

## **CRIMINAL RECORD AS A “SECONDARY SANCTION”**

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### **Abstract in original language**

Az elítélt személy adatai bekerülnek a bűnügyi nyilvántartásba, amelynek nemcsak büntetőjogi következményei vannak, hanem az élet más területén is az elítéltnak negatív (jog)következményekkel kell számolnia. A 144/2008. (XI. 26.) AB határozatig a mentesítést követően sem törölték a nyilvántartásból az elkövető adatait, amely az Alkotmánybíróság döntése szerint az emberi méltósághoz való jogba ütközik.

Nem is említve, hogy európai, illetve nemzetközi szinten is egyre szélesebb körben avatkoznak be az egyének magánszférájába.

### **Key words in original language**

Bűnügyi nyilvántartás; alapvető jogok; rendőrségi és bűnügyi együttműködés.

### **Abstract**

Everybody knows that guilty person has to be punished because of some committed criminal offence. Besides executing the sanction, the perpetrator's personal data get in the national criminal record. It has also got negative legal consequences for example in the field of employment, which exists until exemption. This regulation must comply with the ne bis in idem principle. Not to mention other constitutional rights.

Furthermore, what will be the next step in the European police and judicial cooperation in criminal matters?

### **Key words**

Criminal record; fundamental rights; police and judicial cooperation.

### **Introduction**

Criminal record concerns fundamental rights as the Constitutional Court of the Republic of Hungary has set it down. In criminal databases lots of personal and special personal data are handled. Data handling must comply with the protection of personal data. Not to mention the fact that criminal data concern the right to life and human dignity as well. On the other hand there is the criminal jurisdiction of the State which requires from the State to punish perpetrators of criminal offences. The State has the obligation to protect its citizens - their life, their corporal integrity, their property etc. -

from criminals. Security and other constitutional rights compete with each other. The legislation's task is to find the adequate balance among these constitutional interests.

Fundamental rights are endangered by the European and the international cooperation in criminal matters, too. On supranational level data protection must also be guaranteed so much the more, as the tendency is that the State is encroaching upon wider and wider sphere of private life on behalf of security and investigation.

#### The Hungarian regulation

Criminal record is an efficient criminological measure for authorities investigating a case, but it must function within constitutional limits. The system of Hungarian criminal records consists of two parts: the database of identification data and photos, moreover the criminal records. Criminal records have got several types in Hungary: the register of criminal offenders, the record of people who have to take disadvantageous legal consequence, people who have to face compulsory dispositions, people who are involved in a criminal procedure (i. e. suspects and accused people).

In addition to this system there are many databases that assist investigation, for example the record of criminal and police biometrics data. According to the law in force the record of biometric data involves the dactyloscopic database and the DNA-profile database, too.<sup>1</sup>

Beyond these records there are many other databases that support investigation such as registers connected to the personal and material warrant of caption or other databases handled by the police such as the modus operandi database.<sup>2</sup>

A guilty person has to be punished because of some committed criminal offence. The State's obligation is to protect the other members of society. Besides executing a sanction (for example imprisonment), the perpetrator's personal data get into the national criminal record. It has also got further

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<sup>1</sup> Act XLVII of 2009 on the system of the criminal records, recording of judgement against Hungarian citizens by the courts of the Member States of The European Union and the record of criminal and police biometrics data § 3 (1), § 7, § 36 (1)

Cf. FENYVESI, Csaba – HERKE, Csongor: The role of criminal recording in the criminalistics involving DNA database In: Tremmel Flórián – Mészáros Bence – Fenyvesi Csaba: Orvosok és jogászok a büntető igazságszolgáltatásban. Dezső László emlékkönyv, Pécs, 2005, pp. 45-54

