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On Certain Issues of the Protection of Members of Parliament From Their Activities Being Monitored by the Police and Intelligence Services[1]

Introduction

The immunity of members of parliament is a constitutional issue that is relatively well-known by the general public, although interest is raised by the unpopularity of the privileged position of deputies and senators. At the same time, this is a theme that is rather neglected in the professional literature.

It is worth briefly noting in the introduction that what is commonly referred to as "parliamentary immunity" refers to a whole range of legal institutes with different legal bases. Some parts exclude legal accountability entirely, as in the case of the non-accountability for voting, but also for other means of immediately exercising mandates, such as the submission of draft laws or amendments.[2] Others establish special procedural rules for exercising or extrapolating the accountability of members of parliament. Other parts of what is collectively referred to as parliamentary immunity make it possible for a member of parliament to refuse to cooperate with public authorities, for example in the form of a refusal to testify.[3]

It is clear that immunity procedures are contrary to the principle of equality of all before the law. The existence of such a different legal regime is justified by the specific objective of guaranteeing and protecting the free and independent exercising of mandates entrusted to members of parliament. By considering both equality before the law and an interest in the free and unobstructed conduct of parliament as the highest

[1] This article was prepared in the framework of the research project "Analysis and expected development of competencies of the Police of the Czech Republic and police security entities in selected areas" and the sub-task "Strengthening the competencies of entities in the context of current human rights challenges". The author is an academic member of staff of the Department of Public Law, Faculty of Security Management, Police Academy of the Czech Republic. ORCID No. 0000-0001-8009-4294. He can be contacted via e-mail at: j.kudrna@polac.cz

[2] For more information on this issue, see e.g. KUDRNA, Jan. K otázce odpovědnosti člena parlamentu za způsob výkonu jeho mandátu. *Acta Universitatis Carolinae. Iuridica.* č. 2/2019, s. 7–19.

[3] For more information on this issue, see e.g. KUDRNA, Jan. K rozsahu práva člena Parlamentu odepřít svědectví podle čl. 28 Ústavy. *Právní rozhledy.* 2018, č. 22, s. 789-793. Z komentářů viz např. SLÁDEČEK, Vladimír; MIKULE, Vladimír; SUCHÁNEK, Radovan; SYLLOVÁ, Jindřiška. *Ústava České republiky. Komentář.* Praha: C. H. Beck, 2016, s. 346. From professional articles see e.g. KOUDELKA, Zdeněk. Ústavní právo a zákonná povinnost mlčenlivosti poslanců. *Trestní právo.* 2017, č. 2, s. 5.

body of the people, society can measure the acceptability of this different legal treatment of members of parliament and the appropriateness of its scope.

Different countries approach the scope of parliamentary immunity in different ways. In recent years, some countries, such as the Slovak Republic, have taken the path of essentially abolishing the immunity of members of parliament, limiting it to the non-accountability of members of the National Council of the Slovak Republic for voting. Countries with a relatively narrow concept of parliamentary immunity also include the United Kingdom and the United States of America. The Czech Republic, together with other neighboring countries, such as Poland, Austria, and Germany, consider the immunity of members of their parliaments in a broader context.

Disparity in the scope of legal protection provided to members of parliament for independently exercising their mandate may also take the form of special means for protecting members of parliament from being monitored, or by establishing special procedures, after which members of parliament may be monitored. In particular, it may involve monitoring a deputy or senator as an individual, and monitoring or recording their communications. In terms of the public authorities, such monitoring can be performed by the police or the intelligence services.

This issue deserves attention mainly because in today's democratic countries it is parliament that is equipped with significant powers of control over executive branches with the means and powers to interfere with the privacy of individuals.

If members of parliament, and especially their supervisory bodies, are subject to the same rules as other people, the question arises as to whether the role of those being controlled and those controlling them can be reversed. For this reason, some countries also introduce special rules that must be observed if members of parliament are to be monitored.

Brief overview of the issue of monitoring members of parliament in the Czech Republic

In the Czech Republic, there is no special protection provided to members of parliament against them being monitored. Although, as will be mentioned below, it was somewhat different in the case of Czechoslovakia.

