



**TILT LAW & TECHNOLOGY  
WORKING PAPER SERIES**

**Privacy Crimes in Czech Republic**

**Criminalization of privacy intrusions by private parties in Czech  
substantive criminal law**

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## 1. Introduction

This country report provides an overview of how privacy is protected in substantive criminal law in the Czech Republic. Since criminal law is usually considered the *ultima ratio* of legal tools, it provides a particularly focused lens through which to study privacy protection: privacy violations as stipulated in criminal law can be considered the most serious infringements of privacy, and hence to be indicating particularly important elements of privacy that are considered protection-worthy by the legislator.

The main purpose of substantive criminal law is the protection of the most important legal goods, including interests of the society, constitutional order, and legal rights and legitimate interests of natural and legal persons, against criminal activity. It serves protective (this is the dominant one), preventive, repressive and regulative functions.<sup>1</sup> Criminal law is the strictest instrument at the disposal of the state and is used where other legal instruments are not sufficient.

Since our aim is to better understand the concept of privacy, and to see how it can be protected in the 21<sup>st</sup> century in light of socio-technological developments, a broad conception of privacy is applied here, discussing criminal provisions that have something to do with protecting aspects of persons and their personal life, and the privacy expectations they have in their property, places, person and data. This potentially covers a large part of criminal law, so that not all privacy violations will be described in detail. Particular emphasis is given to aspects of private life where socio-technological developments raise particular challenges for preserving privacy protection, in light of the law being based on possibly outdated conceptions or assumptions. More detailed attention will be given to the following issues: How are people protected in relation to places? How are computers, data and stored documents protected? How are personal data and the image of people protected? How are people protected against tracking and tracing in public spaces?

Criminal provisions that are not related to one of these main areas of interest will be briefly mentioned, in order to contribute to a comprehensive overview of privacy protection in criminal law, but not detailed or analysed further, except where they contain particular elements relevant for improving our understanding of the concept of privacy as protected in criminal law.

We start with a brief introduction into Czech criminal code, describing the basic elements of the Criminal Code, its structure, the notion of legal goods in criminal law and the concept of privacy as a protected legal good. Subsequently, these criminal provisions are described as relating to property (section 3.), places (section 4.), persons (section 5.) and data (section 6.).

## 2. Basic elements of Czech criminal law

### 2.1 The structure of the Criminal Code

In the Czech Republic the Criminal Code provides a complex and systematic way of regulating the field of criminal substantive law. The regulation is complex in the sense that no other laws establish criminal liability and systematic in the sense that it divides the regulation into the general

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<sup>1</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 20.

and the special part, the latter consisting of chapters organized by the general interests they protect.<sup>2</sup>

The general part of the Criminal Code regulates its applicability, basic categorization of criminal offences, the basic elements of establishing criminal liability, punishments and protective measures and expungement. It also offers interpretative provisions relating to certain terms commonly used in the special part.

The special part of the Criminal Code is divided into 13 chapters based on the group objects (explained in 2.3.) protected by particular provisions contained within the chapter. The chapters are ordered according to the importance that is given to particular values by the Czech Republic.<sup>3</sup> The Criminal Code places individuals and their basic rights to life, health, freedom, dignity and property in the forefront as the most important protected good. Only afterwards, the code protects more general interests of the society, such as economic crimes, generally dangerous crimes, public order. Previously, the 1961 Criminal Code reflected different political preferences and the systematic ordering of the special part gave priority to wider societal interests over individual interests. The present special part consists of these 13 chapters:

1. Criminal offences against life and health
2. Criminal offences against freedom and personality rights, privacy and the secrecy of correspondence
3. Criminal offences against human dignity in the sexual sphere
4. Criminal offences against family and children
5. Criminal offences against property
6. Economic criminal offences
7. Generally dangerous criminal offences (posing a general threat, or a threat to an aircraft or a ship)
8. Criminal offences against the environment
9. Criminal offences against the Czech Republic, another state or an international organisation
10. Criminal offences against public order
11. Criminal offences against military conscription
12. Military criminal offences
13. Crimes against humanity, peace and war crimes, which are not placed last due to lesser importance, but rather due to its specific character going beyond national regulation.

As stated above, the Czech criminal law is codified, which means that in principle criminal liability is based exclusively on the provisions of the Criminal Code. Certain other laws, by now mostly obsolete, that were introduced to deal with the consequences of the communist regime may still regulate certain special aspects of substantive criminal law, without being referred to in the Code.<sup>4</sup>

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<sup>2</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 38.

<sup>3</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 39.

<sup>4</sup> Statute no. 184/1964 coll. which precludes the statute of limitations in cases of the most serious crimes against peace, war crimes and crimes against humanity committed in service of the occupying armies, Statute no. 119/1990 coll. on judicial rehabilitation, and the Statute no. 198/1993 coll. on the illegality of the communist regime and on the resistance against it.

Following the continental written law tradition, judicial decisions are not considered an official source of law, only its interpretation and are binding only in the specific cases. Nevertheless, especially the Supreme Court's judgments are in practice respected and followed.

## **2.2 Main elements of the general part of the Criminal Code**

A criminal offence is an unlawful act which has been labelled as criminal by a criminal statute and which has the characteristics specified by such statute.<sup>5</sup>

An act becomes a criminal offence by fulfilling two conditions: the unlawfulness and the formal characteristics (formal definition of the criminal offence). There are two correctives to the formal criterion. The first one is substantive, specifically the subsidiarity of criminal repression, which means that the act has to be societally harmful in a non-negligible way and non-criminal liability would not be sufficient.<sup>6</sup> The second is the procedural principle of opportunity which allows the prosecutor to terminate the criminal proceedings, if based on the importance and level of violation or threat to the protected interest, the way in which it happened and the consequences of the act, and the conduct of the perpetrator after the commission of the act, it becomes clear that the purpose of the proceedings has been fulfilled.<sup>7</sup>

Criminal offences are categorized either as misdemeanors, which include all negligent offences and intentional offences with maximum sentence not higher than five years, and felonies which include all criminal offences that are not misdemeanors.<sup>8</sup> The mandatory elements of a criminal offence include the object, closely related to the notion legal good, objective considerations, which include the *actus reus*, the result and the causal relation between the two, the subject, which is a person that can be held criminally liable, and the subjective element, generally intent, but where specifically regulated also negligence. Certain criminal offences can be defined by facultative elements such as a certain place, time, certain means or tools, or a certain motive.<sup>9</sup>

The captions given by the legislator to sections and individual articles should not be assigned a legal status in the interpretation of the provision, but rather considered as facilitating the search through the Criminal Code to find individual crimes; where the caption and the content diverge, the content of the provision prevails.

## **2.3 The notion of 'object of crime' and the concept of privacy**

Objects of criminal offences are the societal relations, interests and values against which the criminal act is directed. They are also referred to as legal goods. Three types of objects are distinguished in Czech literature: general object, group object and individual object. These categories are especially important in the systematic ordering of the special part of the criminal code. The general object is sum of all the legal goods protected in the Criminal Code. The group object is an aggregate of individual objects that share certain characteristics. Criminal offences

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<sup>5</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 114.

<sup>6</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 116.

<sup>7</sup> §172(2) of the Code of Criminal Procedure.

<sup>8</sup> §14 of the Criminal Code.

<sup>9</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, pp. 146-147.

linked to the same group objects form the chapters and parts of the Criminal Code.<sup>10</sup> Individual object is the particular interest protected by a specific provision of the Criminal Code.

Objects are also differentiated into the main (primary) and the side (secondary) object. The main is the object against which the criminal act directly targets. Other societal interests can also be incidentally infringed, but are not considered in deciding on guilt, although they may be considered in determining punishment<sup>11</sup>. A criminal offence can also have more than one object, either cumulative or alternative. A typical example is robbery which protects liberty and property at the same time.

