

Kazenski postopek, zasebnost in preiskava elektronskih naprav

Criminal procedure, privacy and digital investigations

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A. Kazenski postopek – pojem

skupek pravno urejenih dejanj pristojnih drž.
organov in drugih udeležencev

če je verjetno, da je bilo izvršeno kaznivo dejanje

z namenom ugotoviti in odločiti o obstoju kaznivega
dejanja in o storilcu

izreči kazensko sankcijo

Criminal procedure – the concept

a set of legally regulated actions of the competent
state authorities and other actors

in case of likelihood a crime has been committed

in order to establish and decide on the existence of
a crime and to establish the identity of the
perpetrator

and to impose a criminal sanction

(Nasprotujoče si) funkcije kazenskega postopka (Conflicting) functions of criminal procedure

varstvena

odzivanje na kriminaliteto

kaz. postopek omogoča, da se uresničimo kazenskopравни predpis uresniči (Kazenski zakonik)

law-enforcement

responding to crime

crim. procedure allows us to implement the criminal law regulations (Criminal Code)

jamstvena

omejevanje represije

uresničevanje kazenskega prava na način, ki je v naši družbi vrednostno in pravno sprejemljiv (procesna jamstva)

safeguards (rights and freedoms)

limiting repression

exercising criminal law in a way that is acceptable in our society in terms of its values and legal framework (procedural guarantees)

Modeli kazenskega postopka

akuzatorni

reševanje spora med strankama postopka

inkvizitorni

iskanje resnice o preteklem dogodku

mešani

sinteza?

Models of criminal procedure

accusatorial

dispute resolution between parties

inquisitorial

truth-finding

mixed

synthesis?

Pravni viri kazenskega procesnega prava v RS

Legal sources of criminal procedure law in Slovenia

Ustava RS

Constitution

Konvencija o varstvu človekovih pravic in temeljnih svoboščin

Convention for the Protection of Human Rights and Fundamental Freedoms

Zakon o kazenskem postopku

Criminal Procedure Act

Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije

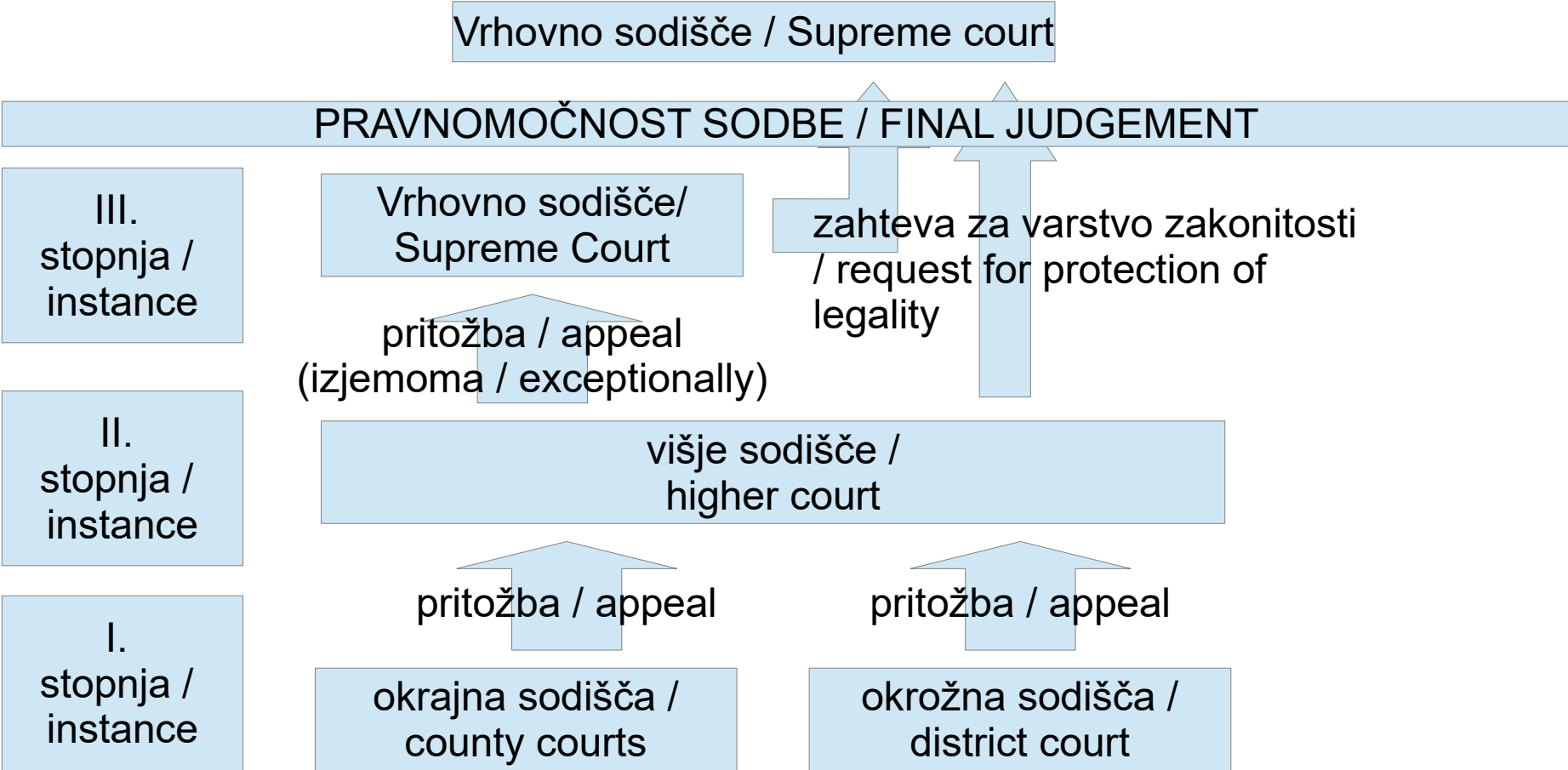
Law on Cooperation in Criminal Matters with the Member States of the European Union

Zakon o zaščiti prič

Witness Protection Act

podzakonski akti, sodna praksa,
pravni akti EU

by-laws, case law,
EU legal instruments



Tipi kazenskega postopka v slovenskih ureditvi

Types of criminal procedure

redni kazenski postopek

na prvi stopnji pristojna okrožna sodišča
kazniva dejanja, za katera je predpisana kazen
zapora nad 3 leta
zborna sojenje (izjeme)

regular criminal proceedings

court of the first instance: district courts
criminal offenses punishable by imprisonment
for more than 3 years
trial by college (exceptions)

skrajšani kazenski postopek

na prvi stopnji pristojna okrajna sodišča
kazniva dejanja, za katera je predpisana
denarna kazen ali kazen zapora do 3 let
(brez sodne preiskave)
sodnik posameznik (na prvi stopnji)

abbreviated criminal proceedings

court the first instance: county courts
criminal offenses punishable by a fine or
imprisonment for up to 3 years
(without judicial investigation)
single judge (in first instance)

postopek zoper mladoletnike

proceedings against minors

Temeljna načela kazenskega postopka

načelo oficialnosti
načelo akuzatornosti (obtožno načelo)
načelo legalitete pregona
načelo iskanja resnice
preiskovalno načelo / razpravno načelo
načelo proste presoje dokazov
načelo neposrednosti in ustnosti glavne obravnave
načelo javnosti glavne obravnave
načelo ekonomičnosti in prepovedi zlorabe
procesnih pravic

Principles of criminal procedure

principle of official prosecution
accusatory principle
the principle of legality of prosecution
the principle of truth-finding
investigative principle / adversary principle
the principle of free assessment of evidence
the principle of immediacy and orality of the main
hearing
the principle of publicity of the main hearing
the principle of economy and the prohibition of
abuse of procedural rights

Faze rednega kazenskega postopka

Stages of criminal procedure

predkazenski postopek

pre-trial proceedings

sodna preiskava

judicial investigation

vložitev obtožnice in preizkus obtožbe

filing and preliminary examination of the charge

predobravnavni narok

pre-trial hearing

glavna obravnava

main hearing

postopek s pritožbo zoper sodbo

appeal proceedings against the judgment

postopek z izrednimi pravnimi sredstvi

extraordinary legal proceedings

OKROŽNO S. /
DISTRICT .C.