The Czech Republic is a country that uses parliamentary control over the monitoring of people, things, and telecommunications traffic. This applies both in the case of the use of the previously mentioned resources by the Police of the Czech Republic, and by the intelligence services operating in the Czech Republic. In the case of the Police of the Czech Republic, the fundamental provision is Article 98 of Act No. 273/2008 Coll., on the Police of the Czech Republic, as amended. In the case of the intelligence services, these are the provisions of Articles 12, 12a, and 14 of Act No. 153/1994 Coll., on the intelligence services of the Czech Republic, as amended, together with the provisions of Article 18 of Act No. 154/1994 Coll., on the Security Information Service, as amended (hereinafter referred to as the "Act on the SIS") and Article 21 of Act No. 289/2005 Coll., on Military Intelligence, as amended (hereinafter referred to as the "Act on MI").

The aim of this article is not to describe the ways in which control over the activities of the Police of the Czech Republic and intelligence services are ensured.

For this purpose, it is sufficient to state that parliamentary control is ensured through the committees of the Chamber of Deputies, which also ensure the control required by the provisions of Article 14 of Act No. 153/1994 Coll., as amended. Crucially, control is entrusted to deputies, i.e. elected representatives of the people, due to the representativeness and legitimacy of the position of the Chamber of Deputies. It is given both by its way of establishment, and by its structure as a body representing all major political interests in society.

To the extent provided by law, control over the means by which the constitutionally guaranteed rights and freedoms of an individual may be significantly impacted is entrusted to deputies as representatives of those whose freedoms may be interfered with. However, it has already been mentioned above that the question arises as to how it is ensured that the controlled does not become the controller. The advantage in terms of the information that some police and intelligence services have can lead to an advantage in the controller-controlled relationship. Therefore, some countries have introduced special rules that must be observed if, for example, a member of parliament is to be monitored, or their telephone or other means of electronic communication is intercepted or recorded, etc. The Czech Republic is not one of these countries, and in this regard the same legal rules apply to deputies, as to any other person.

In relation to the police authorities, these rules are primarily the provisions of Article 158d of Act No. 141/1961 Coll., the Act on Criminal Procedure, as amended (hereinafter referred to as the “Criminal Procedure Code”) regulating the monitoring of persons and things, and Section 88 and 88a of the Criminal Procedure Code regulating the interception and recording of telecommunications traffic, and data on telecommunications traffic, respectively. For the purposes of this work, the monitoring of persons and things in public places by the police authorities is possible according to the Criminal Procedure Code. If a record is to be made, the written consent of a public prosecutor is required; however, in urgent cases for a maximum of 48, such a consent is not required. If the monitoring interferes with the inviolability of the home, the secrecy of correspondence, or the secrecy of records kept in private, by technical means, then the consent of a judge is required.

In the case of the intelligence services, the legal status is such that in the case of the Security Information Service, pursuant to Article 14 of the Act on the SIS, the Director of the Service or the Head of the Organizational Unit designated by him or her decides on the monitoring of persons and things. In the case of military intelligence, it is the Minister of Defense who makes the decision based on a request from the Director of the Service, pursuant to Article 15 of the Act on MI. In the case of the interception or recording of telecommunications traffic by technical means, or interference with the inviolability of the home, correspondence or secrecy of records kept in private, then both intelligence services may use the relevant intelligence means only with the consent of the President of the Senate of the High Court in Prague, in both cases pursuant to Article 9 of the relevant law.

As was already mentioned, no special legal rules apply to members of parliament or members of committees of the Chamber of Deputies controlling the use of interception or recording of telecommunications traffic, surveillance of persons or things by the Police of the Czech Republic, or more generally the activities of the

intelligence services. Both members of parliament and members of these supervisory bodies are subject to the common legal regime outlined above. This means that the principle of equality before the law is fully manifested in the current legal regulation of the described issue, which has the practical consequence that no persons or premises are subject to stricter rules when using the means described above or are even completely excluded from their use.[1] Both the Police of the Czech Republic and the intelligence services may perform their activities within the limits of legal regulations even in the case of deputies without special restrictions.

