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Original scientific paper

DEPRIVATION OF LIBERTY IN CROATIAN MISDEMEANOUR PROCEEDINGS - APPLICATION OF EUROPEAN DETENTION AND PENITENTIARY STANDARDS*,**

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ABSTRACT

The paper addresses the issue of deprivation of liberty in misdemeanour proceedings in the context of both pre-trial detention standards and penitentiary standards set out in the practice of the European Court of Human Rights and the documents of the European Union. The fundamental human right to liberty can be restricted in misdemeanour proceedings in accordance with the Misdemeanour Act of the Republic of Croatia, following a police arrest or based on a court decision on detention to ensure the defendant's presence. The paper aims to analyse material and procedural conditions for the arrest and detention, and the conditions for the execution of both the detention measure and the prison sentence imposed in misdemeanour proceedings within the Croatian prison system.

In addition to the rich jurisprudence of the European Court of Human Rights, which has been developing and strengthening detention standards and the rights of prisoners for decades, the past decade has been marked by intensive activities of the European Union in matters related to persons deprived of their liberty in criminal proceedings. Considering that the issue of deprivation of liberty in misdemeanour proceedings has not been systematically addressed in Croatian literature, the paper will particularly analyse how these standards established in binding and non-binding legal instruments apply to and affect issues related to deprivation of liberty in Croatian misdemeanour proceedings.

Keywords: *arrest, deprivation of liberty, detention, European standards, misdemeanour proceedings*

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1. INTRODUCTION

Misdemeanour proceedings are conducted on the occasion of committed misdemeanours which are under Croatian law considered a type of punishable acts[1] that do not pose a substantial threat to public order or violate fundamental constitutional values to the same extent as criminal offences and are usually sanctioned with more lenient penalties.[2] However, some misdemeanours are even punishable with a prison sentence of up to 90 days[3] or even 120 days in the event of concurrent misdemeanours. The possibility of imposing a prison sentence and the nature of certain misdemeanours led the European Court of Human Rights (ECtHR) to autonomously interpret that misdemeanours can be regarded as criminal offences regardless of their classification under national law and that this entails the applicability of criminal aspect of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).[4]

In addition, the severity of certain misdemeanours, the nature and level of the prescribed sanction and the risk of prejudice to the unimpeded conduct of the proceedings may justify the possibility of deprivation of liberty in the course of the misdemeanour proceedings. This fundamental human right may be restricted in accordance with the Misdemeanour Act of the Republic of Croatia following a police arrest or on the basis of a court decision on detention to ensure the presence of the defendant. Since the right to liberty is one of the fundamental human rights

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1 Croatian criminal law distinguishes three types of punishable acts: criminal offences, misdemeanours and disciplinary offences. Although the European Court of Human Rights (ECtHR) refers to misdemeanour proceedings as minor-offence proceedings in its judgments against the Republic of Croatia, the term "misdemeanour" shall be used in the following chapters for better understanding and distinction from criminal proceedings *stricto sensu* as this term is often used in Croatian law literature written in the English language. E.g. Munivrana Vajda, M.; Ivičević Karas, E., *International Encyclopaedia for Criminal Law: Croatia*, Wolters Kluwer, 2016, p. 23.

2 *Cf.* Article 1 of the Misdemeanour Act, Official Gazette No. 107/2007, 39/2013, 157/2013, 110/2015, 70/2017, 118/2018, 114/2022 (hereinafter: MA).

3 Misdemeanours related to domestic violence, other misdemeanours related to violence, grave environmental offences and grave misdemeanours related to the abuse of narcotics. Art 35 (2) of the MA.