Protection of privacy is one of the fundamental rights and values protected by the constitutional order. The Charter of Fundamental Rights and Freedoms protects the person and their privacy in Art. 7, dignity, honour, good name, private and family life, personal data in Art. 10, inviolability of the home in Art. 12 and secrecy of communication in Art. 13. These values are also afforded criminal law protection across various sections of the Criminal Code. Privacy is one of the group objects protected by the second chapter of the special part, however, other chapters also contain provisions relating to violations of the particular aspects of privacy and private life protected by the Charter. For this reason, the narrative of the following sections of this chapter will not follow the structure of the TZ's special part, but the provisions will be discussed in four parts as relating to things, places, persons and data.

### **3. Things**

#### **3.1 Computers**

##### **3.1.1 Hacking and some preparatory crimes**

The criminal code contains a number of provisions protecting computers. These provisions are largely concentrated in Header V of the special part entitled Criminal offences against property, paragraphs 230-232. In addition, protection of mediated communications in paragraph 182 includes messages sent through electronic means and the non-public transfer of computer data, however, this will be discussed in more detail in section 5.3.3. on the protection of communications. Several criminal offences are defined by the use of a computer as an objective element of the criminal offence or an aggravated circumstance. This section deals with criminal offences where the computer is the object of the perpetrator's attack, therefore, the last set of crimes will be discussed in other sections insofar as the computer is used to attack other protected objects of the right to privacy, such as reputation (section 5.3.2.), mind and thought (section 5.4.1.) and personal data (section 6.).

Paragraphs 230-232 protect computer systems and memory devices from unauthorized access and data tampering. A computer system is defined in the doctrine<sup>12</sup> by referring to the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems

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<sup>10</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 153.

<sup>11</sup> Jelínek, Jiří (eds.) *Trestní právo hmotné*, Praha: Leges (2010) TPH, p. 156.

<sup>12</sup> Grívna, Tomáš, 'Trestné činy proti majetku' in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 2086-2087.

which defines them as any device or a group of interconnected devices of which one, or more, performs automatic (i.e. without human interference) data processing according to a programme, consisting of hardware and software. A memory device is any data storage device, i.e. a material that can store data and the data can be read from it, including hard drives, operation memory, disc drives, USB sticks, memory cards, etc. However, audio or video recordings in form of magnetic stripe are not considered information carriers in the meaning of this provision.<sup>13</sup>

Paragraph 230 of the Criminal Code contains two separate criminal offences and a number of aggravated circumstances relating to both. According to subparagraph 1 anyone who breaks security measures and thus gains unauthorized access to a computer system or its part with imprisonment of up to one year, a ban, or a confiscation of a thing or other property. A security measure is understood as any measure put in place to prevent free access to a computer system. The level of security is irrelevant, as long as the will of the user to exclude access of others is clear.<sup>14</sup> Gaining access is defined as an activity that allows the perpetrator to freely dispose with the computer system or its part and its informational content including remote access.<sup>15</sup>

Paragraph 230(2) penalizes access to a computer system or a memory device, even where security measures were not broken, when the perpetrator abuses the access to use the data stored in the computer or the memory device in an unauthorized way, or deletes, destroys, damages, alters, suppresses such data or lowers its quality, or falsifies data stored in the computer system, or enters data into the computer system without authorization or interferes with the software or the technical setup of the computer or other data-processing device. The acts in subparagraph 2 carry a sentence of up to two years of imprisonment.

Acts penalized in paragraphs 230(1) and 230(2) are punished more severely in the presence of a certain malicious intent (subparagraph 3) or if committed by members of organized groups (subparagraph 4) or if causing serious harm to the victims or substantial gain to the perpetrators (subparagraphs 4 and 5). From a privacy standpoint it is worth noting that serious harm as an aggravated circumstance is not limited to property damage, but extends to harms related to reputation, honour or loss of data having immaterial value.<sup>16</sup>

Paragraph 231 penalizes certain preparatory acts that are directed towards committing the criminal offence in paragraph 230 or breaching the secrecy of communicated messages in paragraph 182. These preparatory acts include manufacturing, spreading, importing, exporting, transporting, offering, mediating, selling, arranging for oneself or another, or keeping of devices or parts of devices, manuals or other tools including software that are adapted to facilitate unauthorized access to a computer, or computer passwords, access codes, data and other similar tools which can gain the perpetrator access to a computer system. The criminal offence in paragraph 231 requires a specific intent, that is, to commit criminal offences defined in paragraph 230 or paragraph 180.

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<sup>13</sup> Novotný, Oto, Rudolf Vokoun, Pavel Šámal (eds.) *Trestní právo hmotné. Zvláštní část*, Praha: Wolters Kluwer (2010). pp. 211-212.

<sup>14</sup> Grivna, Tomáš, 'Trestné činy proti majetku' in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 2087.

<sup>15</sup> Grivna, Tomáš, 'Trestné činy proti majetku' in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 2089.

<sup>16</sup> Grivna, Tomáš, 'Trestné činy proti majetku' in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 2094.

The third of the computer crimes in Header V does not require intent and is committed by gross negligence, however, it is defined by a substantial to property and does not relate to unauthorized access, hence it will not be discussed further, since its relation to privacy is minimal.

#### 3.1.1.1 Objects protected in par. 230-231

The placement of computer crimes under the header of property crimes would suggest that the main object protected therein relates to the property-based aspects of computers and data stored in computer systems. In light of the fact that access to a computer system is penalized even in the absence of damage to property, this placement seems questionable. The doctrine makes an analogy with the violation of the freedom of the dwelling. The protection of the dwelling is motivated by protecting privacy and unauthorized access to a computer system infringes privacy in a similar, and serious, manner since computers store information of personal and intimate nature about its users.<sup>17</sup> Therefore, what paragraph 230(1) protects foremost is the confidentiality of computer data and systems, and its integrity is only protected as a secondary object. The object of protection in paragraph 230(2) is the accessibility and integrity of computer data and systems.<sup>18</sup> Whereas paragraph 231 defines a preparatory crime to commit criminal offences specified in paragraph 230, its object of protection is in principle the same.

### 3.2 Documents

Article 13 of the Charter of Fundamental Rights and Freedoms guarantees the secrecy of correspondence and the secrecy of privately stored documents. The Czech Republic not only has an obligation to refrain from interfering with this right, but also a positive obligation to protect it from interference of others. This obligation has also found its translation in the Criminal Code, specifically in the Header II entitled criminal offences against liberty and personality rights, privacy and secrecy of correspondence. Part II of the header includes the core of privacy crimes in the Criminal Code, including the protection of privately stored letters and documents in par. 183 Criminal Code:

*“(1) Whoever without authorization breaches the secrecy of a letter or another writing, photograph, film, or another record, computer data or another document privately stored by another person making it public, giving access to it to third person or uses it in another way will be punished with imprisonment no longer than one year (...)*

*(2) Punishment of imprisonment no longer than two years (...) will be handed to anyone who commits the act specified in subparagraph 1 with the intention to (...) cause serious harm to another or places her societal status in jeopardy.”*

The object of protection is the secrecy of documents that the person keeps in private with the intention to keep them from being revealed to others.<sup>19</sup> This intention is also important in

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<sup>17</sup> Grivna, Tomáš, ‘Trestné činy proti majetku’ in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 2086.

<sup>18</sup> Grivna, Tomáš, ‘Trestné činy proti majetku’ in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 2094.

<sup>19</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1636.

determining whether something is kept privately. Commonly, things kept privately are those kept in the dwelling of a person, as well as those kept in other premises that the person has under control. This does not preclude premises where other persons have access, as long as the documents are kept in a way that clearly shows the intention of their owner to keep them private, e.g. a drawer in a desk at the office.<sup>20</sup>

It is important to note that merely learning the contents of the documents does not trigger criminal sanctions. One of three further actions are subject to criminal penalty, either making the contents publicly known, or making the content known to another person or a group of people, or using it in another way. With regards to the last action, ambiguously defined by the Criminal Code, doctrine lists several examples of other use: use of the document or its content in the benefit of the perpetrator (enrichment, gaining business advantage) or to the detriment of the victim (decreased societal status, disintegration of family ties).<sup>21</sup>

### **3.3 Property**

Crimes related to things other than computers and documents might have a less direct connection to privacy, related to a person's interest in using property as a means to shield activity, facts, things or information from the view of others. For example, the content of a person's handbag may reveal much of their private life in the form of a personal diary, medications and other personal artifacts and these become known to anyone who misappropriates it.