VIŠJE S. /
HIGHER COURT

VRHOVNO S. /
SUPREME C.

Omejevalni ukrepi

posegi v celovitost domnevnega storilca pred (brez) pravnomočne obsodilne sodbe

varnost ljudi, premoženja

zagotoviti nemoten tek kazenskega postopka
navzočnost domn. storilca
zavarovati izvršitev sodnih odločb

osebni (npr. pripor), stvarni (npr. začasno zavarovanje odvzema premoženjske koristi)

Restraining measures

interference with the integrity of the alleged perpetrator before / without a final conviction

security of people, property

to ensure the smooth running of criminal proceedings
attendance of alleged perpetrator
to secure the enforcement of judgments

eg pre-trial detention, bond, temporary seizure of assets

Preiskovalna dejanja

posegi v celovitost domnevnega storilca pred (brez) pravnomočne obsodilne sodbe

odkriti, preiskati kaznivo dejanje in ugotoviti domnevnega storilca

zagotoviti dokazna sredstva

zbiranje obvestil, hišna, osebna preiskava, zaseg predmetov, preiskava el. naprave, prikriti preiskovalni ukrepi

Investigative measures

interference with the integrity of the alleged perpetrator before/without a final conviction

to detect, investigate the crime and identify the alleged perpetrator

provide evidence

interviews, house/personal search, seizure of items, investigation of el. devices, covert investigative measures

Dejanja zavarovanja dokazovanja

Preservation of evidence

preprečiti nevarnost, da dokaznega sredstva kasneje ne bo mogoče uporabiti

to avoid the risk that the evidence will not be able to be used later

začasni zaseg predmetov, dejanja dokazovanja v predkazenskem postopku ali sodni preiskavi

temporary seizure of items, acts of evidence in pre-trial proceedings or judicial investigation

Dokazna sredstva in dokazovanje

»nosilci« podatkov, pomembnih za odločitev sodišča o obtožbi

priče

listine

izvedenci

elektronski dokaz

ogled

domnevni storilec

kdaj? glavna obravnava

vendar: zaradi zavarovanja dokazovanja že v predkazenskem postopku in v sodni preiskavi

Evidence and evidence-taking

"Carriers" of information relevant to the court's decision on the charge

witnesses

documents

experts

electronic evidence

crime scene inspection

the alleged perpetrator

when? main hearing

however: for the purpose of securing evidence already in pre-trial proceedings and in judicial investigation

B. Temelji varstva zasebnosti

Introducing protection of privacy

Pravni viri

Domači

Ustava RS

Kazenskopravno, civilnopravno varstvo

Mednarodni

EKČP: pravica do spoštovanja zasebnega in družinskega življenja, doma in dopisovanja, 8. člen

Legal sources

Constitution

Criminal law, civil law protection

International

ECHR: the right to respect for private and family life, home and correspondence, Article 8

Primerjava US v. EKČP

Constitution vs. ECHR

Merila posegov v zasebnost po EKČP so strožja?

Legitimni cilji posega: razlogi nacionalne varnosti, gospodarske blaginje države, preprečevanje neredov, preprečevanje kaznivih dejanj, varovanje zdravja, varovanje morale, varstvo pravic/svoboščin drugih – EKČP, 8/2

Merila posegov v zasebnost po URS so strožja?

Sodna odločba (nedotakljivost stanovanja, kom. zas.) - 36, 37 URS

Posegi v kom. zas.: uvedba/tek kazenskega postopka, varnost države – 37 URS

Are the criteria for privacy interventions under the ECHR stricter?

Legitimate objectives of the intervention: reasons of national security, economic prosperity of the state, prevention of riots, prevention of criminal offenses, protection of health, protection of morals, protection of the rights / freedoms of others - ECHR, 8/2

Are the criteria for privacy interventions according to the URS stricter?

Court decision (inviolability of the dwelling, comm. privacy) - 36, 37 URS

Interventions in comm. privacy: criminal proceedings, state security - 37 URS

Razvoj: moderne ustave

Development: modern constitutions

»The right of the people to be secure in their **persons, houses, papers, and effects**, against **unreasonable searches** and **seizures**, shall not be violated, and no **warrants** shall issue, but upon **probable cause**, supported by oath or affirmation, and **particularly describing** the place to be searched, and the persons or things to be seized.«

- IV. amandma k Ustavi ZDA

»The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.«

- IV. amendment to the US Constitution

Razvoj: Privilegij zoper samoobtožbo v. varstvo zasebnosti?

Development: privilege against self-incrimination vs. privacy protection

»For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself /.../ And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.«

- Boyd v. US, 1889

Kako razlikovati med zasebnostjo in pravico do molka?

Pravica do molka le v primeru zaslišanja ali njegovih ekvivalentov.

Pasivnost obd. pri posegih v zasebnost – gradivo dosegljivo mimo volje obd.

»For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself /.../ And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.«

- Boyd v. US, 1889

How to distinguish between privacy and the right to remain silent?

The right to remain silent applies only in the event of an interview/hearing of the alleged perpetrator or its equivalents.

Passivity of the alleg. perp. in cases of invasion of privacy - material available against the will of the alleg. perp.

Lastninski koncept varstva zasebnosti

Trespass concept of privacy protection

Ali gre za kršitev zasebnosti, če policija prisluškuje pogovorom v prostoru, po telefonu ipd. tako, da ne poseže v posest prostora?

Olmstead v. US, 1928: NE

Ločeno mnenje sodnika Brandeisa

Is it a violation of privacy if the police eavesdrop on conversations in the room, on the phone, etc. without trespassing?

Olmstead v. US, 1928: NO

Separate opinion of Judge Brandeis

Koncept (razumnega) pričakovanja zasebnosti: ZDA

Reasonable expectation of privacy: USA

Ali pomeni poseg v zasebnost prisluškovanje tel. pogovoru z napravo, pritrjeno na steno tel. govornice?

Does the invasion of privacy occur when wiretapping a telephone conversation with a device attached to the outer wall of the phone booth?

ZDA: Katz. v. US, 1967: DA

USA: Katz. v. US, 1967: YES

Poudarki:

- Pravica do zasebnosti varuje ljudi, ne prostore
- Ne-varovano? Kar oseba hote izpostavi javnosti (tudi če doma ali v pisarni)
- Varovano? Kar oseba želi zadržati kot zasebno (tudi če je dosegljivo javnosti)

Highlights:

- The right to privacy protects people, not premises
- Unprotected? What a person intentionally exposes to the public (even if at home or in the office)
- Protected? What a person wants to keep private (even if available to the public)

Kasnejši razvoj: opravičljivost, razumnost pričakovanj posameznika

Subsequent development: justifiability, reasonableness of individual expectations

Koncept (razumnega) pričakovanja zasebnosti: ECHR

Reasonable expectation of privacy: ECHR

Ali je varovana zasebnost policistke, ki službeni telefon uporablja za neslužbene potrebe?

Is the privacy of a police officer who uses a business phone for non-business purposes protected?

Halford v. UK, 1987: DA

Halford v. UK, 1987: YES

Pomembna:

- ni bilo opozorila delod., da bi bili lahko pogovori prestreženi
- izključna uporaba pisarne
- dva telefona, eden namenjen osebni uporabi

Important:

- there was no warning from the employer that the conversations could be intercepted
- exclusive use of the office
- two telephones, one for personal use

Širitev koncepta tudi na zasebnopravna razmerja. Izvorno?

