pg. 280

¹⁰ High Court of Justice, Bfv.I.951/2011/2.

result in either a positive, or negative discrimination during the judicial procedure.¹¹ It can be seen from the cited cases, that judicature attributes great significance to the social acceptability of a certain circumstance or act, and to its effect on the feeling of society. Obviously, one could line up arguments against the high court decision mentioned above –especially regarding the position, vocation or occupation of those involved in the trial –, which may justify the exclusion of the public, considering the homosexual relationship. Especially, if the relationship is secret and it may induce shame in the participant of the trial or trigger negative public opinion, were it revealed.

However, the Supreme Court considered the partial exclusion of publicity justified on ethical grounds in case of the hearing of a single witness in a revisional procedure regarding a criminal case initiated because of a bribery qualified as grievous. Namely, the witness – a mother of three, living in a partnership – recounted her emotional attachment to the perpetrator accused of passive bribery in her confession, the revelation of which in front of the public would have made her situation in the family very difficult. Thus, the protection of the private life of the witness legally justified, for an ethical reason, the exclusion of the public from procedural acts related to the hearing of the witness.¹²

The *protection of a minor* participating in the procedure may also serve as a ground for the exclusion of publicity. A minor can participate in the procedure as an accused, injured, witness or of other interest, also, according to the rules of Law C of 2012 (Criminal law) in force since 1st July 2013, a child older than twelve, who committed certain aggravated assault against health or life, or a violent crime against property, can become an accused. The social need to ensure the undisturbed ethical and mental development of minors present in the court either as an accused or a witness may be stronger than the principle of publicity, and can justify the exclusion of it.¹³ In many cases, this legal reason can be established together with the ethical reason, but this is not necessary at all.¹⁴

Publicity can also be excluded for the sake of *the persons participating in the procedure or the witness*.¹⁵ Persons participating in the procedure, among others, are the accused, the defender, the injured, the witness and other people concerned. The procedural law currently in force pays great attention to witness protection, with a detailed regulation. Witness confession counts as highly important evidence at the criminal trial, and many times it cannot even be substituted with anything. Thus, it must be ensured by all means – especially in cases of significant subjective weight, in violent or organized crime cases – that witnesses may give their confession under uninfluenced circumstances, without being intimidated. It can be ordered for the sake of the protection of the witnesses to manage their personal information, even their name, as private, they can be declared as specially protected, which excludes the possibility of hearing them at a trial, furthermore, they may

¹¹ EBH2000.190.

¹² Supreme Court, Bfv.II.807/2012/4.

¹³ With minors, it can have a great significance to get a confession in an undisturbed, unstressed, uninfluenced atmosphere, which could be another argument for a hearing with the public excluded, for the sake of their protection. See: Balázs ELEK: The significance of age in the hearing of minors in the criminal procedure, Home Affairs Review, 2011/3, p. 93-11.; Balázs ELEK: Reliability of personal evidences in criminal cases, Police Review, 2009/3, p. 87-102

¹⁴ Practical Commentary on Criminal Procedural Law, Second edition, Volume II, (ed. György BERKES) HVGORAC, Budapest, p. 664

¹⁵ This legal reason was established by Section 141 of Law I of 2002 (Be. Novella).

receive personal protection according to the law, or may participate in a witness protection program as per special law, which can guarantee their anonymity even with changing their identity and providing a new place of living.¹⁶ Besides the incomplete list of protective measures above, the witness, or any other person participating in the procedure, can be protected with the exclusion of publicity. Krisztián Szabó pointed it out in his monograph, that the decision regarding the exclusion of publicity requires careful consideration from the court, to avoid the unjustified limitation of one of the most important functional procedures. (Szabó, 2012) I agree with this statement of his. But I do not share fully the notion that the exclusion of publicity can only be justified for the sake of protecting the witness, due to the prominent significance of the principle. In my opinion, it can also be justified by the protection of the accused, of the accomplice, and especially of an accused that cooperates with the authorities and provides damning testimony against another accused (*pentito*), or even of the specialists submitting damning opinion on the accused. It is obvious though, that in the judicial procedure, “in camera” trials are primarily ordered for the sake of protecting the witness. An example for this is a decision of the High Court made in a revisional procedure, where it has been established that publicity was excluded legally for the sake of protecting the witnesses in a case of hearing detectives, who got involved in a gun-battle with the accused – who mortally wounded their comrade with a gun – as a result of conspiring actions on their part.¹⁷