In the TZ, the criminal offences targeting property are largely organized in header V: Criminal offences against property. These include various forms of misappropriation, including theft, embezzlement and fraud, and offences causing damage or destroying property of others. From a privacy perspective, the most interesting offences in header V are the computer crimes discussed in another section (see section 3.1.).

## **4. Places**

### **4.1 Role of place in the Criminal Code**

Places play an important role in the Criminal Code, either as objects of protection or objective elements constituting a criminal offence. The core of this chapter will focus on the former role of place in criminal law, focusing on criminalization of conduct against the home as a legally protected place, putting to effect the positive obligation of the state to protect the freedom of the home stemming from Article 12 of the Charter.

The role of places other than home in the criminal law lies mainly in determining whether certain behavior fulfils the signs of a criminal offence. This is generally the case for certain obscenity

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<sup>20</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1637.

<sup>21</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1638.

crimes, crimes against public order and morals. Three types of places can be distinguished: places accessible to the public, dwellings, and places having a special quality (see below).

Disorderly conduct (see section 5.4.2.) in places accessible to the public is a criminal offence under § 358 of the Criminal Code. Interestingly, places accessible to the public are a much wider category than what we usually understand under public spaces. They include any place to which a wide range of individually undetermined persons have access and where such persons generally appear. Access is understood in terms of visibility, it is not necessary that people can physically access the place as long as they can see or hear the disorderly conduct taking place. It does not only include places that are accessible to everyone, but also places accessible to certain groups of people, such as pupils or employees of a factory. It is also not necessary for any persons to be present at the time of the conduct, the mere possibility constitutes places accessible to the public.<sup>22</sup> Importantly, such places never include dwellings<sup>23</sup>, even when visible to the public, suggesting that privacy of the home protects even such conduct that would in other places trigger penal sanction.

An example of places having a special quality are places that are in proximity to schools or similar places regularly visited by children, where certain activities, namely prostitution, are criminalized.

## 4.2 Home

Inviolability of the home is a fundamental freedom protected by the LPS in Article 12. The LPS stipulates that no one shall enter a dwelling without permission from a person living there. Article 12 provides for some derogations from this principle<sup>24</sup>, but in principle puts in place a negative obligation of the state to respect the inviolability of the dwelling and a positive obligation to protect it from interference of others, which have been translated into criminal procedural laws and criminal substantive laws respectively.

The term dwelling used by the LPS is also used in the Criminal Code. Criminal law doctrine understands the term dwelling to mean a house, an apartment or another space used for living and the accessories belonging to them. It is widely defined to capture the factual state of living regardless of the form of legal entitlement to the protected space. It includes houses, apartments, cabins, hotel rooms, shelters, dormitories, retirement homes, and other live-in institutions. It includes the adjacent land, if it is fenced and used for housing purposes. It does not include barns, unless they contain things related to leisure activities and are functionally connected to the dwelling, bowers, objects under construction.<sup>25</sup>

Dwelling should be distinguished from the term that can loosely be translated as household which is a term used in Civil Law and relates to persons living together and sharing the related costs. Dwelling is a physical place and is not dependant on relations to other people. Its function is to

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<sup>22</sup> Šámal, Pavel, Milada Šámalová, 'Trestné činy proti pořádku ve věcech veřejných', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3034.

<sup>23</sup> Šámal, Pavel, Milada Šámalová, 'Trestné činy proti pořádku ve věcech veřejných', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3034.

<sup>24</sup> Can only be violated on statutory grounds (§ 82 TR, § 40 PolCR).

<sup>25</sup> Šámalová, Milada 'Výkladová ustanovení', in Šámal, Pavel (eds.) *Trestní zákoník I. § 1 až 139. Komentář*, 1. Edition, Praha: C.H. Beck (2009), pp. 1245-1246.

offer privacy, freedom from disturbance, protection of personal artefacts, and protection of the person from negative outside influences.<sup>26</sup>

The key provision protecting the inviolability of the dwelling in the Criminal code is paragraph 178 entitled Breach of the freedom of the home:

*“(1) Whoever enters another’s dwelling without authorization or remains there without authorization shall be punished with imprisonment of no more than two years.*

*(2) Imprisonment term between six months and three years shall be handed to the perpetrator, if they commit the act in subparagraph 1 using violence, or a threat of immediate violence, or if they overcome an obstacle put in place to prevent entry.*

*(3) Imprisonment term between one year and five years shall be handed to the perpetrator (...) who commits such act with a weapon or jointly with at least two other persons.”*

The object of protection in paragraph 178 is the freedom of the home, which can only be violated on statutory grounds, such as §82 of the Code of Criminal Procedure or §40 of the Police Act.<sup>27</sup> Protection in paragraph 178 is only given to people who have a legal title to live in the dwelling, but these people are protected *erga omnes*. Therefore, a tenant is protected against the landlord or the owner of the building, but a squatter likely doesn’t enjoy protection against anyone despite factually living in a certain place. At the same time, a house or a flat where no one factually lives is not given protection<sup>28</sup> under paragraph 178.<sup>29</sup>

Breach of the freedom of the home can be committed in two ways: unauthorized entry and unauthorized remaining in a dwelling. For the entry to be authorized, not all dwellers have to agree with it. If at least one of the lawful dwellers agrees with the entry, it will not be penalized under paragraph 178,<sup>30</sup> unless the permission was obtained by fraud or deception. Unauthorized remaining in a dwelling refers to situations where the initial entry was authorized, but the perpetrator remains in the dwelling despite the dweller declaring her will that the person should leave the dwelling. Such declaration can be explicit or tacit.<sup>31</sup> The dwelling is understood in holistic terms, therefore, if someone is authorized to enter or remain a particular part of the dwelling, entering other parts of the dwelling shall not be penalized. Therefore, entering a locked room of a flatmate in a shared house will not constitute a criminal offence under paragraph 178, since the condition of unauthorized entry refers to the dwelling as a whole.

The use of violence against the person or e.g. the lock, threats or overcoming obstacles triggers higher penalties. The obstacles mentioned in paragraph 178 do not need to be particularly difficult

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<sup>26</sup> Šámalová, Milada ‘Výkladová ustanovení’, in Šámal, Pavel (eds.) *Trestní zákoník I. § 1 až 139. Komentář*, 1. Edition, Praha: C.H. Beck (2009), p. 1245.

<sup>27</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1593.

<sup>28</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1593-1594.

<sup>29</sup> Although it might fulfil other paragraphs (208)

<sup>30</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1594.

<sup>31</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1594.

to overcome to trigger higher penalties. Even using a key found on the street to unlock the door, climbing over a fence or through an open window will qualify as such.<sup>32</sup>

Another criminal offence indirectly protecting the dwelling is Theft in §205 of the Criminal Code. Although theft is generally criminalized only when property of certain value is stolen, minimum value is not required when theft is committed by breaking in. People, therefore, enjoy higher protection in the property kept at home and other enclosed places.

Moreover, the protection of privately kept documents (see section 3.2.) also protects documents kept in the dwelling. The importance of the connection between protection of private documents to the protection of the home can be traced back to 19<sup>th</sup> century Austrian constitutionalism where articles protecting inviolability of the home specifically referred to privately kept documents and papers.<sup>33</sup>

### 4.3 Non-residential places

Just as home, non-residential places enjoy protection against theft by breaking in. Protection of privately kept documents can also apply to non-residential places. A specific protection of places in which the victim does not reside is included in § 208 which criminalises unauthorized use of a house, flat or non-residential place, or prevention of using such spaces to the authorized person. Similarly to theft, this provision protects property-based aspects of places.