Extending the concept to private-person's relationships as well. Originally?

Koncept (razumnega) pričakovanja zasebnosti: vsebina

Reasonable expectation of privacy: the concept

Subjektivni test: pričakovanje

izraženo navzven, razvidno drugim (npr. zaprta vrata, zavese, zaprt prtljažnik, geslo na elektronski pošti...

Subjective test: expectation

expressed externally, visible to others (eg closed doors, curtains, closed trunk, e-mail password ...

Objektivni test: opravičljivost

merila? moralna in druga ustaljena pravila v družbi...

Objective test: justifiability

criteria? morals and other established rules, values in society ...

Koncept (razumnega) pričakovanja zasebnosti: problemi

Reasonable expectation of privacy: problems

1. vrednostna odprtost testa: katera pričakovanja (vrednote, interesi) šteti za razumna (družbeno sprejemljiva)?

2. (pravno)kulturno pogojeno razumevanje koncepta zasebnosti (zasebnost-kot-skrivnost)

3. subjektivni test:

- če pričakovanja posameznika -> v funkciji odpovedi pravici
-> nepotreben

- če pričakovanja družbe -> opravlja nalogo objektivnega testa -> nepotreben

4. nejasna uporaba:

- (pretežno) vključevalna funkcija?

- (pretežno) izključevalna funkcija?

5. neuporabnost v kontekstu sodobnega tehnološkega razvoja?

1. value openness of the test: which expectations (values, interests) are considered reasonable (socially acceptable)?

2. (legal) culturally conditioned understanding of the concept of privacy (privacy-as-secret)

3. subjective test, how understood?

- if expectations of the individual -> in the function of waiver -> unnecessary

- if the society's expectations -> performs the task of an objective test -> unnecessary

4. unclear use:

- (mostly) inclusionary function? Defining privacy

- (mostly) exclusionary function? Limiting privacy

5. useless in the context of modern technological development?

Primer 1: prometni podatki

Example 1: communication traffic data

ZDA: Smith v. Maryland (third party doctrine in prometni podatki)

USA: Smith v. Maryland (third party doctrine and traffic data)

ESČP: Malone v. UK (prometni podatki neločljivo povezani s komunikacijo)

ECtHR: Malone v. UK (traffic data inextricably linked to communication)

Primer 2: delovno mesto

Kako zagotoviti, da bodo delovna sredstva, ki so v lasti delodajalca, tudi uporabljena za potrebe delovnega procesa?

ZDA: delavcu prizna pričakovanje zasebnosti, a ta se mora podrediti "razumnim" posegom delodajalca

ESČP: delavcu se prizna pričakovanje zasebnosti; delod. ima možnost "odpraviti" razumnost pričakovanja zasebnosti (Barbulescu vs. Romunija)

Example 2: the workplace

How to ensure that employer-owned work tools are also used for work-related purposes?

USA: Recognizes the employee's expectation of privacy, but this must be subjected to "reasonable" interventions by the employer

ECtHR: the worker is expected to have privacy; employer has the ability to "eliminate" the reasonableness of the expectation of privacy (Barbulescu v. Romania)

Varstvo zasebnosti v RS

Krovni 35 URS

Nedotakljivost telesne in duševne celovitosti

Zasebnost

Osebnostne pravice

Razmerje do drugih določb?

Varstvo zasebnosti po 35 URS je najširše

Posebni vidiki 36-38 URS ne izčrpajo varstva zasebnosti

Privacy protection in Slovenia

General protection: Art. 35 URS

Inviolability of physical and mental integrity

Privacy

Personality rights

Relation to other provisions?

Privacy protection under 35 URS is the broadest

Special aspects 36-38 of the URS do not exhaust the full scope of privacy protection

Zasebnost v. osebnostne pravice

Privacy and personality rights

Pravico do zasebnosti štejemo med osebnostne pravice

Značilnosti osebnostnih pravic?

Predmet varstva: elementi osebnosti

Nujni za svoboden razvoj in oblikovanje življenja

Primeri: pravica... do življenja, zdravja, duš. In tel. integritete, na lastni podobi, na glasu, do časti in dobrega imena, tudi osebne svobode...

The right to privacy is considered a personality right

Characteristics of personality rights?

Subject of protection: personality, autonomy

Necessary for free development and shaping of one's life

Examples: the right ... to life, health, mental and physical integrity, to one's own image, to one's voice, to honor and good name, to personal freedom ...



Skupno: pravica do samostojnega, svobodnega odločanja v lastnih zadevah

Svoboda v odločanju

Svoboda v ravnanju

Predpostavka: zanesljiv pregled nad informacijami o posamezniku, ki so znane njegovemu okolju

Common denominator: the right to independent, free decision-making in one's own affairs

Freedom in decision making

Freedom of action

Assumption: A reliable overview of the information about an individual that is known to his/her environment

Zasebnost v praksi USRS: primer odločbe U-I-272/98 (2003)

Privacy and the Slovenian Constitutional court: decision U-I-272/98 (2003)

1. Krog **intimnega delovanja**:

- celota ravnanj, razmerij, občutij,
- ki jih oblikuje posameznik
- **sam** ali **z drugimi**
- v intimni skupnosti

2. Samostojno odločanje posameznika, koga spustiti v ta krog

3. Varnost pred vdorom javnosti, drugih

Vidiki?

Prostorski --> glede na prostor

Funkcionalni --> glede na vsebino

1. Circle of **intimate activity**:

- the totality of actions, relationships, feelings,
- determined by an individual
- **alone or with others**
- in an intimate community

2. Independent decision of the individual whom to let into this circle

3. Security from intrusion by the public, others

Perspective?

Spatial -> according to space

Functional -> according to content



„osebne zadeve, ki jih želi ohraniti skrite in ki veljajo za take glede na ustaljena moralna in druga družbena pravila“

= koncept razumnega pričakovanja zasebnosti

»spolno življenje, zdravstveno stanje, zaupni pogovori med bližnjimi, dnevniški zapisi...«

= vsebinsko dopolnjen

"Personal matters which he wishes to keep hidden and which are regarded as such in accordance with established moral and other social rules"

= the concept of a reasonable expectation of privacy

"Sex life, health condition, confidential conversations between relatives, diary entries ..."

= substantially supplemented

Domet zasebnosti: stanovanje in varovani prostori

Scope of privacy: home, dwelling

“Stanovanje je nedotakljivo.” - 36 URS

»Dwellings are inviolable.« - Art. 36 of Const.

Predpostavke vstopa v prostor in preiskave: odločba sodišča, pristanek, zakon (če nujno, da se neposredno prijetje storilca KD ali zavarovanje ljudi in premoženja)

Preconditions for entering and investigating the premises: court decision, or consent, or statute (if necessary to directly arrest the perpetrator or secure people and property)

Pravila izvajanja vstopa v prostor in preiskave (navzočnost imetnika stanovanja/prostora, dve priči)

Rules for entering and investigating the premises (presence of the owner, two witnesses)

Stanovanje

13. Izhajajoč iz namena jamstva je predmet varovanja **zaključena celota prostorov, ki jih oseba uporablja za bivanje, kjer živi sama ali skupaj z bližnjimi ter skrito pred očmi javnosti in kamor spusti le osebe, ki jim dovoli vpogled v najbolj skrita področja svojega življenja. Gre za prostore, kjer oseba upravičeno pričakuje, da se jo pusti pri miru, ker je tam doma.** V tem smislu je treba razumeti pojma "stanovanje" in "drugi tuji prostori", uporabljena v 36. členu Ustave. Tudi pravica iz tretjega odstavka 36. člena Ustave se zato nanaša na preiskavo stanovanja in drugih prostorov v opisanem smislu izrazov.