How issues related to the possible monitoring of members of parliament are addressed in the United Kingdom

Some countries approach the described issue differently than the Czech Republic. One such country is the United Kingdom. This is partly due to the fact that the immunity of members of parliament has been established there, and partly because the United Kingdom has a long tradition of intelligence and police services. The issue of protecting the electronic communications of members of parliament is also frequently debated in the United Kingdom.[2] The legal basis for this has always been Article 9 of the Charter of Rights of 1689, according to which parliamentary proceedings may not be interfered with. Hence, access to the protection of the electronic communications of members of parliament is relatively narrow in the United Kingdom, as protection of the electronic communications of members of parliament is only provided if and to the extent that interference with it would affect the freedom of parliamentary proceedings. Therefore, for example, it is forbidden to interfere in the correspondence of members of parliament, but this is not absolute. It is forbidden to prevent the delivery of messages, but this does not exclude, for example, the intervention of the police or intelligence services if there is a reasonable suspicion justifying the detention of a consignment or the inspection of its contents. Interference with electronic communication is excluded in the case of something a member of parliament is going to say or propose to debate in parliament, or because of what he or she has already said or proposed in parliament.[3] In other cases, it is difficult to infer

[1] In the former Czechoslovakia, the situation was slightly different in this regard. Pursuant to the provisions of Article 28(1) of Act No. 65/1956 Coll., and Article 36(1) of Act No. 60/1965 Coll., both of which were laws on the Prosecutor's Office, supervision of the observance of the rule of law by bodies with nationwide competence, including the National Assembly, fell within the competence of the Attorney General. The rules governing the activity of the former State Security were not resolved at a legal level.

[2] See e.g. 14. zprávu Výboru pro standardy a imunity *„Privilege: Hacking of Members' mobile phones. Fourteenth Report of Session 2010-2011.“* Zpráva je dostupná online zde: https://publications.parliament.uk/pa/cm201011/cmselect/cmstnprv/628/628.pdf [cit. 18. 4. 2021].

[3] See the parliamentary document *„Submission by Dr Andrew Defty, Professor Hugh Bochel and Jane Kirkpatrick, School of Social Sciences, University of Lincoln“*. Vyjádření je dostupné online zde: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79402/PPC_Response_University_of_Lincoln.pdf [cit. 18. 4. 2021].

violation of Article 9 of the Charter of Rights of 1689.[1] To summarize this section, it is possible to state that the communications of British members of parliament are protected in essentially the same way as any British citizen.[2] Parliamentary privileges protect against purely politically motivated interference in the electronic communications of members of parliament.

However, the issue of tapping telephone calls made by members of parliament in the United Kingdom is addressed not only at the legal level, but also partly at the political level, in relation to the above-mentioned privileges. This is done through the application of the so-called Wilson Doctrine, which is named after Prime Minister Harold Wilson, who on 17 November 1966, after a series of parliamentary questions on whether the government was tapping the telephones of members of parliament, declared that no such tapping was taking place. In addition, Mr. Wilson added that no such tapping had taken place since his government took office in 1964, and none would take place in the future unless it was necessary on grounds of national security. Should such grounds arise, then members of parliament would be generally informed.

It is clear from the above that it is considered an acceptable exception to the above privileges if it is a matter of national security. However, the Wilson Doctrine should not be overestimated. Although other prime ministers have joined suit, a certain discrepancy is that neither Mr. Wilson nor any of his successors promised to give advance notice of the change in practice. He said he would do so when national security interests allowed.