4 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, signed at Rome on 4 November 1950 and entered into force on 3 September 1953. For elaboration of criminal law nature of Croatian misdemeanour proceedings in accordance with *Engel* criteria established in jurisprudence of ECtHR and its autonomous interpretation of term criminal proceedings, see Novosel, D.; Rašo, M.; Burić, Z., *Razgraničenje kaznenih djela i prekršaja u svjetlu presude Maresti protiv Hrvatske,* Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 17, No. 2, 2010, pp.790-792. After the *Engel* judgement, in its subsequent practice, in the case *Jussila v. Finland,* the Court took the position that not all criminal procedures are equal, and the criminal-head guarantees in cases that do not belong to the hard core of criminal law will not necessarily apply with their full stringency. *Jussila v. Finland*, § 43, app. No. 73053/01, 23.11.2006. For more detail, see Vojvoda, N., *"Jezgra" i "periferija" kaznenog prava u praksi Europskog suda za ljudska prava,* Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 30, No. 1, 2023, pp. 73 – 95.

guaranteed by the Constitution of the Republic of Croatia (Article 22),[5] ECHR (Article 5), EU Charter on Fundamental Rights (Article 6)[6], the question arises as to which guarantees and to what extent are applicable to the deprivation of liberty in misdemeanour proceedings.

After the introduction, the paper provides a detailed analysis of liberty deprivation measures in misdemeanour proceedings, arrest and detention and sets out the general legal framework for these coercive measures, then elaborates on the application of European detention standards, especially procedural guarantees from Article 5 of the ECHR. This is followed by an analysis of the national legislation on arrest and detention with special emphasis on disputed issues in theory and practice. The last chapter before the conclusion deals with the issue of compliance with penitentiary standards, i.e. detention conditions during the enforcement of the prison sentence and detention measures imposed in misdemeanour proceedings.

2. APPLICATION OF EUROPEAN DETENTION STANDARDS ON DEPRIVATION OF LIBERTY IN MISDEMEANOUR PROCEEDINGS

2.1. General remarks on arrest and detention

The Misdemeanour Act of the Republic of Croatia distinguishes two forms of deprivation of liberty in misdemeanour proceedings, arrest and detention defining them as any measure or action that includes deprivation of liberty of a person suspected of having committed a misdemeanour.[7] These coercive measures have the purpose of ensuring the presence of the defendant and the successful conduct of misdemeanour proceedings.[8] The measures to ensure the presence of the defendant in the Misdemeanour Act are nomotechnically arranged in Chapter 17 according to the intensity of encroachment on fundamental rights from the mildest (summons to the defendant) to the most severe ones (detention). The entire chapter and especially Art. 127(2) is a reflection of the constitutional principle of proportionality, which requires the application of more lenient measures whenever the purpose can be achieved with such measures.[9]

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5 Constitution of Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.

6 Charter of Fundamental Rights of the European Union [2012] OJ C 326, p. 391–407.

7 Article 86(2) of the MA.

8 Article 127 of the MA lists the measures to ensure the presence of the defendant: summons, apprehension, precautionary measures, bail, arrest and detention.

9 *Cf.* Pleić, M.; Budimlić, T., *Mjere opreza u kaznenom postupku – prijepori oko samostalne opstojnosti i trajanja te druga otvorena pitanja,* Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), Vol. 28, No. 2, 2021, pp. 272 – 273.

The police have the authority to deprive a person of their liberty in misdemeanour proceedings for a short time in the event of an arrest pursuant to Art. 134 of the Misdemeanour Act. In addition, special police measures of liberty restriction are foreseen to prevent offenders under the influence of intoxicants from continuing to commit a misdemeanour.[10]

However, continued detention in misdemeanour proceedings can be based solely on the court's decision when the conditions from Art. 135 are met. The legislator also provided for a special type of detention and bail, the purpose of which is to ensure the enforcement of the misdemeanour sanction imposed by the first-instance judgment against a foreign defendant.[11]

Before a thorough analysis of the potentially disputed issues of measures of arrest and detention, it is necessary to determine whether the established European standards and procedures for reviewing the legality of deprivation of liberty in criminal proceedings are applied to these measures in misdemeanour proceedings.

2.2. Application of Article 5 of the ECHR on deprivation of liberty in misdemeanour proceeding

Article 5 of the ECHR protects the right to liberty and security by setting out an exhaustive list of specific grounds for detention in Article 5(1)(a) – (f), and further in paragraphs 2 - 5, by specifying procedural guarantees for persons deprived of liberty. These provisions provide for the right to be informed of the reasons for arrest (§2), the right to challenge the legality of detention (§4), and the right to compensation in the case of unlawful deprivation of liberty (§5). While these provisions refer to all persons deprived of liberty based on Art. 5 (1), Art. 5(3) contains two specific safeguards which only apply to Art. 5(1)(c), arrest and detention of the person suspected of committing an offence: the right to be brought before a judge and the right to be released within reasonable time.[12]

Two of six enlisted grounds for detention, Art 5(1)(a) and Art 5(1)(c), refer to deprivation of liberty in the context of criminal proceedings. Art 5(1)(c) covers the period of deprivation of liberty from the arrest to the passing of the first-instance judgment, and together with the guarantees prescribed in Art. 5(3) form an organic whole.[13] Art 5(1)(a), however, refers to the deprivation of liberty after the

[10] Article 137 of the MA.