- Up-430/00

Home, dwelling

13. Pursuant to the purpose of the guarantee, the subject of protection is the **complete set of spaces used by a person for living, where he lives alone or with loved ones and hidden from public view and where only persons who allow them access to the most hidden areas of his life. These are places where a person justifiably expects to be left alone because he or she is at home there.** In this sense, the terms "apartment" and "other foreign premises" used in Article 36 of the Constitution must be understood. The right from the third paragraph of Article 36 of the Constitution therefore also refers to the search of an apartment and other premises in the described sense.

- Up-430/00

Domest privacy: communication privacy

Scope of privacy: correspondence

“Zagotovljena je tajnost pisem in drugih občil.” - 37 URS

»The privacy of correspondence and other means of communication shall be guaranteed.« - Art. 37 of the Const.

Predpostavke dopustnosti posegov:

- določenost v zakonu (lex certa)
- sodna odločba
- časovna omejenost
- neizogibno
- za uvedbo/potek kaz.postopka ali za varnost države

Assumptions of admissibility of interventions:

- established by law (lex certa)
- court decision
- time constraint
- inevitability
- for the purpose of law-enforcement or for purposes of state security

Komunikacija?

7. Ustava v prvem odstavku 37. člena, s katerim zagotavlja tajnost pisem in drugih občil, varuje svobodo komuniciranja. Ta pravica zagotavlja varstvo posameznikovega **interesa**, da se brez njegove privolitve **nihče ne seznanj z vsebino** sporočila, ki ga posreduje prek kateregakoli **sredstva**, ki omogoča izmenjavo oziroma posredovanje informacij, kot tudi **interesa** posameznika, da **svobodno odloča o tem, komu, v kakšnem obsegu, na kakšen način in pod kakšnimi pogoji bo posredoval določeno sporočilo**.

Gre za varstvo svobodne in nenadzorovane komunikacije in s tem zaupnosti razmerij, v katere pri sporočanju stopa posameznik.

8. Področje varstva komunikacijske zasebnosti se razširja na pisma in druga občila (npr. telefon, telefaks, računalnik) ter obsega **posredovanje** pisnih, zvočnih ali slikovnih sporočil oziroma drugih **sporočil s subjektivno sporočilno vrednostjo**.

- Up-106/05

Correspondence?

7. In the first paragraph of Article 37, which ensures the secrecy of letters and other media, the Constitution protects the freedom of communication. This right ensures the protection of the individual's interest so that, without his consent, no one becomes aware of the **content** of the message conveyed by any **means** enabling the exchange or transmission of information, as well as the individual's interest in freely deciding to **whom, to what extent, in what way and under what conditions it will convey a particular message**. It is about protecting free and uncontrolled communication and thus the confidentiality of the relationships that an individual enters into when communicating.

8. The field of protection of communication privacy extends to letters and other media (eg telephone, fax, computer) and includes the **transmission of written, audio or visual messages or other messages with a subjective message value**.

- Up-106/05

Domet zasebnosti: informacijska zasebnost

Scope of privacy: personal data protection

»Zagotovljeno je varstvo osebnih podatkov.« - čl. 38
URS

"The protection of personal data shall be
guaranteed." - Art. 38 of Const.

Prepoved uporabe osebnih podatkov v nasprotju z
namenom njihovega zbiranja

Prohibition of the use of personal data contrary to
the purpose of their collection

Načelo zakonitosti

The principle of legality

Pravica do seznanitve z zbranimi podatki

The right to be acquainted with the collected data

Pravica do sodnega varstva ob kršitvi

The right to judicial protection in the event of an
infringement

Osebni podatki

“Osebni podatek je torej katerikoli podatek o posamezniku; oblika ni pomembna. **Bistveno je le, da se podatek nanaša na točno določenega ali vsaj določljivega posameznika.** DNK oziroma na podlagi njene analize pridobljeni podatki pomenijo najintimnejšo, trajno in nespremenljivo vez s točno določenim posameznikom. Enako torej velja tudi za profil DNK, ki brez dvoma izpolnjuje navedena merila. Kljub svoji reducirani obliki profil DNK omogoča identifikacijo (oziroma je prav temu tudi namenjen) in je že zgolj zaradi tega osebni podatek.”

- U-I-312/11

Personal data

“Personal data is therefore any data about an individual; the shape is not important. **It is only essential that the data refers to a specific or at least identifiable individual.** DNA, or the data obtained on the basis of its analysis, means the most intimate, lasting and unchanging bond with a specific individual. The same therefore applies to the DNA profile, which undoubtedly meets the above criteria. Despite its reduced form, the DNA profile allows identification (or is intended for that purpose) and is personal data for that reason alone.”

- U-I-312/11

Domet zasebnosti: upravičenci

Scope of privacy: beneficiaries

fizične osebe

natural persons

pravne osebe

legal entities

ESČP, Societe Colas idr. v. Francija (teritorialni vidik);

ECtHR, Societe Colas et al. v. France (territorial aspect);

ESČP, Wieser Bicos... v. Avstrija (komunikacijska zasebnost)

ECtHR, Wieser Bicos ... v. Austria (communication privacy)

US RS, U-I-40/12

US RS, U-I-40/12

Domet zasebnosti: delo vs. prosti čas

Scope of privacy: professional activities vs. rest&recreation

There appears, furthermore, to be **no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature** since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. /.../

- Niemietz v. Nemčija (Germany)

37. In the absence of a warning that one's calls would be liable to monitoring, the applicant had a reasonable expectation as to the privacy of calls made from a work telephone /.../ and the same expectation should apply in relation to an applicant's e-mail and Internet usage /.../

- *Barbulescu v. Romunija (Romania)*

57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. **Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor.** A person who walks down the street will, inevitably, be visible to any member of the public who is also present. **Monitoring by technological means of the same public scene /.../ is of a similar character.** Private-life considerations may arise, however, once **any systematic or permanent record comes into existence of such material from the public domain.**

- P.G. in J.H. v. Združeno kraljestvo (United Kingdom)

C. Nove tehnologije, varstvo privilegija zoper samoobtožbo in pravice do zasebnosti

New technologies, protection of privilege against self-incrimination and of the right to privacy

Zasebnosti in privilegij sta po vsebini tesno povezana...

Privacy and privilege are closely related ...

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. **And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.**

- Boyd v. US, 1886

... yet separate

If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that, **when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment -- the Fifth -- to achieve a general protection of privacy, but to deal with the more specific issue of compelled self-incrimination.**

- Fisher v. US, 1976

69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, **it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect** such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

- ESČP, Saunders v. Združeno kraljestvo (United Kingdom), 1996

Domet privilegija zoper samoobtožbo: izjave

Scope of the privilege against self-incrimination: statements

/... je Ustavno sodišče že v odločbi št. Up-134/97 /.../ navedlo, da je bistvo privilegija zoper samoobtožbo v povezavi s prepovedjo izsiljevanja izpovedb v tem, da morajo organi pregona v najširšem smislu obdolžencu pustiti, da je povsem pasiven oziroma da se sam zavestno, razumno in predvsem prostovoljno odloča, ali bo z njimi sodeloval ali ne. **To pomeni, da obdolžencu ni treba izjaviti ničesar v zvezi s kaznivim dejanjem, ničesar, s čimer bi se inkriminiral ali s čimer bi se lahko inkriminiral proti svoji volji.** Gre torej za preprečevanje, da bi obdolženi izpovedal zoper samega sebe, bodisi zaradi prisile bodisi zaradi neinformiranosti, misleč, da mora izpovedati. Tako to ustavno procesno jamstvo državi preprečuje prisiliti posameznika, da postane vir dokazov zoper samega sebe. Bistvo privilegija zoper samoobtožbo je ohraniti obdolženčevo procesno subjektiviteto in s tem pošten postopek./.../

- Ustavno sodišče RS, Up-1293/08

/ ... the Constitutional Court already in decision no. Up-134/97 /.../ stated that the essence of the privilege against self-incrimination in connection with the prohibition of extortion of confessions is that law enforcement authorities in the broadest sense must leave the defendant completely passive or that he consciously, reasonably and above all it decides voluntarily whether to cooperate with them or not. **This means that the defendant is not required to declare anything in relation to the offense, anything to incriminate himself or to incriminate against his will.** It is therefore a matter of preventing the accused from confessing against himself, either out of coercion or out of ignorance, thinking that he must confess. Thus, this constitutional procedural guarantee prevents the state from forcing the individual to become a source of evidence against himself. The essence of the privilege against self-incrimination is to preserve the defendant's procedural subjectivity and thus a fair procedure./.../

- Constitutional Court of the Republic of Slovenia, Up-1293/08

Domet privilegija zoper samoobtožbo: izročitev predmetov

Scope of the privilege against self-incrimination: item production

44. The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. **Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed.** The special features of customs law /.../ cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.