The following Prime Ministers have repeatedly advocated the Wilson Doctrine, although it is clear that the doctrine was not followed in all cases. For example, in the monitoring of communications of members of Sinn Fein in 1990, and probably in some other cases as well. In 2005, Prime Minister Tony Blair intended to replace the Wilson Doctrine with the establishment of a special body to assess the acceptability of phone tapping. But after widespread criticism that such a course of action would be unconstitutional because it would give members of parliament privileges that are not given to the average citizen, he dropped the idea.[3]

Therefore, the United Kingdom is an example of a country that recognizes certain elements of special protection, in particular the electronic communications of members of parliament, but does so to a very minimal extent. The protection of members of parliament in this regard is almost the same as that provided to the average citizen.

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[1] See *Privilege: Hacking of Members' mobile phones. Fourteenth Report of Session 2010-2011.* s. 9-10 a zejména vyjádření předsedy Nejvyššího soudu lorda Phillipse uvedené na s. 11. Dostupné online: https://publications.parliament.uk/pa/cm201011/cmselect/cmstnprv/628/628.pdf [cit. 18. 4. 2021].

[2] See also the official report *„Report of the Committee of Privy Councillors appointed to inquire into the interception of communications"* z října 1957. The report is available online at: https://www.fipr.org/rip/Birkett.htm [cit. 18. 4. 2021].

[3] DEFTY, Andrew. *The Wilson doctrine: tapping the telephones of members of parliament.* Text dostupný online zde: https://watchingthewatchers.blogs.lincoln.ac.uk/2015/07/23/the-wilson-doctrine-tapping-the-telephones-of-members-of-parliament/ [cit. 18. 4. 2021].

How issues related to the possible monitoring of members of parliament are addressed in the Federal Republic of Germany

A solution quite different from that applied in the United Kingdom is used by the Federal Republic of Germany. In this country, monitoring of a member of parliament, not only at the federal but also often at the land level, is possible after informing the relevant representative council, or its body or office-holder. This ensures that the use of extraordinary means of surveillance against a council member remains under control, at least in the sense that it cannot legally take place in complete secrecy.

At the federal level, control powers over intelligence means are entrusted to a special commission of the Federal Assembly, known as the G-10 Commission or just the G-10. This name is derived from the Act Restricting the Privacy of Correspondence, Posts and Telecommunications, which itself is abbreviated as the G-10 Act.[1] The reason is the implementing relation to Article 10 of the Basic Law, which guarantees the secrecy of correspondence and the secrecy of transmitted messages. In order to control the interference with this constitutionally guaranteed right, a special parliamentary commission has been set up to monitor whether these extraordinary powers are being abused. The G-10 Commission also decides on the justification and necessity of specific restrictive measures, including measures against members of the Federal Assembly. Monitoring of members of the Federal Assembly is possible, but it is done with the knowledge of a G-10 Commission set up by the Federal Assembly. In this way, parliamentary control is ensured over the use of the means to monitor and record electronic communications.

Similar measures are applied by some federal states. An example is Saxony-Anhalt, which in the provision of Article 29(1) of its land law for the protection of the constitution[2] imposes an information obligation on the minister responsible for civil counter-intelligence on measures applied against a member of the land assembly. In practice, this obligation falls to the Minister of the Interior who must inform the relevant commission of the land assembly responsible for the control of the local branch of the Federal Office for the Protection of the Constitution, and the Speaker of the Land Assembly about the use of the means of intelligence.

In Saxony, the law protecting the constitution[3] imposes an even stricter rule. In Article 5(4), it stipulates that a means of intelligence may only be used against a member of the land assembly if such a step has been approved in advance by the Speaker of the Land Assembly.

There are also known cases in Germany of the monitoring of deputies, which were ultimately judged by the highest courts. An example is the case of Bodo Ramelow, first a member of the Thuringian land assembly and then a member of the Federal Assembly.[4] Between 2003 and 2007, he was monitored by the Federal Office

[1] Federal Law of 13 August 1968, as amended. Gesetz zur Beschränkung des Brief-Post-und Fernmeldegeheimnisses (Gesetz zu Artikel 10 Grundgesetz) (G 10) BGBl. I 1968 s. 949.
[2] Land Act of 6 April 2006, as amended. Gesetz über den Verfassungsschutz im Land Sachsen-Anhalt. GVBl. LSA 2006, S. 236.
[3] Land Act of 16 October 1992, as amended. Gesetz über den Verfassungsschutz im Freistaat Schasen. GVBl. SächsGVBl. 1992, s. 459.
[4] Since 2014, Bodo Ramelow has been the Minister-President of Thuringia.

for the Protection of the Constitution, first as a member of the political party PDS, and later Die Linke. The monitoring was first considered by the administrative court in Thuringia, and then by the higher court in Cologne as an inadmissible interference with the independent exercise of the function of a member of parliament, and was prohibited.