## 5. Persons

### 5.1 Body

Protection of the person's interest in excluding access of others to their physical body is an important aspect of privacy protection. Protection of bodily integrity is also considered to be the most important task of the Criminal Code, judging by the placement of the relevant section of the criminal code protecting life, health and physical integrity.

Human life is the highest protected value in the criminal law.<sup>34</sup> The protected value is so high that even permission of the victim does not preclude criminalization of actions against life and health. Life is protected in provisions criminalizing Murder (§ 140), Voluntary Manslaughter (§ 141; here the intent is not to kill but to cause bodily harm), Murder of the newborn by the mother (§ 142; privileged form of murder with significantly lower penalty), negligent manslaughter (§ 143), participation in suicide (§ 144; motivating or assisting in someone's suicide).

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<sup>32</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1595-1596.

<sup>33</sup> E.g. the so-called Stadion Constitution (also known as Imposed March Constitution) of 4 March 1849, or earlier drafts of the fundamental rights documents from 1848.

<sup>34</sup> Šámal, Pavel, 'Trestné činy proti životu a zdraví', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1294.

Health of a person is protected in a number of provisions relating to intentional harming of health (serious in § 145, less serious in § 146), intentional harming of health with a justifiable motivation in § 147, and negligent forms of harming health (§ 147, § 148). The term ‘harming health’ is understood as creating such a state, which by interfering with the normal physical or mental functions makes it more difficult, for an extended period, to enjoy the normal way of life of the victim and which requires medical treatment. A serious harm to health is understood as only a serious medical condition or illness. This includes mutilation, loss of ability to work, paralyses of a body part, loss or worsening of the function of a sensing organ, damage to an important internal organ, disfigurement, abortion of a fetus, agonizing suffering, or another long-term health defect.<sup>35</sup>

A provision highly relevant to privacy protection is the criminalization of torture and inhuman treatment in the exercise of public authority in § 149. Who causes physical or mental suffering to another in the exercise of power of state administration, territorial self-governance, a court or another public power body will be subject to penalty of up to 5 years.

Not only actual harm to life and health of persons is criminalized, but also the endangerment of those values. Therefore, not providing help to a person who is in danger of death without putting oneself in danger is criminalized in § 150. Intentional spreading of disease in § 152 and negligent spreading of contagious disease in § 153, endangering someone with a sexually-transmitted disease in § 155 and endangerment with harmful food products<sup>36</sup> or items in § 156-157. Starting or participating in a brawl is criminalized in § 158.

A separate subsection is given to crimes against pregnancy. While abortion as such is legal in the Czech Republic, if it fulfills the conditions set by a special law, certain practices are criminalized. Unauthorised abortion with the woman’s permission, that is abortion not performed within the limits set by the special law, is criminalized in § 160 and helping a woman to end the pregnancy herself in § 161. § 162 criminalizes pressuring a woman to get an abortion. The most serious criminal offence in the subsection, also from the privacy perspective since it interferes not only with bodily integrity, but also family life and decisional privacy, is forced abortion criminalized in § 159.

Certain activities related to objects derived from human body are also criminalized. Unauthorised collection of tissue and organs is criminalized in § 164, unauthorized transplants of organs or tissue for a monetary reward in § 166 and unauthorized disposal with human embryo or genome in § 167.

## **5.2 Image: Protection from Visual Observation and Recording**

The Czech Criminal Code does not contain any specific provision explicitly criminalizing unlawful visual observation, recording or the making of photographs. Prior to the adoption of the new Civil Code in 2012, a lively public debate had opened in relation to the introduction of a more far-reaching protection of people’s right to own image, but similar debates have not arisen in the context of criminal law. Nevertheless, criminal legal practice has dealt with a number of cases related to visual recording of people without their consent and a number of judgements over the

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<sup>35</sup> § 122 of the Criminal Code.

<sup>36</sup> This refers to food products that can seriously harm someone’s health after short-term consumption, and probably not to unhealthy food in general. At least, there is no case law available where owners or employees of fast-food and similar establishments were criminalized for endangerment of human health.

last five years have held perpetrators of such actions criminally liable under a very general and broadly defined provision of §181 of the Criminal Code entitled ‘Damaging another person’s rights’. The provision falls under Header II (Criminal offences against freedom and personality rights, privacy and secrecy of correspondence), Section 2 (Criminal offences against personality rights, privacy and secrecy of correspondence) of the Criminal Code.

*§181 Damaging another person’s rights*

*(1) Whoever causes serious detriment to another person's rights by:*

- (a) misleading another person; or*
- (b) exploiting another person's mistake,*

*will be punished by imprisonment of up to two years or be banned from activity.*

The object of protection of §181 is defined very broadly as rights of persons other than property rights, in particular family rights, labour rights, personality rights and others.<sup>37</sup> The offence is often dubbed ‘non-property fraud’. Being broadly defined, the provision has covered a wide range of unlawful conduct, including unlawful recording, non-consensual pornography, identity theft, and many others. ‘Rights’ in the meaning of the provision include both fundamental rights protected by the Charter of Fundamental Rights and Freedoms<sup>38</sup>, but also rights in the civil law meaning of the word (right as a legal entitlement), including personality rights, portrait rights, etc.

Visual recording (or observation) without knowledge or consent can potentially interfere with the rights protected in the Charter. The general right to privacy protected by Art. 10 of the Charter and its aspect of informational determination includes protection from being watched, followed and tracked in public spaces,<sup>39</sup> and the protection of home life under Art. 12 of the Charter includes protection from unauthorized making of pictures and audio records from closed private spaces.<sup>40</sup> Non-consensual visual recording also interferes with personality rights protected in the Civil Code:

*Subsection 2*

*Image and Privacy*

*§ 84*

*Capturing the image of another person by any means in a manner that makes it possible to reveal their identity from the representation is only possible with their permission.*

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<sup>37</sup> Šámal, Pavel, ‘Trestné činy proti svobodě a právům na ochranu osobnosti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1616.

<sup>38</sup> Part of Czech constitutional order.

<sup>39</sup> Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. (eds.)(2012), *Listina základních práv a svobod, Komentář*, Wolters Kluwer ČR, Prague, p. 285.

<sup>40</sup> Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I. (eds.)(2012), *Listina základních práv a svobod, Komentář*, Wolters Kluwer ČR, Prague, p. 331.

Importantly, not every interference with person's right to own image and privacy will amount to committing the offence under §181 since the protection is reserved for serious violations. Whether an interference is serious or not has to be determined on a case-by-case basis, especially taking into account the kind of right that is interfered with, what was the intensity of the detriment and the consequences it had for the victim, whether the consequence is easily rectified or rectification would be very difficult or impossible.<sup>41</sup>

Criminalization also requires deception on the part of the perpetrator which takes two forms: the perpetrator creates a mistaken belief of the victim by pretending, or creating false impression of circumstances different from the factual state by acting or omitting to act, or the perpetrator abuses a mistaken belief of the victim which she did not create herself, but has knowledge of.<sup>42</sup> In judicial practice, in cases of unlawful visual recording, the fact that it had been done covertly in situations where the victim had some expectations of not being observed was sufficient to establish deceit.<sup>43</sup>

Due to the very broad wording of the provision it is difficult to draw the exact boundaries of when it could be applied to visual recording or observation. Literature offers no help and only some guidance can be found in the limited set of available case law. So far, the courts have found violation of §181 in two types of cases: covert recording of people's private life in the dwelling and covert recording of sexual activity.