- ESČP, Funke v. Francija (France)

Skupno: oblast osumljenca

"Pravica do zasebnosti posamezniku vzpostavlja krog intimnega lastnega delovanja, kjer sme **sam odločati** o tem, katere posege vanj bo dopustil."

- odločba Ustavnega sodišča RS, U-I-40/12

"Dejanska in izključna **oblast nad prostorom** stanovanja in nad vsem tvarnim v njem je bistven del in pogoj domovanja kot sestavine človekove zasebnosti."

- prav tam

Common: authority of the suspect

"The right to privacy establishes a circle of intimate personal activity for the individual, where he can **decide for himself** what encroachments he will allow."

- Decision of the Constitutional Court of the Republic of Slovenia, U-I-40/12

"Actual and exclusive **authority over the space** of the dwelling and over all material in it is an essential part and condition of the dwelling as a component of human privacy."

- ibid.

Različno: prispevek domnevnega storilca

Different: contribution of the alleged perpetrator

Privilegij – varstvo pred (izsiljeno) aktivnostjo domnevnega storilca

Privilege - protection against (forced) activity of the alleged perpetrator

Zasebnost – domnevni storilec je lahko povsem pasiven

Privacy - The alleged perpetrator may be completely passive

Kako preiskovati: "analogni" odgovor

How to investigate: the "analogue" solution

" /.../ Iz ZKP nadalje izhaja, da policija pri izvedbi zasega ne sme uporabiti sredstev, predvidenih v drugem odstavku 220. člena ZKP za izsiljene izročitve (denarna kazen, zapor). Tako razumevanje potrjuje že logična razlaga zakonskih določb. Zaseg sme namreč policija opraviti le, če je neodložljiv, učinkovanje denarne kazni in zapora pa vselej terja čas. **V primeru, ko oseba določene stvari na zahtevo ne izroči, mora torej policija, ki hoče priti do te stvari, opraviti preiskavo prostora oziroma osebe, kjer se stvar nahaja.** To hkrati pomeni, da morajo biti - če naj bo zaseg dopusten - izpolnjeni tudi zakonski pogoji za izvedbo take preiskave.

- odločba Ustavnega sodišča RS, Up-62/98

(ne problematizira ureditve edicijske dolžnosti)

" /.../ It further follows from the CPC that the police may not use the means provided for in the second paragraph of Article 220 of the ZKP for forced production of items (fines, imprisonment). **If the person does not hand over a certain item on request, the police who want to seize the item must conduct an investigation of the place or person.** At the same time, this means that, if the seizure is to be admissible, the legal conditions for carrying out such an investigation must also be met.

- Decision of the Constitutional Court of the Republic of Slovenia, Up-62/98

(does not deal with the regulation of the duty to produce evidence)

Vmesni sklepi

1. Domnevni storilec je **varovan pred prisiljevanjem k sodelovanju** z organi kazenskega postopka, tj. pred prisiljevanjem k vlogi aktivnega dokaznega vira.

2. **Posegi v zasebnost ali sodelovanje tretjih oseb ne terjajo sodelovanja**, aktivnosti domnevnega storilca (ne ogrožajo pasivnosti domnevnega storilca)

3. Krepitev (ohranitev) varstva privilegija zoper samoobtožbo praktično neizogibno vodi v

(i) krepitev posegov v zasebnost domnevnega storilca, in

(ii) krepitev dolžnosti sodelovanja tretjih oseb.

Interim conclusion

1. The alleged perpetrator is **protected from coercion to cooperate** with the authorities of criminal proceedings, ie. from being compelled to act as an active source of evidence.

2. **Interference with the privacy or participation of third parties** does not require the participation, activities of the alleged perpetrator (does not endanger the passivity of the alleged perpetrator)

3. Strengthening (maintaining) the protection of the privilege against self-incrimination practically inevitably leads to

(i) strengthening the interferences of the privacy of the alleged offender, and

(ii) strengthening the duty of third parties to cooperate with law-enforcement.

Kako preiskovati: tehnološki razvoj in enkripcija

How to investigate: technological development and encryption

Primer:

Policija osumljencu zaseže mobilni telefon. Telefon je zavarovan z geslom, vsebina pa šifrirana. Osumljenec noče zagotoviti dostopa do telefona.

Primer:

Policija tekom izvajanja prikritih preiskovalnih ukrepov prestreže tudi osumljenčevo elektronsko pošto. Policisti ugotovijo, da je vsebina šifrirana.

Kako lahko preiskovalci pridejo do vsebine mobilnega telefona / elektronske pošte?

Example:

Police seize the suspect's mobile phone. The phone is password protected and the content is encrypted. The suspect refuses to provide access to the phone/data.

Example:

Police also intercept the suspect's e-mail during the implementation of covert investigative measures. Police officers find that the content is encrypted.

How can investigators access data on mobile phone / email content?

“Šifriranih datotek ni mogoče brati /.../ in ne morejo predstavljati dokaznega gradiva. V teh primerih mora forenzik na splošno poskusiti najti ali uganiti šifrirni ključ ali kako drugače najti geslo /.../ Včasih to deluje in je mogoče datoteke dešifrirati, vendar pa lahko to traja tedne in pogosto niti ni uspešno.”

- Kerr, 2005

“**Encrypted files cannot be read** /.../ and cannot be used as evidence. In these cases, the forensic scientist should generally try to find or guess the encryption key or otherwise find the password /.../ Sometimes this works and the files can be decrypted, but this can take weeks and often is not even successful. ”

- Kerr, 2005

"Analogni pristop" ne deluje več (vedno)

"Analogue approach" no longer works (always)

1. premagovanje fizičnih ovir (dostop do nosilca podatkov)

= zaseg listine, predmeta

2. ugotavljanje vsebine

= branje listine, ogled predmeta...

1. overcoming physical barriers (access to data carrier)

= seizure of a document, object

2. identifying the content

= reading a document, inspecting an object ...

Kako preiskovati v digitalnem svetu?

How to investigate in the digital world?

1. premagovanje fizičnih ovir (dostop do nosilca podatkov)

= zaseg nosilca podatkov

2. (potencialno) premagovanje ovir za dostop do vsebine podatkov

= ugotavljanje gesel, dešifriranje

3. ugotavljanje vsebine podatkov

= preiskava elektronske naprave (elektronski dokaz)

Kako premagati korak št. 2?

1. overcoming physical barriers (access to data carrier)

= seizure of data carrier

2. (potentially) overcoming barriers to accessing data content

= finding passwords, decrypting

3. determining the content of data

= electronic device investigation (electronic evidence)

How to overcome barriers no. 2?