The protection of state and official secrets is a special reason to exclude publicity compared to the previously examined ones, because if the legal preconditions are given, the public must be excluded. Otherwise, one must expect consequences as per criminal law, if official secrets become available for unauthorized people without the consent of the qualifier. In such cases, only client publicity is asserted, and the participants of the trial are obliged to keep all official information they received to themselves. The notion of official secret, the qualification procedure, the levels of information protection and the method of protection are primarily defined by the provisions of Law CLV of 2009. Law differentiates between top secret, secret and confidential information, and information with a limited circulation. Protection is only asserted, when information is made official during a regular qualifying procedure, which has special prerequisites of form and content. If the court establishes that there are official documents or other data carriers among the criminal documents, and especially if those are used as evidence, publicity must be excluded without consideration. In absence of this, misuse of official information might be realized (as defined in Section 265 of Criminal Code), and criminal procedure can be initiated based on the report of the qualified person (Article (2) of Section 266 of Criminal Code). Considering all this, for sake of asserting the appropriate protection for official information, the court has to examine the documents attached to the charges with great care already during the preparation of the trial, to see whether there is official information among the evidence, which could necessitate the ordering of an “in camera” trial. Practical experience shows that charges are often accompanied not only by open information, but also by official, not yet opened information as well, typically on compact disc data carriers, which hold tapped telephone conversations. If they do not want to use these as evidence, nothing prevents the hearing from being public, protection can be

¹⁶ See Law LXXXV of 2001 on witness protection program

¹⁷ High Court Bfv.I.964/2011/7. (Court of Budapest 9.B.593/2003., High Court of Budapest 3.Bf.1429/2004.)

ensured in a procedure in which the regulations on guarding secrecy are applied. However, according to my opinion, in spite of the obvious technical difficulties, a procedure of investigation or prosecution, in which such official information is forwarded to the court, along with the records of investigation, that they do not wish to use, is not appropriate. The reason for this often is that it is difficult to separate the public material from the official one on the data carrier, although I think that at the current state of technical development, the physical separation of evidence wished to use cannot be an objective problem.

When the court excludes the public from a public hearing, an “in camera” trial is held.¹⁸ The rule defined by the revisional law about the acceleration of the criminal procedure does not have the acceleration of procedure in its focus, but it has a technical nature, it defines the notion for “in camera” trial.¹⁹ Namely, the court cannot only have a trial, but a public meeting as well regarding a case, for example, in the primary procedure (according to Paragraph (1) of Article 541 of CP) (declaring the trial in a separate procedure off), in the secondary trial (Paragraph (1) of Article 361 of CP), and in the tertiary procedure (Paragraph (1) of Article 391 of CP) as well. In the instance of these procedural acts, an “in camera” trial is held when publicity is excluded from the court.

Those entitled to propose a motion may propose for the exclusion of public at any stage of the procedure, thus, in the primary trial, but even in the secondary, or tertiary procedure.²⁰ Such a motion is usually proposed by the prosecutor, the defense, the accused, or the injured or witness, or the representative of these people.

3.2 Measures in connection with the exclusion of publicity

The court makes a formal decision with reasoning regarding the subject of exclusion of publicity. No separate appeal lies against the decision, but grievance can be made of it by an appeal against the definitive decision.²¹ The restriction of the right to appeal can be explained by the legislator wanting to avoid the interruption of the trial until the judgment on the separate appeal. (Király, 2003) In my opinion – as opposed to the reasoning of the revisional law establishing the words of the law in force²² – the decision cannot be considered exclusively of a technical, conductive nature, as it requires reasoning, on the other hand, it is a decision – with a possibility to be made grievance of later by the appeal against the definitive decision –, the illegal quality of which could even lead to the judgment being declared invalid. It is significant, that beside the process of the division, it is not the head of the division, but rather, the court itself that orders the exclusion of publicity, or the denial of the motion that proposes it.

With certain prerequisites, even if the public is excluded, the law makes it possible for a person not being a main participant or in any other position to be present at the trial. One instance of this is when it is allowed for officials performing jurisdictional duties, for

¹⁸ Paragraph (3a) of Article 238 of CP. Promulgated by Article 143 of Law CLXXXIII of 2010, in force since 1st of March, 2011.

¹⁹ See the ministerial preamble attached to Article 143 of Law CLXXXIII of 2010.