The arguments of the Administrative Court in Cologne[1] are of particular interest, as this court highlights in its decision several essential matters for the described issue. First of all, the court pointed out that it should be the land assemblies and the Federal Assembly that control the intelligence services, and that the opposite situation should not arise, in which there would be a *de facto* reversal of roles, and the controlled could monitor the activities of the controller. The court further pointed out that monitoring may jeopardize the free exercising of the mandate of a member of parliament, as is guaranteed by the constitution. It also stated the need to protect communication and that awareness of surveillance could make it completely impossible for a member to communicate freely with voters. In this connection, Mr. Ramelow documented a case in which a voter, out of fear of surveillance and registration by the intelligence service, wanted to meet him exclusively at a motorway rest stop.

The final decision in the case of B. Ramelow was made by the Federal Constitutional Court in its decisions No. 2 BvR 2436/10 and 2 BvE 6/08 of 17 September 2013.[2] The Federal Constitutional Court stated that the monitoring of a deputy by the intelligence service constitutes an interference with the second sentence of Article 38(1) of the Basic Law, which guarantees free communication between deputies and voters. This provision of the Basic Law states that deputies are representatives of all the people and are not bound by any orders or instructions and act only in accordance with their conscience. It is clear here how broad the interpretation of the Federal Constitutional Court has been. It continues its interpretation that the monitoring of a deputy by the intelligence service constitutes an interference with their free mandate, which may be permissible in individual cases, if necessary, in view of the need to protect a free democratic legal order. However, such an intervention is subject to strict proportionality requirements. According to the Federal Constitutional Court, these conditions were not met in the given case.

An essential part of the decision of the Federal Constitutional Court is its paragraph 97, which states that the process of communication between a deputy and voters is covered by the protection of the second sentence of Article 38(1) of the Basic Law. Here, we see an interpretation of the term “free mandate”, which is not limited to a ban on giving and enforcing instructions to deputies, but also includes broader conditions for deputies to be able to act independently. A free mandate is a complex of preventive measures. In this sense, according to the Federal Constitutional Court, a free mandate also guarantees the protection of a member of parliament from the

[1] Decision No. 20 K 3077/06 of 13 December 2006. Available online: https://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2007/20_K_3077_06urteil20071213.html [cit. 18. 4. 2021]. This decision was not made final and conclusive because the Supreme Administrative Court in Leipzig annulled it, against which Mr Ramelow defended himself by a constitutional complaint.

[2] The decision of the Federal Constitutional Court is also available online at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/09/rs20130917_2bvr243610.html [cit. 18. 4. 2021].

supervision of the executive and is closely related to the principle of separation of powers enshrined in the second sentence of Article 20(2) of the Basic Law. The Federal Constitutional Court also recalls that the Federal Assembly should control the federal government and not the other way around. Nevertheless, according to the Federal Constitutional Court, individual deputies are not protected from the exercising of executive powers. Nevertheless, any such intervention should be subject to an autonomous decision of the parliament in ways assumed by the Basic Law and other regulations.

However, as generally stated above, the protection of a free mandate is not unlimited. It may be affected, but only in justified cases, if necessary for the protection of a free democratic legal order and subject to strict conditions of proportionality. According to the Federal Constitutional Court, monitoring of a member of a representative council is possible, for example, in order to ensure the smooth and proper functioning of parliament or against persons acting against the constitutional order of the country.

Therefore, the German example shows another possible model for addressing the described issue, where monitoring of members of parliament is possible, but is subject to special rules, according to which parliament or its special body is also involved in the decision-making process.