Tri rešitve

0. Odpoved kazenskemu pregonu

1. s sodelovanjem domnevnega storilca

--> poseg v privilegij zoper samoobtožbo

2. brez sodelovanja domnevnega storilca

--> poseg v zasebnost

--> sodelovanje tretjih oseb

--> intenzivnejši posegi v pravico do zasebnosti domnevnega storilca ali tretjih oseb

Three solutions

0. Abandoning criminal prosecution

1. with the participation of the alleged perpetrator

-> interference with the privilege against self-incrimination

2. without the participation of the alleged perpetrator

-> invasion of privacy

-> participation of third parties

-> more intensive interferences with the right to privacy of the alleged perpetrator or third parties

Odpuved kazenskemu pregonu ne pride v poštev

Abandoning criminal prosecution not an option

12. Življenje, zdravje, varnost, telesna in duševna celovitost ter dostojanstvo posameznika so objekti varstva kazenskega prava, ki jih kazniva dejanja, naj jih zagrešijo agenti državnega aparata ali drugi posamezniki, lahko resno prizadenejo. Jasno je, da človekovi pravici iz 34. in 35. člena Ustave na državo naslavljata dolžnost vzdrževati se naklepnih nedopustnih posegov v telesno integriteto in varnost posameznikov. **Ker mora država poleg tega sprejeti primerne ukrepe za varovanje ljudi znotraj svoje jurisdikcije, sta njeni temeljni obveznosti: (1) vzpostavitev primerne zakonodajnega okvira za namen odvratanja, preprečevanja, odkrivanja in pregona kaznivih dejanj ter (2) skrb in prizadevanje, da se bo ta učinkovito udeleževal v praksi. /.../**

- odločba US RS Up-1082/12 z dne 2.4.2013

12. The life, health, safety, physical and mental integrity and dignity of the individual are objects of criminal law protection that can be seriously affected by criminal offenses, whether committed by agents of the state apparatus or other individuals. It is clear that the human rights under Articles 34 and 35 of the Constitution address to the state the duty to refrain from deliberately inadmissible encroachments on the bodily integrity and security of individuals. In addition, as **the State must take appropriate measures to protect people within its jurisdiction, its basic obligations are: (1) to establish an appropriate legislative framework for the purpose of deterring, preventing, detecting and prosecuting criminal offenses, and (2) to ensure that this is done. effectively put into practice. /.../**

- decision of the US RS Up-1082/12 of 2.4.2013

Posegi v privilegij zoper samoobtožbo?

Interefering with privilege against self-incrimination?

“Na kratko, šifriranje preoblikuje pravico države, da pridobiva dokaze, v pravico posameznika, da dejansko uniči dokaze tako, da onemogoči dostop do njih /.../ Edini način, da vzpostavimo status quo – da ohranimo prvotno možnost države, da pridobiva dokazno gradivo – je ta, da pritrdimo ustavnosti **prisilnega dešifriranja.**”

- Terzian 2014

“In short, encryption transforms the right of a state to obtain evidence into the right of an individual to actually destroy evidence by denying access to it /.../ **The only way to establish the status quo - to preserve the state's original ability to obtain evidence material - is to affirm the constitutionality of forced decipherment.**”

- Terzian 2014

"**Kdor**, zato da bi preprečil ali otežil dokazovanje, skrije, uniči ali poškoduje tujo listino ali drugo stvar, predlagano za dokazovanje, ali jo **napravi delno ali popolnoma neuporabno**, se kaznuje z zaporem do treh let.!"

- KZ-1, 285/1 (preprečitev dokazovanja),

Danes: »kdor« =/ domnevni storilec

Jutri?: "kdor = domnevni storilec"?

"**Whoever**, in order to prevent or complicate taking of evidence, hides, destroys or damages another person's document or other item proposed as evidence, or makes it partially or completely useless, shall be punished by imprisonment for up to three years."

- KZ-1, 285/1 (prevention of evidence-taking),

Present: »Whoever« =/ alleged perpetrator

Future: "whoever = alleged perpetrator"?

Okrepljeno obvezno sodelovanje tretjih oseb

Enhancing obligatory third-party cooperation

“**Ponudniki storitev** pogosto laže posredujejo večje količine podatkov, kot da bi se mukoma prebijali čez datoteke, da bi identificirali iskano datoteko. Preiskovanca o zahtevi za posredovanje podatkov o njej ni treba obveščati. Peti Amandma [**privilegij zoper samobtožbo – op.] ni uporabljen, ker je zavezanec k posredovanju podatkov nevpletena tretja oseba.**”

- Kerr, 2005

“**Service providers** often find it easier to pass on large amounts of data than to struggle through files to identify the file they are looking for. The subject does not need to be informed of the request for information. **Fifth Amendment [privilege against self-incrimination - op.] is not applicable because the data subject is an uninvolved third party.**”

- Kerr, 2005

... dostop do elektronskih naprav

(6) Imetnik oziroma uporabnik elektronske naprave mora omogočiti dostop do naprave, predložiti šifrirne ključe oziroma šifrirna gesla in pojasnila o uporabi naprave, ki so potrebna, da se doseže namen preiskave. Če noče tako ravnati, se sme kaznovati oziroma zapreti po določbi drugega odstavka 220. člena tega zakona, razen če gre za osumljenca ali obdolženca ali osebo, ki ne sme biti zaslišana kot priča (235. člen) ali se je v skladu s tem zakonom odrekla pričevanju (236. člen).

- ZKP, 219a/6

... access to digital devices

(6) The holder or user of an electronic device must provide access to the device, submit encryption keys or encryption passwords and explanations on the use of the device, which are necessary to achieve the purpose of the investigation. If he refuses to do so, he may be punished or imprisoned in accordance with the provision of the second paragraph of Article 220 of this Act, unless he is a suspect or accused or a person who may not be heard as a witness (Article 235) or in accordance with this Act renounced testimony (Article 236).

- CPC, 219a / 6

... zavarovanje elektronskih podatkov

Imetnik, uporabnik, upravljavec ali skrbnik elektronske naprave oziroma tisti, ki ima do nje dostop, mora na zahtevo organa, ki jo je zasegel, takoj ukreniti, kar je potrebno in je v njegovi moči, da se **onemogoči uničenje, spreminjanje ali prikrivanje podatkov.** Če noče tako ravnati, se sme kaznovati oziroma zapreti po določbi drugega odstavka 220. člena tega zakona, razen če gre za osumljenca, obdolženca ali osebo, ki ne sme biti zaslišana kot priča (235. člen) ali se je v skladu s tem zakonom odrekla pričevanju (236. člen).

- ZKP, 223a/3

Šifriranje = prikrivanje

... preservation of digital data

The holder, user, operator or administrator of an electronic device, or who has access to it, must, at the request of the seizing authority, take immediate action, as far as possible, to prevent the destruction, alteration or concealment of the data. If he refuses to do so, he may be punished or imprisoned in accordance with the provision of the second paragraph of Article 220 of this Act, unless he is a suspect, accused or a person who may not be heard as a witness (Article 235) or in accordance with this Act renounced testimony (Article 236).

- CPC, 223a / 3

Encryption = concealment

- a) "dostop do "naprave", ne "dostop do podatkov"
- b) fizični dostop? oddaljeni dostop?
- c) dostop, ki ga zagotovijo organi kazenskega postopka po zasegu?

"Pogodbenica sprejme potrebne zakonodajne in druge ukrepe, s katerimi pristojne organe pooblasti, da odredijo **vsakomur, ki je seznanjen z načinom delovanja računalniškega sistema ali ukrepi za zavarovanje računalniških podatkov v njem**, kadar je primerno, da zagotovi **potrebne informacije, ki omogočijo izvajanje** ukrepov iz prvega in drugega odstavka."

- Konvencija o kibernetiski kriminaliteti, 19/4

"Kar je potrebno in je v njegovi moči"; problem sorazmernosti

- a) "access to" device ", not" access to data "
- b) physical access? remote access?
- c) access provided by criminal authorities after seizure?