<sup>2</sup> FENYVESI – HERKE, 2005, pp. 45-46

FENYVESI, Csaba – HERKE, Csongor: A bűnügyi nyilvántartás szerepe a kriminalisztikában. In: Nagy Ferenc (ed.): Ad futuram memoriam. Tanulmányok Cséka Ervin 85. születésnapja tiszteletére. Pólay Elemér Alapítvány, Szeged, 2007, p. 206

negative legal consequences for example in the field of employment, which exists until exemption. The time of the exemption is defined in the penal code. The record was valid for a longer time than the exemption until the Constitutional Court declared that this regulation is unconstitutional. Until the decision of the Constitutional Court personal data could be found in the criminal record even if the offender had already got a clean record.<sup>3</sup> The exemption is a fundamental requirement that is in connection with the right to human life and human dignity since the criminal jurisdiction of the state is limited by the fundamental human rights. The right to human dignity has got several components such as the right to self-determination, the protection of private sphere and its special aspect, the protection of personal data. So the legal consequences of the conviction of a criminal cannot be unlimited. After the exemption – according to objective points of view – the criminal has got the right to live an unprejudiced life. Threats of later crime are not sufficient reason for the limitation of rights.

The right to human dignity is the most important fundamental right along with the right to life. This right comprehends the right to self-determination, too. And as I have referred to the fact that in the criminal records there are many data of innocent people, too. So the problem of criminal records concerns the presumption of innocence as well. The information exchange between states should also serve legal means against crimes and should not harm the resocialization of perpetrators. The effort against delinquency can be realized only under the honour of human rights and the rule of law.<sup>4</sup>

So the regulation of criminal record must comply with the *ne bis in idem* principle, too. That means that no legal action can be applied twice for the same criminal offence. After the execution of a sanction and after the exemption a criminal has got the right to resocialization that cannot be restricted after the exemption. If it does not work in this way the criminal who committed a crime only once would be stigmatized gratuitously for a long time.

Not to mention that a person who is not declared guilty by a court could also be registered in the Hungarian criminal database. For example the

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<sup>3</sup> In several European countries this regulation proves to be constitutional. Criminal data are handled for a long time, for example in Switzerland information is stored for 15 years if the sanction is minimum one year long or in Germany it lasts 3, 5, 10 or 20 years from the execution – depending on the type of sanction.

However, in the case of *Puig Panella c. Spain* the European Court of Human Rights settled the harm of the Convention because data about the conviction of the criminal had been handled for 13 years.

<sup>4</sup> Decision 144/2008. (XI. 26.) AB

dactyloscopic database contains fingerprints of people just because they were at the scene of crime however they are not guilty.<sup>5</sup>

It is indisputable that further fundamental rights are concerned by criminal records, first of all the protection of personal data. A criminal record contains an especially large volume of personal data and special personal data. According to the Hungarian Constitutional Court the protection of personal data has two sides: a passive and an active one. Passive protection means that the state has to abstain from encroachment upon the private sphere. On the other hand the active side of data protection obliges the state to go to any lengths for the protection. This latter is called the obligation of objective institution protection.<sup>6</sup> Data handling is necessary for the efficient enforcement of the criminal power of the State. The Constitutional Court examined the constitutionalism of data handling outside the criminal field since in the criminal database registered data are applied in other fields of our life. In these fields the constitutionalism of data handling depends on the quantity and the quality of data because the threats of forming a personality-profile can exist. Not all kinds of discrimination are unconstitutional, because difference could have a constitutional reason.<sup>7</sup>

The European Court of Human Rights also decided very similarly to the Hungarian Constitutional Court. It emphasizes that the recording of DNA samples and fingerprints of arrested people by authorities violates Article 8 of the European Convention of Human Rights that declares the right to private life.<sup>8</sup> If the storing is not differentiated by the age of the criminal or the importance of the offence, it could harm fundamental rights.<sup>9</sup>

The previous law was not adequate to the requirement of legal security, either. The Act LXXXV of 1999 on criminal record and certificate showing lack of criminal record did not regulate exactly the person entitled to the right to have access to criminal personal information that can harm legal security.