[11] Article 136 of the MA.

[12] Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 408.

[13] *Cf.* Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava, Strasbourški acquis*, Zagreb, 2013, pp. 1176 – 1177.

establishment of guilt and conviction, and the application of this provision commences immediately upon the first-instance judgment.[14]

The question of whether the measures of deprivation of liberty imposed in misdemeanour proceedings fall under Article 5(1)(c) depends on the fulfilment of three conditions: firstly, the existence of a criminal offence, secondly, the existence of a justified purpose and thirdly, the existence of justified suspicion.[15] The key issue in the application of Article 5(1)(c) to the deprivation of liberty in misdemeanour proceedings is the issue of defining the term "offence". This term is identical to the terms *offence* and *criminal charges* as set out in Art. 6(1) of the ECHR and the interpretation of those terms is also relevant for the interpretation of the scope of Arts. 5(1)(a) and (c).[16]

Thus Article 5 (1)(c) extends not only to criminal offences classified as such under national law, but it has a wider scope in accordance with the ECtHR's principle of autonomous interpretation.[17] In *Steel v. the UK*, ECtHR considered that an offence within the meaning of Article 5(1)(c) was an issue bearing in mind the nature of the proceedings in question and the penalty at stake.[18] The Court held that even though breach of the peace is not classified as a criminal offence under English law, the duty to keep the peace is within the scope of the public duty and the police have powers to arrest any person who has breached the peace.[19]

As for the second condition, the purpose of detention – under this provision detention is only permitted when it is effected in connection with criminal proceedings.[20] Following the criteria established in the practice of the ECtHR, misdemeanour proceedings with regard to the nature of the offence and the degree and severity of the possible sanction can be considered a criminal proceeding in the sense of this requirement from Article 5.

Since arrest and detention can only be ordered for serious misdemeanours (violent acts, acts against public order and peace) sanctioned by imprisonment or heavy fines according to the Misdemeanour Act, the existence of a criminal offence in

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14 *Cf.* Trechsel, S., *op. cit.*, note 12, p. 437.

15 According to Art 5(1)(c), the deprivation of liberty is justified in the case of the lawful arrest or detention of a person effected to bring him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him from committing an offence or fleeing after having done so.

16 Omejec, *op. cit.,* note 13, p. 1177.

17 Harris, D.J. *et al.*, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 315.

18 Harris, O'Boyle & Warbrick, *op. cit.*, note 17, p. 315.

19 *Steel v UK*, §48, app. no. 24838/94, 23.9.1998.

20 Harris, O'Boyle & Warbrick, *op. cit.*, note 17, p. 315.

the context of Art. 5(1)(c) and the application of the guarantees from Art. 5(3) of the Convention on cases of arrest and detention in misdemeanour proceedings should not be disputable.

Thus, in *Osmanović v. Croatia*, ECtHR examined the applicant's allegations that there had not been sufficient reasoning for remanding him in custody and that the proceedings by which he sought to challenge his detention had not been in conformity with the guarantees provided under Article 5 of the ECHR. The Court held that there was no dispute between the parties and that depriving the applicant of liberty in connection with the proceedings for breach of public peace and order falls within the scope of Article 5(3).[21] Considering the fact that detention lasted for eight days, the Court stated that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.[22] The Court found that, since the applicant was charged with breach of the public peace and order by attacking two off-duty police officers, the national authorities provided relevant and sufficient reasons in justifying the short eight-day period of the applicant's detention and that there has been no violation of Article 5(3) of the ECHR.[23]