²⁰ See Paragraph (4) of Article 237 of CP

²¹ Paragraph (1) of Article 238

²² The reasoning connected to Paragraph (1) of Article 142 of Law I of 2002 points it out by citing Paragraph (2) of Article 260 of CP that the decision appears in a trial-leading order.

consular representatives of accused foreign citizens, or, based on the provision of an international contract, for a member of the authority of a foreign state to be present at the “in camera” trial.²³ These legal regulations are justified on the one hand by our international obligations, and on the other, it provides an extra guarantee that at the trial of a person who is not being familiar with the Hungarian language or law, and thus, having an obvious disadvantage compared to a Hungarian citizen when it comes to defense, a representative of the state of the accused can be present, which not only means control from the side of the foreign state to have a fair trial, but it also strengthens the position of the accused.

The other instance is when the injured, if they do not have a representative, or the accused, if they do not have defense, can propose that a person appointed by them and being there at the site, might be present at the trial, except when that person is to be examined as well. But if the public has been excluded for the sake of the protection of official or state information, such a motion cannot be proposed. No appeal lies for the decision made in the subject of this proposal.²⁴ The assurance of the presence of the so called confidential people is not a new institute in the Hungarian rules of procedure, as it had been known already by the Code of Criminal Procedure. In case publicity was excluded, there could have been two appointed confidential men present for each accused and injured at the main trial.²⁵ According to Vámbéry, publicity is so called emblematic in cases conducted in the presence of such people. (Vámbéry, 1916) It goes without saying that the trial is not secret in such cases either, because on the one hand, client publicity is asserted, and on the other, the presence of confidential people provides a publicity which has a wider scope nominally. The presence of the confidential person serves firstly social control, and secondly, it supports the protection of people participating in the trial without a representative and the assertion of their rights, according to the law in force as well. Naturally, as per the principle of equality in front of the law, as opposed to what the Code of Criminal Procedure states, both males and females can have such a function already.

If the court orders an “in camera” trial, it warns the participants that they cannot give away information about what they heard at the trial, and if needs be, it calls their attention to the penal consequences of the misuse of official or state information. The warning must be put down in the records of evidence.²⁶ The appropriate protection of the interest establishing the exclusion of publicity can only be ensured, if the clients do not give away any information about what they heard at the trial either. The head of division must warn the participants about this, and, if needs be, so when it is justified in relation of the given person, about the penal consequences of the misuse of official or state information.

In accordance with the principle of publicity, the press has a right to provide information about a public hearing as per Paragraph (2) of Article 74/A. of the CP. At the same time, the press is not entitled to cover an “in camera” trial, or any part of the trial from which the court excluded publicity, and no one can inform them either, except when publicity had been excluded due to the misbehavior of the audience (Paragraph (2) of Article 74/B. of CP). It is quite obvious and goes without saying that information and

²³See Paragraph (2) of Article 238 of CP

²⁴See Paragraph (3) of Article 238 of CP

²⁵Code of Criminal Procedure, Article 294

²⁶Para. (4) of Art. 238 of CP

circumstances guarded by an “in camera” trial would not be protected when exposed to the press, thus – disregarding the cited exception – the press is not entitled to cover an “in camera” trial either in electronic, or in another form, and its representatives cannot be present either.

The trial must be conducted publicly, if the reason for an “in camera” trial is eliminated. The court, even if publicity is excluded, must declare the definitive part of the decision made at an “in camera” trial to full extent, and its reasoning with the limitation, that those parts of reasoning and information, the publication of which would violate the interest that established an “in camera” trial, cannot become public.²⁷

It is a consequence of the principle guaranteeing publicity, that when the reason for an “in camera” trial is eliminated, the trial must continue publicly as per the main rule. The ethical reason usually does not expire, but the protection of the participant of the procedure can become unnecessary, and as far as official or secret information is concerned, the elimination of classification may result in the previously “in camera” trial turning into a public one.

The definitive part of a decision made at an “in camera” trial must be published in full, regardless of the nature of the legal reason that established the exclusion of publicity. There is no such information in the definitive part that could directly or indirectly violate the interest protected by an “in camera” trial, and this can be considered exemplary for official or secret information as well. The case is different when the reasons for judgment are presented verbally. The reasons may obviously mention such information, the publication of which is to be avoided due to the reason of the “in camera” trial, and this is especially valid in the case of excluding publicity for the sake of protecting official or secret data. It is clear from the legal provision that such information cannot be referred to in the reasoning, thus, the statement of facts and the evaluation of the evidence must be summed up in a way, so that they will not be available for unauthorized people. Often it is very difficult to formulate all this verbally in an understandable and accurate way, especially if the major part of the statement of facts is based on official or secret information. In these cases, obviously only those parts of the historical events are justifiable, which do not include protected information. What is explained above provides guidelines for “in camera” trials based on other legal reasons as well.