### **5.2.1 Covert recording and observation of private life in the home**

Two cases have reached the Supreme Court concerning recording of people in their homes. The first case concerned an ex-husband installing cameras in his ex-wife's house (including one in the bathroom) through which he recorded the ex-wife and their two children for a period of two months. The man was found guilty of committing the criminal offence under §181, but only punished with a monetary fine.<sup>44</sup> The other case concerned a landlord installing a hidden camera behind a mirror in the bathroom through which he recorded his tenants for a period of several years. This perpetrator was also found guilty and received a conditional sentence of 12 months and a duty to financially compensate the victims.<sup>45</sup>

Some boundaries of criminalization can be identified in these cases. Both cases concerned recording of people in their private bathrooms and the court stressed that such recording is an especially serious violation of privacy and certainly serious enough to trigger §181. A bathroom as a space where people perform intimate hygiene<sup>46</sup> and where their naked bodies can be observed

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<sup>41</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011.

<sup>42</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1617.

<sup>43</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011, Supreme Court Decision 4 Tdo 843/2015 from 17 July 2015.

<sup>44</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011.

<sup>45</sup> Supreme Court Decision 4 Tdo 843/2015 from 17 July 2015.

<sup>46</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011.

and recorded,<sup>47</sup> is a space requiring special protection where any violation of the expectation of being undisturbed amounts to a gross interference of intimate privacy and personality rights.<sup>48</sup>

Due to the explicit mention of the bathroom in both cases, it is not clear whether similar recording or observation of other parts of the house would also amount to offence under §181. In Tdo 942/2011, the court states that the perpetrator created an erroneous belief about undisturbed enjoyment of the apartment space, suggesting that the protection applies not only to the bathroom, but to the apartment as such. This would be consistent with the fact that intimate life and activities are certainly not confined exclusively to bathrooms. Nevertheless, the court especially stressed the degree of harm caused by monitoring a bathroom, and it is unclear whether this was what tipped the balance in favor of qualifying the act as ‘serious detriment to privacy’.

In 4 Tdo 843/2015 the Supreme Court also clarified the actions that can amount to serious detriment of someone’s rights. In the context of intimate activities in a bathroom, the court found that not only recording, but also mere observation amounts to a serious violation of privacy. Already the fact that the perpetrator tricked the victims into using a bathroom in which they could be observed and recorded by him amounts to a sufficient violation, regardless of the observation or recording actually taking place. The fact that the perpetrator kept the images produced in this way on VHS cassettes would in itself also constitute a violation under §181. The whole process of observation, recording and storing of records constitutes a single continuous offence, of which each element is sufficient in itself to qualify as a criminal offence.

The time-frame of such recording was found rather irrelevant by the court. Even a short-term monitoring of the victim in such intimate settings is a serious violation.<sup>49</sup>

### **5.2.2 Covert recording of sexual activity**

Another case that reached the Supreme Court concerned a sex worker who secretly recorded, using a camera hidden in her purse, the sexual activities she engaged in with a client. She did this at a request of another person to whom she subsequently handed the recording for the purposes of blackmailing the victim. Both were found guilty of ‘damaging another person’s rights’.<sup>50</sup>

The Supreme Court ruled that creating a visual and audio recording of such an intimate matter as sexual intercourse of a person without the knowledge of this person, especially when the recording is handed over to another person who stores it, has to be considered a serious detriment to the rights of the victim. Interestingly, the court also stated that the creation of the recording by the sex worker did not in itself amount to the offence under §181 until she handed it over to the third-party, but the court did not further elaborate on this. We could speculate that since she was herself involved in the sexual acts, her having a recording of it did not constitute a sufficiently serious violation of victim’s privacy.<sup>51</sup> Extending this reasoning, if a third-party that would not be involved

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<sup>47</sup> Supreme Court Decision 4 Tdo 843/2015 from 17 July 2015.

<sup>48</sup> Supreme Court Decision 4 Tdo 843/2015 from 17 July 2015.

<sup>49</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011.

<sup>50</sup> Supreme Court Decision 6 Tdo 1028/2010 from 16 December 2010.

<sup>51</sup> Supreme Court Decision 6 Tdo 1028/2010 from 16 December 2010.

in the sexual act covertly recorded it, it would create the same material situation as was created when the recording made by the sex worker was handed over to the third-party. Such situations would, presumably, also be criminalized under §181.

In summary, based on available case law, the following situations are criminalized as ‘damaging another person’s rights’ under §181:

- Covert observation or recording of people in private bathrooms and subsequent storage of such recordings (potentially also the same regarding other parts of private dwellings, but this remains unclear)
- Covert recording of sexual activities by one of the participants and subsequent sharing of such recording with third-parties, or (speculatively) covert recording of sexual activities by a third-party.

Considering the very wide scope of the provision, it could potentially cover a wide range of other situations where privacy rights are seriously harmed by observation or recording, but in the absence of additional case law and scholarly debate, no clear boundaries are established yet.

### **5.2.3 Non-consensual Publication of Intimate Images**

Based on available reports, the provision of §181 can also be applied to cases of non-consensual publication of intimate images<sup>52</sup>, depending on the specific circumstances of such publication. In case, the perpetrator obtains such images that the victim keeps privately, it could also be penalized under §183 of the Criminal Code.

## **5.3 Relational**

### **5.3.1 Family life**

The protection of family life is usually justified by the respect for a person’s choice with whom they want to share and build up their life and the respect for family ties against interference. The Czech Criminal law contains a section entitled Crimes against Family and Children. However, the focus of this section is, with one exception, rather on acts within a family than outside interferences with a family unit. Special focus is on protection from acts which would interfere with proper development of children, who upbringing is mostly happening within a family.

Protection of children as such, and not just their relation with the parents, is expressed in a number of criminal offences. Abandonment of children of children is criminalized in § 195 in order to protect the life and health of children. Criminalization of neglect to provide sustenance to which children are legally entitled from their parents in § 196. The more serious criminal offences relate to domestic abuse of children or other dependents in § 198 and domestic abuse of other persons living in the same dwelling in § 199. Abuse is defined as bad treatment with the person which has signs of a higher degree of roughness and cruelty and have a certain degree of permanence, which

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<sup>52</sup> See e.g. <https://www.novinky.cz/krimi/338830-soudni-znalec-rozesilal-fotky-nahe-expritekkyne.html>

this person subjectively experiences as a wrong.<sup>53</sup> It includes both physical abuse as well as psychological maltreatment,<sup>54</sup> such as deprivation of sleep. Threatening proper upbringing of children is criminalized in § 201. The act is committed by compromising the child's mental and emotional development by encouraging or allowing immoral or idle lifestyle, allows the child to conduct criminal activity, seriously neglecting the duty of care for the child or allowing the child to gamble. Seducing the child to engage in sexual activity is criminalized in § 202 and giving alcohol to children in § 204.

Lastly, the Criminal Code contains provisions that restrict people's choice with whom and how they want to live their life. And so §194 criminalizes bigamy, the object of protection being the interest of society in preserving the institution of monogamy, which is not elaborated further in the criminal law literature. Also, in a different section, incest among siblings or relatives in a direct line is criminalized in §188. The object of protection is the principle that sexual relations among relatives are not permitted which is based on the experience that descendants from such relations is "prone to degeneration". For this reason, only intercourse and not other sexual activities is criminalized here, since those other activities cannot lead to pregnancy. Doctrine is also of an opinion that for the same reason only incest among blood relatives is criminalized and relations based on adoption are excluded.<sup>55</sup> This line of reasoning would also appear to exclude relations where at least one of the partners is not fertile, either due to disease or menopause, but the literature does not reflect this.

The one criminal offence directly protecting family ties from outside interventions is the criminalisation of child abductions, the object of which is the unhindered exercise of care which belongs to the person that is authorized to exercise care over the child.

Family ties are also protected in the form of exceptions from criminal liability due to family relations. For instance, helping a perpetrator of a criminal offence to escape justice is a criminal offence under § 366. However, helping a perpetrator who is a close person<sup>56</sup> escape justice is not criminalized, with the exception of a list of criminal offences consisting of serious war crimes and crimes against humanity. Similar exception exists in regards to the duty to report or prevent criminal acts, where the exception extends to other persons such as lawyers or priests within the secrecy of their occupation.