The applicant also contended that his right to effective judicial supervision under Article 5 (4) had been violated by the Constitutional Court when declaring his constitutional complaint inadmissible without examination of his complaints on merits. Having in mind that the Court has already found a violation of Article 5(4) in several cases against Croatia with similar allegations,[24] the Court stated that by declaring the applicant's constitutional complaint inadmissible simply because he had no longer been detained, the Constitutional Court deprived it of whatever further effect it might have, which did not satisfy the requirement of the effectiveness of the review as required under Article 5 (4) of the ECHR.[25]

2.3. Deprivation of liberty under the EU law

Having recognised the continuous problem of excessive use of pre-trial detention among the EU Member States and inadequate detention conditions in their

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21 *Osmanović v Croatia*, §35., app. no(s). 67604/10, 6.11.2012.

22 *Osmanović v Croatia*, §38, see *Belchev v. Bulgaria*, § 82, no. 39270/98, 8 .4.2004.

23 *Osmanović v Croatia,* § 41.

24 After ECtHR established the above-mentioned violation in several cases, the Constitutional Court of the Republic of Croatia decided to review the problematised practice assessed as contrary to the European Convention and amended it to conform to the Convention. See Graovac, G., *Izvršenje "istražnozatvorskih" presuda Europskog suda za ljudska prava u predmetima protiv Republike Hrvatske*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 24, no. 2, 2017, pp. 362 – 363.

25 *Osmanović v Croatia,* §§ 51. – 52.

respective prison systems that adversely affect the mutual trust and EU judicial cooperation in the area of criminal law, in the last decade the EU decided to take concrete actions in that area. Back in 2009 the European Parliament proposed adopting a directive setting common minimum rules for pretrial detention in the European Union Member States.[26] In 2011, the Commission presented the Green Paper on the application of EU criminal justice legislation in the field of detention within the procedural rights package.[27] Since 2009, the procedural rights of defendants in criminal proceedings have been the subject of six directives adopted by the European Parliament and Council of European Union with the aim of improving the mutual recognition of decisions in criminal matters.[28] The procedural rights Directives have a direct impact on some aspects of pre-trial detention by establishing rights for the defence or obligations for the Member State.[29] These Directives, depending on the content and scope of the procedural rights they regulate, can also be applicable in misdemeanour proceedings. However, when it comes to deprivation of liberty in misdemeanour proceedings, the application of the Directives is not questionable, given that the scope of application of the Directives in any case refers to suspects deprived of their liberty.

Although the adoption of the new pre-trial detention rules in a form of a directive, based on Art. 82(2)b TFEU, has been intensively discussed in recent years,[30] the European Union has not been inclined to adopt such a legislative act.[31] Deriving from the fact that, in addition to numerous binding and non-binding international and European legal instruments, notably rich ECtHR jurisprudence and established detention standards, it is not necessary to pass new legislative proposals, the EU has recently adopted the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material

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26 European Parliament, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/91.

27 Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, 14.6.2011, COM/2011/0327 final.

28 Directives related to rights to interpretation and translation, to information, to access to a lawyer, to legal aid the presumption of innocence and procedural safeguards for children suspected or accused in criminal proceedings have been adopted so far.

29 Martufi A.; Peristeridou C., *Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework*, European Papers, vol. 5, no. 3, 2020, p. 1482.

30 For a detailed analysis of the content of the proposed legislative activities, see Baker, E., *et al.*, *The Need for and Possible Content of EU Pre-trial Detention Rules*, Eucrim, 3/2020, pp. 225 – 226.

31 Some authors warn on the limits of Art. 82(2)b of the Treaty on the Functioning of the European Union as a legal basis for the harmonisation of detention rules and that it can be argued whether the EU has given itself the necessary legal basis for achieving this objective. Wieczorek, I., *EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?,* European Journal on Criminal Policy and Research, vol. 28, Issue 3, 2020, p. 477.