The decisions of the Constitutional Court harmonise with Recommendations of the Council of Europe, for example with the Council of Europe's Recommendation No. R (84) 10. These recommendations emphasise that in the course of fight against international delinquency the honour to

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<sup>5</sup> Act XLVII of 2009 on the system of the criminal records, recording of judgement against Hungarian citizens by the courts of the Member States of The European Union and the record of criminal and police biometrics data § 38 a)

<sup>6</sup> Decision 11/1990. (V. 1.) AB

<sup>7</sup> Decision 144/2008. (XI. 26.) AB

<sup>8</sup> The right to protection of personal data is not declared in the Convention, just the right to private life, but the Court implies data protection in it.

<sup>9</sup> Case of S. and Marper v. the United Kingdom (*Applications nos. 30562/04 and 30566/04*)

fundamental rights and the rule of law must be taken into consideration.<sup>10</sup> Human rights can be restricted only if the restriction is necessary and proportionate with the definite and legally justified purpose. The regulation of the criminal record must comply with the requirement of proportionality that is to say „the importance of the objective to be achieved must be proportionate with the restriction of the fundamental right concerned.”<sup>11</sup>

Legislative power must also keep in view that criminal law is the ultima ratio of the legal system, which means that criminal law must be a keystone of sanctions in the whole legal system. „The role and function of criminal sanctions, (...) is the preservation of legal and moral norms when no other legal sanction can be of assistance.”<sup>12</sup>

### Cooperation in criminal matters between States

As I have mentioned before, data protection is getting more and more important on European and international level, too. On these levels fundamental rights and the rule the functioning of jurisdiction. But it cannot hinder the resocialization of the criminal.

The problem is that there is no regulation on data protection in criminal matters. The Lisbon Treaty necessarily leads to changes in the protection of personal data. This Treaty abolishes the pillar system, but this change does not lead to a comprehensive data protection. The directive 95/46/EC - passed in the First Pillar - on the protection of individuals with regard to the processing of personal data and on the free movement of such data is not applicable in the Third Pillar [Police and Judicial Co-operation in Criminal Matters (PJCC)],<sup>13</sup> because Article 3 (2) of the directive declares that it “shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law.” However, this directive lays down the most fundamental requirements against data handling for example the requirement of lawfulness, the principle of Purpose Specification etc.<sup>14</sup>

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<sup>10</sup> Decision 144/2008. (XI. 26.) AB

<sup>11</sup> Decision 15/1991. (IV. 13.) AB

<sup>12</sup> Decision 11/1991. (III. 5.) AB, Decision 144/2008. (XI. 26.) AB

<sup>13</sup> HIJMANS, Hielke – SCIROCCO, Alfonso: Shortcomings in EU data protection in the third and the second pillars. Can the Lisbon Treaty be expected to help? In: *Common Market Law Review*, v. 46, n. 5, October, 2009, p. 1514.

<sup>14</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data § 3 (2), § 6 (1) b

It is fact that other types of protection must be declared in criminal matters than in other field of law. There is no comprehensive regulation of data protection in the criminal field. This shortcoming wanted to be remedied by the Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters but its force does not cover the cooperation between Member State and Third Country or a natural person since in this situation states (or a state and a natural person) negotiate from time to time. The framework does not extend to the national data handling, either. Furthermore, it renders handling of data to other Member States for any purposes possible, if the sender assents to it. This regulation is an unjustified empowering of the States to data handling. Moreover, other specific regulations – for example the framework decision of the European Criminal Records Information System (ECRIS) - have priority over this framework. However, several important principles are declared in it.<sup>15</sup>

I have referred to the fact that beyond the national regulation a new dimension has appeared: the international and the European (regional) cooperation. Lots of information are exchanged between states. It raises the problem of protection of personal data and data security. The Council Framework Decision on the protection of personal data of police and judicial cooperation in criminal matters is the legal source that poses the fundamental principles of data protection in criminal cooperation. “The Hague Programme on strengthening freedom, security and justice in the European Union, adopted by the European Council in 2004, has stressed the need for an innovative approach to the cross-border exchange of law-enforcement information under the strict observation of key conditions in the area of data protection and has invited the Commission to submit proposals in this regard by the end of 2005 at the latest. This was reflected in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union.” “It is necessary to specify the objectives of data protection within the framework of police and judicial activities and to lay down rules concerning the lawfulness of processing of personal data in order to ensure that any information that might be exchanged has been processed lawfully and in accordance with fundamental principles relating to data quality.”<sup>16</sup>