### 5.3.2 Social relations and reputation

Among values closely connected to privacy, or seen as the aspects of it, are those protecting certain relations of individuals to other people. Czech criminal law criminalizes certain actions that interfere with freedom of association, freedom of assembly and with religious exercise. Perhaps more interestingly for this report, the Criminal Code protects the reputation and good name of

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<sup>53</sup> Šámal, Pavel, Milada Šámalová, 'Trestné činy proti rodině a dětem', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1751.

<sup>54</sup> Supreme Court Decision 3 Tdo 1160/2005 from 14 September 2005.

<sup>55</sup> Šámal, Pavel, Milada Šámalová, 'Trestné činy proti lidské důstojnosti v sexuální oblasti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1681.

<sup>56</sup> §125 of the Criminal Code: "Close person is understood to be a relative in a direct line, adopted parent, adopted child, sibling, spouse and partner; other persons are considered close, if the the harm done to one of them would be felt by the other one as a harm to themselves."

individuals, since attacks against these values can significantly affect the social relations of people targeted by such attacks.

Slander is criminalized in §184 of the Criminal Code:

- (1) *Whoever discloses false information about another which is capable of significantly endanger the esteem they enjoy among other people, especially harming them in their work relations, disturb their family ties or cause another serious harm to them, shall be punished by deprivation of liberty up to one year.*
- (2) *Deprivation of liberty up to two years or ban of certain activity shall be served to the perpetrator who commits the act referred to in paragraph 1 by means of print, film, radio broadcast, television, publicly available computer network or another similarly effective mean.*

The object of protection in criminalization of slander lies in the protection of honour and positive reputation against slander, which can seriously harm family or social life of the victim. It is an expression of the constitutional protection in Art. 10 of the Charter protecting human dignity, honour and reputation. Only individuals are protected by the provision, not collectives, institutions or other legal personalities.<sup>57</sup> Disclosing information to one person other than the victim is sufficient, if it leads to loss of reputation.<sup>58</sup> Disclosure through mass media triggers more severe penalties. The potential of the information to harm reputation should be determined on a case-by-case basis, depending on the status of the person, character traits, the nature of the information, circumstances of its disclosure and its spread. The harm to reputation does not have to occur, it is sufficient that the information has the potential of that effect.<sup>59</sup> Importantly, spreading true information cannot constitute defamation even when this information harms the reputation of the person concerned.

In contrast to a number of other jurisdictions, the offence is not prosecuted solely upon the request of the victim. It is not necessary that the victim is even aware of the slander. Protection is also given to missing people and even to the deceased.<sup>60</sup>

The perpetrator does not need to be aware of the false nature of the information, negligence towards the truthfulness is sufficient. The truthfulness of the information has to be verifiable. Therefore, statement that are evaluative in nature cannot constitute slander.<sup>61</sup> Insult is not criminalized in the Czech criminal law, although harming the honour of another person by insulting them or by subjecting them to mockery is an administrative delict under §49(1) of the Administrative Delicts Act.

More specific criminal offences that have a close connection to reputation criminalise false accusation, false witness statements and expert testimony and false interpreting in §345, §346 and

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<sup>57</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1642.

<sup>58</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1643.

<sup>59</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1643.

<sup>60</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1642.

<sup>61</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1643.

§347 respectively. These offences are also punished significantly more severely when committed with an aim to harm family or social relations of the victim.

Certain serious cases of harms to reputation can also be criminalized under the general provision of §181 damaging another persons rights (for detailed description of §181 see section 5.2.). This is for instance the case of the so called revenge pornography, where a person publishes or disseminates sexual images or images showing a naked body of an ex-partner, or another person, without their consent. Thus a perpetrator who posted sexual pictures of the victim which he obtained with her permission on a fake facebook profile he started in her name and subsequently sent those pictures to some of the victim's work relations has been found of damaging her rights under §181.<sup>62</sup> It should be noted that other cases of revenge pornography could be criminalized as a breach of secrecy of privately kept documents under §183 of the Criminal Code (see section 3.2.), if the perpetrator obtains the images without permission from a place in which they were privately kept.

### 5.3.3 Communications

Protection of private communications forms one of the cornerstones of privacy protection. The secrecy of transported messages is protected in Art. 13 of the Charter. The constitutional protection been transposed largely into the §182 of the Criminal Code entitled Breach of the secrecy of transported messages. Both the Charter article and the criminal law provision only explicitly protect mediated communications. No explicit protection of unmediated communication is provided in the Czech Criminal Code. The provision protecting secrecy of mediated communications read as follows:

- (1) *Whoever intentionally breaches the secrecy of:*
  - a) *Enclosed letter or another writing during the exercise of postal service or transported by another transport service or transport means,*
  - b) *Data, text, voice, sound or visual message sent through means of electronic communications network and attributable to an identifiable participant or user, who receives the message, or*
  - c) *Non-public transfer of computer data into a computer system, from it or within it, including electromagnetic emanations from the computer system transporting such computer data, shall be punished by deprivation of liberty of up to two years of a ban of activity.*
- (2) *The same punishment shall be given to whoever with the aim of harming another person or for their own benefit*
  - a) *Reveals a secret which they learned from a writing, telegram, phone call or a transfer through electronic communications network which was not meant for them, or*
  - b) *Uses such a secret.*

The provision contains two separate criminal offences: intentional breach of secrecy and revealing or using secrets.

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<sup>62</sup> Supreme Court Decision 4 Tdo 815/2014 from 22 July 2014.

The breach of secrecy relates to any unauthorized breach of the transported letter, message or transmission of data with the intention to learn their contents. It is therefore, the content of the message that is protected by the first paragraph.<sup>63</sup> Certain level of security is required for the communication to enjoy protection of this provision. Only enclosed letters and writings are protected. Similarly, only non-public transmission of data enjoy protection, which the doctrine interprets as only those that are specially protected or secured from access.<sup>64</sup>

Revealing of the secret refers to any disclosure of the content of the communication by and to a person to whom it was not addressed. Such disclosures are more strictly penalized when they are motivated by especially heinous aims, interpreted as aims which are in a principal opposition to morality and indicate moral perversion, insensitivity, selfishness, unscrupulousness, and general disrespect of the perpetrator towards the values of democratic society, for example vengefulness or greed. This does not include those aims that have a basis in natural human emotions such as jealousy (*sic*) or a long-term stress and tension in personal relations.<sup>65</sup>

Preparatory activities, such as obtaining tools or passwords that can be used to get access to protected communications, with the intention to commit an offence under §182 are criminalized in §231 of the Criminal Code.

Unmediated communications, as mentioned earlier are not explicitly protected in the criminal code. Nevertheless, the general provision of §181 Damaging another persons rights can be used to fill in this void in some of the more serious cases. See section XY on visual observation and recording for the more detailed discussion of the provision. Similarly to covert visual observations, covert eavesdropping on unmediated conversations could be understood as a deceptive form violating another person's privacy rights, fulfilling the definition under §181. Although no case law at the Supreme Court level is available where mere eavesdropping constituted offence under §181, criminal offence was found to be committed in a case where eavesdropping was combined with visual observation. It is, therefore, unclear whether the aural observation itself would be criminalized, but it has been a contributing factor in at least one case in front of Czech courts.<sup>66</sup>

#### 5.4 Thought

Thought is by some considered the last bastion of privacy that is yet to be conquered. Although technologies that enable others to learn the content of our thoughts may yet be in their infancy, the privacy of thought is not limited to mind-reading techniques. By privacy of thought we mean person's interest in the privacy of the mind, enabling development of opinions and beliefs, as well as freedom from unwanted attention. Acts that allow inferences of human thought, such as violation of the secrecy of elections which reveals the political preference of the victim, or torture in the exercise of public authority which may be utilized to force information out of people shall

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<sup>63</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1625.

<sup>64</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1627-1628.

<sup>65</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1628-1629.

<sup>66</sup> Supreme Court Decision 6 Tdo 942/2011 from 30 September 2011.

also be considered as acts against the privacy of thought. The privacy of thought also includes the ability to enjoy the peace of the mind, freedom from unwanted harassment and bothering.