detention conditions.[32] Aiming to prevent the excessive use of pre-trial detention, the EU Recommendation on pre-trial detention pleads for the application of this measure only for the more serious crimes. The Recommendation encourages Member States to impose pre-trial detention only for the offences that carry a minimum custodial sentence of 1 year. Considering that detention in the Croatian misdemeanour proceedings is possible even for some misdemeanours for which only a fine can be imposed, it is obvious that Croatian misdemeanour law cannot adequately abide by the Recommendation in this aspect. Nevertheless, when reviewing the justification of the application of detention in misdemeanour proceedings in the light of the EU Recommendation, and in the light of the discussion on the excessive use of detention, apart from the gravity of the offence, *i.e.* the prescribed sanction, it is also necessary to take into account the totality of all the conditions for determining pre-trial detention, hence the well-founded assessment of the court on the existence of a specific risk for the conduct of proceedings is particularly significant. In addition, the length of time that is commensurate with the severity of the offence for which this measure can be applied should be taken into consideration. However, this Recommendation should be a strong incentive to order detention in misdemeanour proceedings only as a last resort when application of precautionary measures cannot achieve its purpose.

3. POLICE POWERS OF LIBERTY DEPRIVATION IN MISDEMEANOUR PROCEEDINGS

3.1. Arrest

Arrest is a measure of liberty deprivation that differs from detention by its brevity and the fact that it does not consists of confinement. It is a short, instantaneous act and, though it precedes the decision on detention, it does not necessarily entail detention.[33] Yet, arrest entails the possibility of detaining a person for up to 24 hours in police station before bringing said person before the competent court, which requires compliance with fundamental procedural guarantees for a person deprived of liberty. Given the intrusive nature of the arrest, the Constitution of the Republic of Croatia lays requirements for the application of this measure,[34] and the Misdemeanour Act elaborates it in detail.

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[32] Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2023] OJ L 86, p. 44–57.

[33] Krapac, D. i suradnici, *Kazneno procesno pravo, Prva knjiga: Institucije*, Zagreb, 2020, p. 364

[34] Art 24 of the Constitution of the Republic of Croatia. For a more detailed analysis see *infra 3.1.1.*

3.1.1. Grounds for arrest

The Misdemeanour Act distinguishes between arrest as a measure carried out by the police with a court order (Art. 129) and arrest without a court order (Art. 134). The possibility of arrest without a court order is envisaged only in a situation where a person is caught in the act of committing a misdemeanour if there are detention grounds in accordance with Article 135 of the MA.[35] For comparison, the Criminal Procedure Act distinguishes between three situations in which arrest without a court order is possible, while arrest in the event of being caught committing a criminal offence is linked to criminal offences prosecuted *ex officio*.[36] Furthermore, the CPA grants the police the authority to arrest a person if there are grounds for suspicion that they have committed a criminal offence and conditions for ordering pre-trial detention exist.

Accepting the limitation envisaged in Art. 135 of the MA related to the type of misdemeanour for which detention can be ordered,[37] three conditions have emerged in practice, which should cumulatively be fulfilled for a person to be arrested: firstly, being caught in the commission of a misdemeanour, secondly, a consideration of a specific type of misdemeanour and the type and level of prescribed sanction, and thirdly, the existence of specific grounds for detention (*causae arresti*).[38]

Misdemeanour legislation, unlike the CPA,[39] does not define the term "caught in the act of committing a misdemeanour" which raises the question of whether, for the existence of the grounds for arrest, it is sufficient for any person to catch the perpetrator in the commission of a misdemeanour or whether the perpetrator must be caught by the police. The extent of the police powers of arrest depends on the scope of the interpretation of this notion, and the restrictive interpretation significantly limits the police's ability to act promptly, especially in particularly sensitive cases of domestic violence.[40]

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35 See *infra 4.1.*

36 Article 107 of the Criminal Procedure Act, Official Gazette No. 152/08,76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24 (hereinafter: CPA).

37 For the review of the method of resolving legislative ambiguities with ministerial instructions see Bonačić, M.; Filipović, H., *Istraživanje o dvostrukim uhićenjima kod prekršaja nasilja u obitelji*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), vol. 29, No. 2, 2022, pp. 252 – 253.

38 *Cf.* Filipović, H.; Trivunović, V., *Uhićenje kao mjera osiguranja nazočnosti okrivljenika u prekršajnom postupku de lege lata – de lege ferend*a, Hrvatska pravna revija, no. 2, 2014, pp. 87-88.

39 Article 106 (2) of the CPA.

40 Bonačić, M.; Filipović, H., *op. cit.*, note 37, p. 252.

Based on the wording of Article 86 of the Misdemeanour Act which defines arrest and detention and on the secondary application of the provisions of the Criminal Procedure Act when relevant to misdemeanour proceedings,[41] this term should be interpreted to mean that it is sufficient for a police arrest if any person catches the offender committing a misdemeanour.