Conclusion

As can be seen for the above text, the British model is applied in the Czech Republic in terms of the scope of special legal protection for members of parliament. There is one difference, and that is that in the United Kingdom it is socially and politically permissible for the government to monitor politicians through the intelligence services. At least for the time being, such a situation in the Czech Republic would be perceived as politically unacceptable. A similar use of intelligence services takes place in the Federal Republic of Germany. In view of the tragic experience of large-scale totalitarianism using the intelligence services and the secret police, among other things, to combat its opponents, the Federal Republic of Germany has chosen a solution that ensures parliamentary control over intelligence and the monitoring of persons in a way that systemically could not become controlled.

It has been possible to observe a gradual strengthening of intelligence services in the Czech Republic for about the last decade. In both financial and personnel terms, but also in terms of their powers. It is clear that the powers of the intelligence services have gradually been strengthened as a systematic government policy over the last eight years or so. In connection with this trend, the government of Bohuslav Sobotka also set as one of its goals the introduction of comprehensive parliamentary control over intelligence services.[1] The last major extension of the powers and competences of the intelligence services consisted in entrusting the provision of the cyber defense of the Czech Republic to military intelligence.[2] This step meant, after more than thirty

[1] See the last point of Chapter 2 “Government Priorities” of the Program Statement of the Government of the Czech Republic of 12 February 2014. Available online at: https://www.vlada.cz/cz/media-centrum/dulezite-dokumenty/programove-prohlaseni-vlady-cr-115911/ [cit. 18. 4. 2021].

[2] This was done by Act No. 150/2021 Coll.

years, the first abandonment of the rule that the intelligence services of the Czech Republic are not equipped with executive powers. If the development continues in this direction, which can be expected, it may become a legitimate question as to whether the German model should be applied in the Czech Republic.

There are principle grounds for the possible use of the German model. The controller should have the full range of surveillance tools at its disposal and should not become a ward of the controlled. I believe that this reason is to legitimize the violation of the principle of equality of all before the law. Nevertheless, it must be said that for possible practical implementation, it is necessary to create the conditions for fully functional parliamentary control, the will to introduce such a system, and the readiness of parliament to apply this system appropriately and sensitively. Its proper functioning is a rather delicate matter and requires multilateral trust.

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S U M M A R Y

This article deals with fundamental issues of the protection of the independence of parliamentary proceedings in relation to the activities of the intelligence services and, where appropriate, the police. In particular, this article focuses on the case of members of parliament involved in parliamentary scrutiny of these special executive bodies. The article deals with the question of whether, in the framework of the current legislation, the independence of the position of the controller *vis-à-vis* the controlled can be maintained under all circumstances. The article shows two foreign approaches to this problem, namely the British and German model.

Key words: parliament; intelligence services; police; phone tapping; surveillance; control; Czech Republic; Germany; the United Kingdom; G-10 Commission; Bodo Ramelow.

R E S U M É

KUDRNA, Jan: K NĚKTERÝM OTÁZKÁM PROBLEMATIKY OCHRANY ČLENŮ PARLAMENTU PŘED SLEDOVÁNÍM JEJICH ČINNOSTI ZE STRANY POLICIE A ZPRAVODAJSKÝCH SLUŽEB

Tento článek se věnuje principiálním otázkám ochrany nezávislosti jednání parlamentu ve vztahu k činnosti zpravodajských služeb a případně policie, a to zejména v případě poslanců, kteří se podílejí na kontrolní činnosti parlamentu vůči těmto zvláštním orgánům výkonné moci. Článek je věnován otázce, zda v rámci stávající právní úpravy může být za všech okolností zachována nezávislost postavení kontrolora vůči kontrolovanému. Článek ukazuje dva zahraniční přístupy k řešení tohoto problému, a to model britský a německý.

Klíčová slova: parlament; zpravodajské služby; policie; odposlechy; sledování; kontrola; Česká republika; Spolková republika Německo; Británie; Komise G-10; Bodo Ramelow.