3.3 Consequences of violating the principle of publicity in the criminal case

The fundamental principle of publicity can be violated in two ways. First, when the court does not exclude publicity in spite of the regulation of law, and the second, when it excludes publicity without having a legal reason realized. (Tremmel, 2001) In the first case, the court does not recognize that publicity should be excluded – such a procedural situation occurs when official or secret information is mentioned in the case, which belongs under strict legal protection. According to what we already discussed above, the neglect of exclusion of publicity may result in penal consequences in these cases.

The other case is when the court excludes publicity without a legal reason. According to Article 261 of Law I of 1973, and until the modification in force since 1st of July, 2006, the CP qualified the exclusion of publicity without legal grounds as a relative procedural

²⁷ Para. (1)–(3) of Art. 239 of CP

offence (Paragraph (1) of Article 375 of CP). In compliance with this, the procedural offence did not entail the revocation of the revised decision unconditionally, with a binding force. Cassation could only have been used, if the error in the procedure had a significant influence on the verdict.

From 1st July, 2006, the law in force declares that exclusion of publicity from the court without a legal reason is an absolute procedural offence and a reason for revocation. It can result in the unjustified exclusion of publicity, if there is no ethical reason, no fact establishing the interest to protect the participants of the procedure or witnesses, and no official or secret information which would justify careful protection by having an “in camera” trial or meeting.²⁸ The decision about the exclusion of publicity requires a careful, thorough judicial procedure, with the consideration that conducting the criminal trial in public is the main rule. However, according to what has been discussed earlier, the exclusion of publicity can be usually justified for ethical reasons in crimes against the freedom of sexual life and sexual ethics, and in case of violent acts against minors for the sake of ensuring their protection and healthy psychic development. The protection of official or secret information can impose an obligation on the court regarding the ordering of an “in camera” trial. The procedural offence of an illegal exclusion of publicity is quite rare in practice, but it happens sometimes. In one such case, the court of law excluded publicity on the basis of the protection of tax secret in the interest of the participants of the case, based on paragraph (1) and section c) of paragraph (2) of Article 237 of CP. Nevertheless, the High Court proceeding on secondary level established, that the economic nature of the case in itself, a possible mentioning of tax secret is not sufficient to be a ground of, for reasons indicated, the exclusion of publicity, so the High Court revoked the judgment of the court of law because of an absolute procedural offence.²⁹

4. CLOSING REMARKS

Penal judgment is the mirror of justice. Publicity is the principle which allows society to clearly see its own functioning, its own faults and the calling to account of those who violate its order. Furthermore, it grants a glimpse into the mechanism of penal authorities, creating a control over the independent judicial branch. The principle of publicity is already asserted today on a global level, although it goes without saying, that different states make possible for example the informing of the press in different ways. Following Cséka I believe, that the principle of publicity is irreversible, and its validity cannot be questioned in spite of its disadvantages. Namely, because its advantages represent a more significant weight on the scale of fair procedure, as the already quoted, undoubtedly real disadvantages, and suppressing these is the task of effective legislation in my opinion – such as the retentive, stricter sanctioning of disturbing behavior allowed by publicity³⁰, and the regulation of the way press is informed, ensuring that press coverage does not influence in any way the order of the trial, especially the process of verification. One such regulation could be to make a closed-circuit recording with the internal technical system

²⁸ See section II. f) of paragraph (1) of section 373 of CP, and sections a-c) of paragraph (3) of section 237 of CP

²⁹ Court of Law of Nyíregyháza, 4.B.134/2011/69., High Court of Debrecen Bf.II.175/2013/17.

³⁰ I consider it justifiable, similar to certain Anglo-Saxon solutions, to penalize behavior that entails the contempt of court.

of the court, and to have this recording forwarded uniformly to the press, and this way, it would be possible to prevent those undoubtedly procedure-disturbing effects caused by recordings conducted simultaneously by several television companies at the same time. Another solution would be if the law of procedure defined the standards of conducting a trial – in relation to the presence and covering of the press – in a more detailed and effective way, and this would help prevent such scenarios, which not only endanger the order and decorum of the court, but also influence the process of verification. The technical developments of the future will no doubt have an effect on the court procedures as well. There are already plans to publish case documents in a digital format, instead of paper, and quite possibly, the electronic information of the press is being modernized as well. But the right of future generations will expect the influence-free conduct of criminal trials, which is another guaranteeing safeguard of a fair procedure beside publicity. The new law of criminal procedure already under codification can be an important key in having fair procedures, its tasks being the maintenance of rules of guarantee, and the establishment of a simpler and more effective process of verification than the present one.

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