Although an extensive interpretation of the term "caught in the act of committing a misdemeanour" has been adopted in practice, some authors take a more restrictive stance stating that police have the right to arrest a person whom they (police) caught in the act of committing a misdemeanour.[42]

Considering the doubts arising in relation to the conditions for arrest thus set out and the interpretation of the question of who can catch a person in the act of committing a misdemeanour, it would be advisable to review the current legislative solution and consider *de lege ferenda* the introduction of a new legal basis for arrest that will be linked to the existence of a certain degree of suspicion that a misdemeanour has been committed and the existence of grounds for detention. In the literature, however, such proposals also diverge in regard to the question of whether the existence of grounds for suspicion (*osnove sumnje*) is sufficient for an arrest,[43] or whether the existence of reasonable suspicion (*osnovana sumnja*) is necessary.[44]

This issue is of particular importance from the Constitutional point of view since, according to the Article 24 of the Constitution of the Republic of Croatia, arrest without a court order is possible only in case of reasonable suspicion that a serious crime has been committed. The strict constitutional conditions on arrest in criminal proceedings were elaborated by the Criminal Procedure Act by setting out, instead of the abstract gravity of the crime, other circumstances as crucial conditions for the achievement of the purpose of the criminal procedure (existence of grounds of suspicion and *causae arresti*).[45] However, misdemeanours are by nature milder offences, and even when it comes to more serious types of misdemeanours that entail a stricter sanction, it is debatable whether it is constitutionally justified to set the same conditions for the arrest of misdemeanour and criminal offences.

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41 Article 82 (3) of the MA.

42 Josipović *et al.*, *Komentar Prekršajnog zakona*, Zagreb, 2014, p. 254.

43 Bonačić, M.; Filipović, H., *op. cit.*, note 37, p. 252.

44 Gržin, M., *Zatjecanje kao uvjet za uhićenje u prekršajnom pravu Republike Hrvatske u komparaciji s prekršajnim zakonodavstvom Sjedinjenih Američkih Država*, Policija i sigurnost. (Zagreb), vol 28 no. 2, 2019, pp. 226 – 227. Gržin proposes, in cases where the police have not found the perpetrator in the commission of a misdemeanour, to introduce an arrest warrant that would cover all types of misdemeanors and the issuance of which could be initiated by the police authorities at the Misdemeanour Court, modelled on the American system. *Ibidem*, p. 225.

45 Krapac, *op. cit.*, note 33, p. 366.

Therefore, *de lege ferenda* we still favour the position that the existence of reasonable suspicion that an offence has been committed would be necessary for an arrest although even such a legal solution is not without its shortcomings in practice but it is more acceptable from the constitutional point of view.

Although the constitutionality of arrest without a warrant in misdemeanour proceedings, given the nature of the misdemeanour, could be questioned regardless of the conditions set by law, we believe that the limitation related to the type and amount of the sanction and the type of misdemeanour, the obligation to bring the arrested person before the court in a short period of time and the existence of circumstances that affect the unimpeded conduct of the proceedings, in their totality could justify short-term deprivation of liberty without a court order. However, full reconciliation of the wording of constitutional provision on arrest and the legislative regulation of the arrest can be achieved either by abolishing any arrest without a court order, which would significantly reduce the effectiveness of misdemeanour procedures, or by constitutional amendments that would come closer to the reality of the criminal law *largo sensu.*[46]

3.1.2. Procedure upon arrest and rights of arrested and detained person

Provisions on the rights of an arrested person are fragmented and can be found in articles 86 and 134 of the MA. According to Article 86, a person arrested or detained under the suspicion of having committed a misdemeanour must be immediately informed of the reasons for the arrest or detention, and the competent authority is obligated to inform their family or another person designated by them about the arrest or detention. If they are questioned as a suspect or the accused, they will be warned that they are not obliged to testify and that they have the right to an attorney of their choice.