"Each Party shall take the necessary legislative and other measures to empower the competent authorities to order anyone familiar with the operation of the computer system or measures to secure computer data therein, where appropriate, to provide the necessary information to enable the measures referred to in the first and second paragraphs. "

- Convention on Cybercrime, 19/4

"What is necessary and in his power"; the problem of proportionality

... pomoč pri izvajanju prikritih preiskovalnih ukrepov

... assisting in implementing covert investigative measures

"5) Odredbo iz prvega odstavka tega člena izvrši policija. Operaterji elektronskih komunikacijskih omrežij so policiji dolžni omogočiti izvršitev odredbe."

- ZKP 152/5

"Če operater v svojem javnem komunikacijskem omrežju komunikacije kodira, komprimira ali šifrira, zagotovi, da so rezultati prestrezanja na izročilnem vmesniku nekodirani, nekomprimirani oziroma nešifrirani."

- Pravilnik o opremi in vmesnikih za zakonito prestrezanje komunikacij, člen 5/4

"5) The order referred to in the first paragraph of this Article shall be executed by the police. Operators of electronic communications networks shall be obliged to enable the police to execute the order."

- ZKP 152/5

"If an operator encrypts, compresses or encrypts communications in its public communications network, it shall ensure that the interception results on the delivery interface are unencrypted, uncompressed or unencrypted."

- Rules on equipment and interfaces for lawful interception of communications, Article 5/4

... zavarovanje podatkov

1) Če so podani razlogi za sum, da je bilo izvršeno, da se izvršuje ali da se pripravlja oziroma organizira kaznivo dejanje /.../ in je za odkritje, preprečitev ali dokazovanje tega kaznivega dejanja ali za odkritje storilca potrebno pridobiti podatke, ki se hranijo v elektronski obliki /.../ **lahko državni tožilec oziroma policija od imetnika, uporabnika ali operaterja oziroma ponudnika storitev informacijske družbe zahteva, da brez nepotrebnega odlašanja ohrani podatke do prejema odredbe sodišča**, vendar ne dlje kot trideset dni od izročitve zahteve dalje. Državni tožilec oziroma policija lahko rok z dodatno zahtevo podaljšata še za največ trideset dni. Če imetniku, uporabniku ali operaterju oziroma ponudniku storitev informacijske družbe v roku za ohranitev ni vročena sodna odredba, se ohranitev podatkov odpravi.

- 149e ZKP

... preservation of data

1) If there are grounds for suspecting that a criminal offense /.../ has been committed, is being committed or is being prepared or organized, and it is necessary to obtain data in electronic form /.../ **the public prosecutor or the police may , requires the user or operator or provider of information society services to retain the data without undue delay until the receipt of the court order**, but not longer than thirty days from the delivery of the request. The state prosecutor or the police may extend the time limit by a maximum of thirty days with an additional request. If the holder, user or operator or provider of information society services is not served with a court order within the retention period, the retention of data shall be revoked.

- 149e ZKP

(Intenzivnejši) posegi v zasebnost domnevnega storilca

Enhanced interference with the right to privacy

Primer:

Osumljenec pri spletnem komuniciranju uporablja end-to-end šifriranje. S šifrirnim ključem operater ali ponudnik storitve ne razpolagata.

Primer:

S šifrirnim ključem za dostop do podatkov na elektronski napravi razpolaga le osumljenec.

Example:

The suspect uses end-to-end encryption when communicating online. The encryption key is not available to the operator or service provider.

Example:

Only the suspect has the encryption key for access to the data on the electronic device.

“Uvajanje zakonskih ukrepov, ki državnim preiskavam odpirajo možnosti uporabe informacijskih tehnologij, je treba razumeti zlasti v kontekstu premika od tradicionalnih oblik komuniciranja k elektronskemu komunikacijskemu prometu in možnostim šifriranja in prikrivanja podatkov /.../

Prikrit vstop v informacijske sisteme je primeren za doseganje teh ciljev /.../

- BVerfG, 27.2.2008, 1 BvR 370/07...

= prikrita / oddaljena preiskava elektronske naprave

“The introduction of legal measures that open up the possibility of using information technologies to state investigations must be understood in particular in the context of the shift from traditional forms of communication to electronic communications and the possibilities of encrypting and concealing data /.../

Covert access to information systems is appropriate to achieve these goals /.../

- BVerfG, 27/02/2008, 1 BvR 370/07 ...

covert / remote search of an electronic device

... predlog ZKP-M (2013)

V prvem odstavku 150. člena se za 1. točko doda nova 1.a točka, ki se glasi: »1.a) v primeru iz prejšnje točke, ko se pri izvajanju ukrepa ugotovi, da oseba uporablja komunikacije, **katerih vsebina ali način komunikacije z naslovniki sta zaščitena z enkripcijskimi metodami**, in z drugimi metodami ni mogoče izvesti nadzora elektronskih komunikacij oziroma bi bilo to povezano z nesorazmernimi težavami, se lahko za izvedbo v času trajanja ukrepa iz prejšnje točke odredi **prikrita namestitev in uporaba programske opreme, ki omogoča le prepoznavanje vsebine zaščitene komunikacije**. Za namestitev prikrite programske opreme se po potrebi izjemoma lahko odredi tajni vstop v tuje stanovanje ali druge tuje prostore v obsegu, da se namestitev lahko izvrši;«

- čl. 7 ZKP-M (2013)

= ti. prestrezanje pri viru (preden komunikacija v šifrirani obliki zapusti pošiljateljevo sfero)

... proposal of CPC-M (2013)

In the first paragraph of Article 150, a new 1.a point is added after point 1, which reads: "1.a) in the case referred to in the previous point, **when it is established during the implementation of the measure that the person uses communications whose content or method of communication with the addressees are protected by encryption methods**, and other methods do not control electronic communications or would be associated with disproportionate problems, for the implementation of the measure referred to in the previous point **may be ordered covert installation and use of software that allows only identification content of secure communication**. For the installation of covert software, secret access to a foreign apartment or other foreign premises may exceptionally be ordered, if necessary, to the extent that the installation can be carried out; "

- Art. 7 CPC-M (2013)

= interception at source (before communication in encrypted form leaves the sender's sphere)

... oddaljena preiskave elektonskih naprav

(1) Če obstajajo utemeljeni razlogi za sum ... se lahko zoper to osebo odredi: /.../ 3) **kontrola računalniškega sistema banke ali druge pravne osebe, ki opravlja finančno ali drugo gospodarsko dejavnost /.../**

- čl. 150/1(3) ZKP

= upravičen "napad na informacijski sistem"

Primerjaj:

"Kdor neupravičeno vstopi ali vdre v informacijski sistem ali kdor neupravičeno prestreže podatek ob nejavnem prenosu v informacijski sistem ali iz njega, se kaznuje z zaporom do enega leta."

- 221/1 KZ-1

... remote digital investigations

(1) If there are reasonable grounds for suspicion ... the following may be ordered against this person: /.../ 3) **control of the computer system of a bank or other legal entity performing financial or other economic activity /.../**

- Art. 150/1 (3) CPC

= justified "attack on the information system"

Compare:

"Whoever unjustifiably enters or intrudes into the information system or who unjustifiably intercepts data during a non-public transfer to or from the information system shall be punished by imprisonment for up to one year."

- 221/1 KZ-1

"Če obstajajo utemeljeni razlogi za sum /.../ se lahko zoper to osebo izjemoma odredi prisluškovanje in opazovanje v tujem stanovanju ali drugih tujih prostorih, z uporabo tehničnih sredstev za dokumentiranje in po potrebi s tajnim vstopom v navedene prostore."

- 151 ZKP

"If there are reasonable grounds for suspicion /.../, this person may exceptionally be ordered to be intercepted and observed in a foreign dwelling or other foreign premises, using technical means of documentation and, if necessary, by secretly entering those premises."