### 5.4.1 Stalking

Stalking is one of the most interesting and complex criminal offences from a privacy perspective, since it relates to various privacy interests. As a criminal offence, stalking may to some extent overlap with the conduct defined for the purposes of this report as voyeurism, revenge pornography and eavesdropping, yet the overlap is limited since stalking is a more complex criminal offence. The criminal offense of stalking is construed on three main elements occurring cumulatively: (1) long-term, repeated or obsessive (2) harassing conduct (3) with a certain unwanted effect. In the Czech Republic, the stalking offence is entitled dangerous harassment which is criminalized in §354 of the Criminal Code:

*(1) “Whoever harasses another person on a long-term basis by*  
*a) threatening another person with assault or another harm to them or their close persons,*  
*b) seeking another’s personal proximity or following them,*  
*c) persistently contacting them through electronic communications means, writing or other types of contact*  
*d) limiting them in their usual way of life, or*  
*e) misusing their personal data to establish personal or other contact,*  
*and this conduct is capable of raising reasonable fear for their life or health or life or health of persons close to them shall be punished by imprisonment of up to one year or a ban of certain activity.” It is punishable by imprisonment up to one year or prohibition of some activity. The qualified merits are punishable by imprisonment from 6 months to three years.”*

The offence is included in the section entitled ‘Criminal offenses disturbing human cohabitation’. In this context cohabitation is understood broadly – not just people sharing a household, but generally people living together as a society. Válková thinks it is perhaps closer to the crimes against the protection of personality, privacy and secrecy of correspondence.<sup>67</sup>

The object of protection is generally defined as the protection of undisturbed interpersonal cohabitation, more concretely expressed as protection of physical and mental integrity, personal freedom and privacy of every individual.<sup>68</sup>

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<sup>67</sup> Válková, Helena, ‘§ 354 Nebezpečné pronásledování’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3006.

<sup>68</sup> Válková, Helena, ‘§ 354 Nebezpečné pronásledování’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3006.

Stalking is qualified as an intentional misdemeanor and penalized much less strictly than in a number of related jurisdictions, for example Germany or Poland, both in the penalty assigned and the high threshold required for criminalization. Whereas fear for life constitutes a qualified offence in these other jurisdictions, in Czech Republic it is a requirement of criminalization as such. Despite this, the Czech provision, equivalent to the qualified provisions in the other jurisdictions carries a much lower sentence than the basic provisions in Germany and Poland.

One of the elements of stalking is long-term harassment, which is defined as a common denominator of such societally harmful activities that in their totality aim to harass so intensively that it threatens mental and sometimes physical integrity of the victim, even if in the beginning the conduct is not visibly pathological or antisocial. The breaking point is difficult to determine and the boundary can be crossed in an inconspicuous manner, when the harassment slowly gains intensity and from a certain point becomes dangerous. It becomes clear when the futility of the perpetrator's attempts to gain victim's favour is obvious, and the harassment continues or when there are violent expressions. The conduct can start by seemingly innocent SMS, emails, phone calls and grow into permanent harassment, or even conduct of other criminal offences such as threats.<sup>69</sup>

Concrete forms can principally be legal behaviors, such as texting or seeking proximity, or illegal behaviors, such as threats or limiting personal freedom of the victim. Singular acts can be in itself legal and not harmful, but in context be considered stalking.<sup>70</sup> The long-term character of the perpetrator's actions is defined as several forced contacts or attempts liable to cause reasonable fear. Singular or random encounters otherwise liable to do so are not considered stalking. Stalking is a continuous, persistent and systematic action diverging from normal human behavior. High frequency is motivated by the perpetrator's effort to change the established way of life of the victim, endanger her mental stability and get her under the perpetrator's influence and power. The higher the frequency, the shorter the time period necessary to qualify as stalking. Typically, at least 10 attempts to contact, or 4 weeks of harassment constitute stalking.<sup>71</sup>

One of the forms of committing stalking is threatening conduct. The threat must be objectively capable of creating a justified fear, actual fear is not required, of physical harm or another harm to values such as sexual integrity, family life, property damage or reputation.<sup>72</sup>

Another form, following and seeking personal proximity must be broadly interpreted in line with the aim to protect individuals from serious attacks against privacy. Prowling, bothering, intruding, escorting, watching, for example daily waiting in front of the victim's house, night-time patrolling in front of the home, watching with binoculars are examples of such behavior.<sup>73</sup>

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<sup>69</sup> Válková, Helena, '§ 354 Nebezpečné pronásledování', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 3006-3007.

<sup>70</sup> Válková, Helena, '§ 354 Nebezpečné pronásledování', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3007.

<sup>71</sup> Válková, Helena, '§ 354 Nebezpečné pronásledování', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3008.

<sup>72</sup> Válková, Helena, '§ 354 Nebezpečné pronásledování', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 3008-3009.

<sup>73</sup> Válková, Helena, '§ 354 Nebezpečné pronásledování', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3009.

Persistent contact is to mean repeated sending of unsolicited messages, spamming of electronic post, intentional distribution of a computer virus, repeated messages, calling, letters, postcards also the sending of unsolicited objects, such as chocolates, alcohol, jewelry or other presents. It can take form of phone terror when the victim is subjected to repeated anonymous phone calls. When done online, it is also referred to as cyberstalking which includes, besides the above forms, also spreading of slander and harmful gossip about the victim liable to damage her reputation.<sup>74</sup>

Limiting the usual way of life of the victim is based on subjective considerations. In general, ordinary people enjoy a lower threshold of protection than for example famous actors, who must to some extent tolerate more intrusive actions of their fans.<sup>75</sup>

Finally, it needs to be noted that the different forms of conduct above do not in itself constitute stalking, if they are not capable of creating justified fear in the victim for their own, or their close ones life or health. The conduct must objectively be capable of creating a higher level of worry, anxiety, feelings of distress.<sup>76</sup>

#### 5.4.2 Other Criminal Offences Interfering with the Mind

Other forms of criminalization of behavior that interferes with the peace of the mind include various forms of hate speech, criminalized in §352, threats in §353 or spreading of false alarm in §357.

In this category we can also include obscenity offences such as disorderly conduct criminalized in §358:

*“(1) Whoever in a place accessible to public commits an act of gross indecency or disorderly conduct, especially by attacking someone, defaming a grave, historical or cultural memorial, or grossly disturbs the preparation, course or finalization of an organized sports event, gathering or a ceremony, shall be punished by imprisonment of up to two years.”*

The provision primarily protects public order and peace, but also honour and dignity of people. The idea behind it is that even in public space people should not be subjected to witnessing certain indecent or immoral acts that disturb the peace.<sup>77</sup> Based on similar reasoning, some less serious violations of the peace of the mind are delicts under administrative law. At a constitutional level, excessive noise in public in the night hours has been found inconsistent with the right to privacy and private and family life by the Constitutional Court, since it interferes with the right to a calm dwelling and sleep.<sup>78</sup>

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<sup>74</sup> Válková, Helena, ‘§ 354 Nebezpečné pronásledování’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3010.

<sup>75</sup> Válková, Helena, ‘§ 354 Nebezpečné pronásledování’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3010.

<sup>76</sup> Válková, Helena, ‘§ 354 Nebezpečné pronásledování’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 3011-3012.

<sup>77</sup> Šámal, Pavel, Milada Šámalová, ‘Trestné činy proti pořádku ve věcech veřejných’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 3033.

<sup>78</sup> Constitutional Court decision Pl. ÚS 13/09, from 25 January 2011.

A more specific offence, affording additional protection of children, criminalizes the exercise of prostitution in places that are in close spatial proximity to schools or other places where children regularly occur.<sup>79</sup>

## 5.5 Autonomy

An aspect of privacy of the person is also the autonomy of the person, or decisional privacy. Here we refer to intimate decisions primarily of sexual and procreative nature, but also including other decision making on sensitive topics within the context of intimate relationships. The following section will first briefly describe the general criminal offences against liberty and then present the criminal offences against sexual self-determination as an especially sensitive aspect of human autonomy.