A new legal institution is the ECRIS on the European level that is not a supranational criminal database but a cooperation between Member States. The Council Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States establishes a more effective measure in criminal

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<sup>15</sup> HIJMANS – SCIROCCO, pp. 1494, 1499, 1516, 1519

<sup>16</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (4) (11)

cooperation. Until this regulation information on convictions had been founded on Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. The objective was to “simplify the procedures for transferring documents between States,” but the framework decision has not aimed at bringing together the systems of national criminal records yet. “Mutual understanding may be enhanced by the creation of a "standardised European format" allowing information to be exchanged in a uniform, electronic and easily machine-translatable way.”<sup>17</sup> What will be the next step in the European police and judicial cooperation in criminal matters? Will the cooperation in criminal matters come to a standstill in information exchange or will a central European criminal record be established in the near future? Raster investigation is very useful in criminal investigation, but can they work in a regional area? This topic raises many-many questions but it is very difficult to answer them. This field of criminal law is changing, is developing. We see the tendency, but we can't answer the question about what the outcome will be.

Anyway, there are many other databases and data in the EU that are not established for criminal purposes (for example Eurodac, biometric passport), but they are applied in criminal investigation, too. The Court's case law is not uniform in the question of data handling diverging from the original purpose [Case of Ireland v. European Parliament and Council; PNR case]. It raises the question of whether it is adequate to the fundamental rights if the use of data diverges from the original aim. It could concern the principle of Purpose Specification.<sup>18</sup>

Beyond these decisions, in the case of Friedl versus Austria the Commission declared that databases about photos and fingerprints can be contrary to the right of the private sphere, which is declared under Article 8 of the European Convention of Human Rights. But photographing of a participant in a demonstration does not harm the Convention. The Commission decided in this way in case of P. G. and J. H. contra United Kingdom, too. In an other case – in the case of Leander contra Sweden – the Commission examined the question of whether a control system follows legal aims or not. In the first step the Commission answered the question of whether the restriction is declared by law, in the second step the necessity test was answered. It is similar to the Hungarian Constitutional Court's practice.<sup>19</sup>

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<sup>17</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (3) (8) (16) (17)

<sup>18</sup> HIJMANS – SCIROCCO, pp. 1504-1505

<sup>19</sup> BERGER, Vincent: *Az Emberi Jogok Európai Bíróságának joggyakorlata*, Budapest, HVG-Orac, 1999, pp. 387-388

As I have earlier referred to the fact that cooperation in criminal matters is developing not only among European countries but also among other states, especially the USA would like to strengthen the information exchange with the EU. The USA wants to encroach upon the private sphere of people with reference to fight against terrorism. Where is the limit, when the investigation bows to the protection of personal data and to other fundamental rights? Imagine one of the last requests of the USA! The United States demand from the European Parliament that the EU should deliver data about all bank transfers. That means more than 90 million data a months. The reason is the fight against terrorism.

All of us know that information is power. Information is the basis of investigation. But nowadays the EU, too, feels that because of terrorism and other criminal offences this encroaches on its citizens' private life.

### Conclusion

To sum up I can just refer to the fact again that nowadays criminal investigation cannot be imagined without developed databases either in a country or on supranational level.<sup>20</sup> A great number of data is necessary for authorities investigating a case but legislation – both the national and the European legislation – has to take care of data protection. There is no stable and comprehensive regulation on data protection in criminal matters. Orwell's world must not be realized where Big Brother is watching you.

The Lisbon Treaty could be the first step to the protection. Under the Lisbon Treaty, the Treaty on the Functioning of the European Union ordains that the European Parliament and the European Council should pass a regulation about data handling. Furthermore, the European Court of Justice would be competent in all areas, except the common foreign and security policy, which leads to a wider legal protection. And the EU accedes to the ECHR, too.<sup>21</sup>

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<sup>20</sup> FENYVESI – HERKE, 2005, p. 54

<sup>21</sup> HIJMANS – SCIROCCO, pp. 1520, 1523



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