- 151 ZKP

D. Preiskava elektronske naprave (219a, 223a ZKP)

Search of electronic devices (219a, 223a CPC)

Elektronska naprava v ZKP

elektronska naprava

z njo povezane naprave ter nosilci elektronskih podatkov

v omrežju povezane in dosegljive elektronske naprave

namen: pridobitev podatkov v elektronski obliki

Electronic device in CPC

electronic device

connected devices and electronic data carriers

network-connected and reachable electronic devices

purpose: to obtain data in electronic form

Problem preiskovanja podatkov v elektronski obliki

The problems of digital investigations

količina – omejeni viri

quantity - limited resources

lokacija - jurisdikcija

location - jurisdiction

integriteta - zanesljivost

integrity - reliability

zasebnost – dovoljenost

privacy – admissibility

transparentnost - preverljivost

transparency - verifiability

poseg v kom. zasebnost?

interference with comm. privacy?

poseg v informacijsko zasebnost?

interference with information privacy?

Je mogoče vnaprej zamejiti poseg v el. napravo tako, da loči med zasebnimi in ne-zasebnimi podatki?

It is possible to limit the investigation in the el. device by distinguishing between private and non-private data?

Vsebinske predpostavke

utemeljeni razlogi za sum, da je bilo storjeno kaznivo dejanje

dokazni standard kot stopnja verjetnosti, da je bilo izvršeno kaznivo dejanje

pomen: drž. organi morajo vnaprej razpolagati s podatki določene kvalitete (višina dokaznega standarda), če želijo poseči v posameznikovo dobrino (invazivnejši kot je poseg, višji je dokazni standard)

Substantive conditions

reasonable grounds for suspecting that a crime has been committed

standard of proof as the degree of probability that a crime has been committed

meaning: state authorities must have sufficient prior information of a certain quality if they want to intervene in an individual's rights (the more invasive the intervention, the higher the standard of proof)

...

verjetnost, da elektronska naprava vsebuje elektronske podatke:

na podlagi katerih je mogoče osumljenca ali obdolženca identificirati, odkriti ali prijati

ali odkriti sledove kaznivega dejanja, ki so pomembni za kazenski postopek, ali ki jih je mogoče uporabiti kot dokaz v kazenskem postopku

probability that the electronic device contains electronic data:

on the basis of which a suspect or accused person can be identified, discovered or apprehended

or to detect traces of a crime that are relevant to the criminal proceedings or that can be used as evidence in criminal proceedings

Formalne predpostavke

sodna odredba (običajno preiskovalnega sodnika)

predlog državnega tožilca

načeloma: pisni predlog in odredba

izjemoma, če nevarnost odlašanja: ustni predlog in ustna odredba, v 12h od izdaje ustne odredbe še pisna

Formal conditons

court order (usually of an investigating judge)

proposal of the public prosecutor

in principle: written proposal and order

exceptionally, if there is a risk of delay: oral proposal and oral order, within 12 hours of the issuance of the oral order, a written



Alternativa:

predhodna pisna privolitev imetnika el. naprave in vseh policiji znanih in dosegljivih uporabnikov naprave (osebe, ki na njej utemeljeno pričakujejo zasebnost)

Alternative:

prior written consent of the holder of el. device and all users of the device known and accessible to the police (persons who reasonably expect privacy on it)

Izvršitev preiskave elektronske naprave

Execution of the search

kdo? "strokovno usposobljena oseba"

strokovnjak, zaposlen pri policiji

izvedenec

zunanji strokovnjak, ki ni nujno izvedenec

who: a "professionally qualified person"

an expert employed by the police

court appointed expert

an external expert who is not necessarily an expert



ohranitev **integritete** izvirnih podatkov in s tem možnost njihove uporabe v nadaljnjem postopku --> 223a ZKP

posegi v pravice oseb, ki niso osumljenci ali obdolženci najmanjši možni meri

varstvo tajnosti oziroma zaupnosti podatkov

prepoved povzročitve nesorazmerne škode

maintaining the **integrity** of the original data and thus the possibility of their use in further proceedings -> 223a ZKP

interference with the rights of persons other than suspects or accused persons kept to a minimum

protection of confidentiality or confidentiality of data

prohibition of causing disproportionate damage

Obseg preiskave el. naprave

ne v nasprotju z odredbo sodišča oz. brez pisne privolitve imetnika/uporabnikov

oseba, ki preiskavo opravlja, mora poznati odredbo in ravnati v njenih okvirih

podatki, kažejo na drugo kaznivo dejanje, ki se preganja po ur. dolžnosti?

Scope of the search

not contrary to a court order or without the written consent of the holder / users

the person conducting the investigation must know the order and act within its scope

when data point to another crime being prosecuted ex officio?

Zagotavljanje dostopa do podatkov

dolžnost imetnika/uporabnika elektronske naprave

omogočiti dostop do naprave

predložiti šifrirne ključe oziroma šifrirna gesla in pojasnila o uporabi naprave

denarna kazen, 1 mesec zapora

razen osumljenec, obdolženec, privilegirane priče, relativno nesposobne priče

Securing access to the data

duty of the holder / user of the electronic device

allow access to the device

provide encryption keys or encryption passwords and explanations on the use of the device

fine, 1 month imprisonment

except suspect, defendant, privileged witnesses, relatively incompetent witnesses

Zapisnik o preiskavi elektronske naprave

identifikacija elektronske naprave, ki je bila pregledana

datum ter uro začetka in konca preiskave oziroma ločeno za več preiskav, če preiskava ni bila opravljena v enem delu;

morebitne sodelujoče in navzoče osebe pri preiskavi;

številko odredbe in sodišče, ki jo je izdalo;

način izvedbe preiskave;

ugotovitve preiskave in druge pomembne okoliščine

Record the search

identification of the electronic device that has been inspected

the date and time of the start and end of the investigation or separately for several investigations if the investigation has not been carried out in one part;

any persons involved and present in the investigation;

the number of the order and the court that issued it;

the manner of conducting the investigation;

the findings of the investigation and other relevant circumstances

Zavarovanje elektronski podatkov

Preservation of electronic data

zagotovitev integritete podatkov

ensuring data integrity

zagotovitev istovetnosti podatkov

ensuring the identity of the data

Kako zavarovati?

shranijo se na drug ustrezen nosilec podatkov na način, da se ohrani istovetnost in integriteta podatkov

ali

istovetna kopija celotnega nosilca podatkov

ali

elektronska naprava se zapečati

How to preserve data?

they shall be **stored on another appropriate medium** in such a way as to preserve the identity and integrity of the data

or

an **identical copy** of the entire data carrier

or

the electronic **device** is sealed

sodelovanje imetnika, uporabnika, upravljavca ali skrbnika?

razen oseb, ki niso dolžne zagotoviti dostopa do el. naprave

navzoče osebe?

imetnik naprave, sam ali preko zastopnika, odvetnika, strokovnjaka, ki ga sam angažira pravilno vabljen

ravnanje strokovno usposobljene osebe?

the involvement of the owner, user, operator or administrator?

except for persons who are not obliged to provide access to electricity. devices

persons present?

the owner of the device, alone or through an agent, lawyer, expert hired by him properly invited

the conduct of a professionally qualified person?

Hramba podatkov

Storage of data

kopije podatkov: dokler potrebno za postopek

copies of data: as long as necessary for the procedure

elektronske naprave: dokler podatki niso shranjeni na ustrezen način

electronic **devices**: until the data is stored properly
maximum 3 months

največ 3 mesece

če zavarovanje podatkov s kopijo ni možno: dokler potrebno za postopek, vendar največ 6 mesecev, razen če el. naprava uporabljena za izvršitev k.d. ali je sama el. naprava dokaz v postopku

if securing the data with a copy is not possible: as long as necessary for the procedure, but not more than 6 months, unless el. the device used to execute the k.d. but it is itself el. device proof in the process

?

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