### 5.5.1 Offences against Liberty

Generally, it can be said that any act which has an element of coercion or forces someone to do something they do not wish to do themselves is an attack against individual autonomy of the person. Most of these criminal offences are situation in the section of the Criminal Code entitled Criminal Offences against Liberty. This section includes protection of the freedom to make decisions, but also to self-development without interference, whether it is pressure in the process of creating will or misleading practices which manipulate people to make decisions that they wouldn't have made, if properly informed.<sup>80</sup> (1513)

The most extreme attack against liberty of the person is slavery criminalized in §168. This provision protects liberty in the widest sense of the word, that is deciding on practically all aspects of life.<sup>81</sup> Slavery is a state in which certain people are precluded from enjoying the nature of their personality, which distinguishes people from other beings, and where these people are not considered, or treated, as free human beings, but as beings that can be disposed of as objects of property rights. A lesser degree of bondage is serfdom, also criminalized in this provision, which is defined by a limited freedom of movement, rights to conclude marriage or contracts, disposal with property, etc.<sup>82</sup>

Giving children for adoption for monetary rewards criminalized in §169, deprivation of personal liberty in the sense of freedom of movement in §170, less permanent restrictions of freedom of movement in §171, abducting a person across borders in §172 and hostage taking in §174.

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<sup>79</sup> §190 of the Criminal Code.

<sup>80</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1513.

<sup>81</sup> Grivna, Tomáš, '§ 168 Obchodování s lidmi', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1517.

<sup>82</sup> Grivna, Tomáš, '§ 168 Obchodování s lidmi', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1518.

### 5.5.2 Offences against Sexual Self-determination

Offences against sexual determination are situated in a separate section entitled ‘Criminal Offences against human dignity in the sexual sphere’. These include rape criminalized in §185, coerced sexual activity in §186 both of which protect the freedom to decide about one’s sexual life<sup>83</sup>, sexual abuse of minors in §187 which additionally protects the moral and bodily development of minors,<sup>84</sup> profiting of another person’s prostitution in §189, production and other disposal with child pornography in §192, abuse of children to make pornography in §193, participation in a pornographic performance involving a child in §193a and established of forbidden relations with a child in §193b.

### 5.5.3 Other Offences Violating Autonomy

Classical criminal offences like robbery, coercion and extortion also interfere with individual’s decisional autonomy. The same is true for abuse of dependency and position of authority. In a more general sense, criminal offences that target the freedom of religious exercise, assembly and association also interfere with a widely defined autonomy of individuals.

## 6. Personal data

The privacy interest in personal data lies mostly in preventing information about one-self to be collected and in controlling the use and further disclosure of information that other have a legitimate access to. The only explicit data protection provision in the Czech Criminal Code is the §180:

*“Unauthorized disposal of personal data*

*(1) Whoever, even negligently, without authorization publishes, reveals, makes accessible or otherwise processes or appropriates personal data, which was collected about another person in relation to exercise of public power and thus causes a serious harm to the rights or legitimate interests of the person to whom the personal data relates shall be punished by imprisonment of up to three years or a ban of certain activity.*

*(2) The same penalty shall apply to whoever, even negligently, breaches a state mandated or state sanctioned duty of confidentiality by publishing, revealing or making accessible without authorization personal data obtained in the exercise of their occupation, employment or position to a third party, and thus causes a serious harm to the rights and legitimate interests of the person to whom the personal data relates.”*

The provision protects individuals from unlawful publishing and abuse of their personal data. The protection in the first paragraph relates to data collected in relation to the exercise of public power,

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<sup>83</sup> Šámal, Pavel, Milada Šámalová, ‘Trestné činy proti lidské důstojnosti v sexuální oblasti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1651.

<sup>84</sup> Šámal, Pavel, Milada Šámalová, ‘Trestné činy proti lidské důstojnosti v sexuální oblasti’, in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), p. 1674.

where the perpetrator can be anyone. The offence in the second paragraph can only be committed by certain persons having a state mandated or state sanctioned duty of confidentiality. Previously only state mandated confidentiality was protected, the state sanctioned duty of confidentiality was added recently, resulting in the extension of criminalization for example to confessional secrecy, which was previously excluded.<sup>85</sup> Either form of the criminal offence is punished more harshly, if the publication is made by means of print, radio or television broadcast, publicly accessible computer network or other mass media.

Another typical data protection criminal offence is what is commonly referred to as identity theft. The Czech Criminal Code does not include explicit criminalization of identity theft, which is in practice criminalized by using the general provision of §181 Damaging another person's rights. The same provision is applied to various privacy crimes that are not explicitly regulated, such as voyeurism or revenge pornography. Of these, identity theft seems to be the best fit to the exact wording of the provision which requires someone to harm another person's rights by misleading someone or abusing someone's mistake. There is abundant case law where the general provision has been applied to criminalize individuals pretending to be someone else, although not all cases were deemed serious enough to trigger criminalization. A perpetrator using another person's ID to conduct certain illicit business activities as found guilty of damaging another person's rights, despite the fact that the owner of the ID did not consider it a significant harm against his person.<sup>86</sup> In another case a driver caught drunk pretended to be someone else during police examination and hospitalization at a psychiatric clinic. This perpetrator was also found guilty under §181.<sup>87</sup> Another party found guilty was a perpetrator who pretended to be his brother at various opportunities after being caught committing a number of petty crimes and administrative delicts.<sup>88</sup> However, in the case where a university student wrote an exam for another student, the harm suffered by the faculty was not considered significant enough to trigger criminalization.<sup>89</sup>

## 7. Final Remarks

Despite being quite recent (2009), the Czech Criminal Code lacks explicit protections of number of aspects related to privacy, especially those dictated by the emergence of technologies. Thus for instance, it lacks any explicit protection against harmful forms of visual observation, protection against eavesdropping on private conversations, or criminal offences like revenge pornography and identity theft that has been gaining attention in other jurisdictions. This is either an oversight, or an underestimation of the issues, or perhaps just a thorough application of the *ultima ratio* arguments and the hesitation to over-extend criminalisation which appear to be strong in the Czech legal culture. However, in more serious cases, and the absence of explicit criminalization, the courts have to rely on other, more general, provisions. The one that seems to be the most flexible in accommodating various new privacy violations is the provision of §181 protecting people's rights from deceitful actions. This provision has been applied in practice to deal with a wide range

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<sup>85</sup> Šámal, Pavel, 'Trestné činy proti svobodě a právům na ochranu osobnosti', in Šámal, Pavel (eds.) *Trestní zákoník II. § 140 až 421. Komentář*, 1. Edition, Praha: C.H. Beck (2010), pp. 1612.

<sup>86</sup> Supreme Court Decision 6 Tdo 1413/2010, from 30 November 2010.

<sup>87</sup> Supreme Court Decision 6 Tdo 54/2014, from 9 December 2015.

<sup>88</sup> Supreme Court Decision 7 Tdo 993/2013, from 23 October 2013.

<sup>89</sup> Supreme Court Decision 6 Tdo 217/2011 from 30 March 2011.

of actions including voyeuristic visual observation, recording, including sound recording, revenge pornography, identity theft and a number of different acts with less relevance to privacy. While the vagueness and open ended character of the provision is useful in filling the gaps in legal protection, it does little for maintaining the principle of legality and the clear delineation of which actions are criminalized and which are not. If this approach takes deeper root in the legal culture, it will be up to the courts to draw the boundaries of criminality.

Where criminalization exists in privacy issues, the penalty level are often set surprisingly low. In the case of criminalization of stalking, for instance, the penalty levels are three times lower for a more serious offence than the penalties in neighboring jurisdictions of Germany and Poland for a less serious offence. The explicit protection of privately kept documents on the other hand, is a point of strength of the Czech code compared to the German or Polish one.