Unlike the CPA which requires the arrestee to be immediately informed of the right not to testify, as well as the right to a defence attorney, the Misdemeanour Act attaches these rights exclusively to the circumstance of interrogation of the arrestee as a suspect or defendant.[47] This should *de lege ferenda* be amended in accordance with the CPA, especially since the Directive on the right of access to a lawyer requires that suspects or accused persons have access to a lawyer without undue delay upon the deprivation of liberty. [48]

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[46] Back in 1998, Josipović pointed out the shortcomings of the constitutional provisions on arrest. Josipović, I., *Uhićenje i pritvor*, Zagreb, 1998, p. 271.

[47] *Cf.* Filipović, H.; Trivunović, V., *op. cit.*, note 38, p. 89.

[48] Article 3§2(c) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant

Article 134 elaborates on the rights from Art. 86 and envisages the procedure to be followed after the arrest until the arrested person is brought before the court. After the arrest, the police are obliged to immediately inform the arrested person about the reasons for their arrest, and upon the arrestee's request, inform their family about the arrest within 12 hours of the arrest. The parent or the guardian of an arrested minor will be notified of the arrest regardless of the arrestee's wishes, and the competent social welfare authority will be informed about the arrest if they need to undertake appropriate measures to take care of the children and other family members in the care of the arrested person. In the case of proceedings related to domestic violence, it is mandatory to immediately inform them of the possible care of family members affected by that violence.

The police will bring the arrested person before the judge with the indictment or release them as soon as the need for deprivation of liberty ceases, no later than within 12 hours of the arrest and in any case, retention cannot last longer than 24 hours. After the arrested person has been brought before the judge, the judge is obliged to immediately question the arrested person on the allegations of the indictment and, on the proposal of the police or *ex officio* decide on their detention or release.[49]

Considering that the EU Directive 2012/13/EU on the right to information in criminal proceedings[50] refers to suspects or accused persons deprived of liberty in the course of criminal proceedings within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights,[51] the applicability of the Directive and its procedural guarantees to arrest and detention in misdemeanour proceedings should not be disputed. However, an analysis of the provisions on the rights of arrested and detained persons indicates that the Directive has not been adequately transposed into the Croatian misdemeanour legislation.

The major deficiency in regulating the rights of the arrested person, from the aspect of procedural guarantees enshrined within the EU Directives, is the absence of the obligation of the competent authorities to provide a written letter of rights

proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294, pp. 1–12.

49 The method of the enforcement of the arrest is not prescribed by the Misdemeanour Act, but the provisions of the police legislation are applied. See Veić, P.; Gluščić, S., *Prekršajno pravo*, Opći dio, Zagreb, 2013, p. 144.

50 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012]OJ L 142, pp. 1–10.

51 Recital 21, Directive 2012/13/EU.

to the arrested person. Even more, the provision of Art. 109a(1) explicitly excluded the delivery of a written letter of rights to an arrested person. As *Novokmet* states, such reasoning would make sense if the method and content of the written letter od rights were specifically regulated for persons deprived of liberty in the corresponding provisions of the Misdemeanour Act. However, the harmonisation of the relevant provisions of the Misdemeanour Act with Directive 2012/13/EU failed in that sense.[52] Although the Misdemeanour Act refers to the subsidiary application of the Criminal Procedure Act which guarantees the rights from the Directive, the subsidiary application of the CPA in this case does not solve this shortcoming since the legislator expressly excluded the right of the arrested person to a written letter of rights from the Misdemeanour Act, which means that the legislator's intention was not to guarantee the right to information to the extent regulated by the provisions of the CPA.

The second controversial issue with regard to the procedural rights guaranteed by the EU Directives on the procedural rights of suspects and accused persons is the right of access to the case file. The arrested person does not receive a written letter of rights, so they are not informed of the right to access the case file, even though in accordance with the Directive, the authorities should ensure that documents, which are essential for effectively challenging the lawfulness of the arrest or detention, are made available to the arrested persons or their attorneys.[53] In addition, the written letter of rights for suspects or accused persons who are arrested or detained should, in accordance with the Directive on the right to information, contain information on the right to an attorney already from the moment of arrest and not from the moment of interrogation, as explained in the introduction of this chapter.

These shortcomings should be corrected by properly transposing the Directive into the misdemeanour legislation.

3.2. Special police measure to immediately prevent offenders under the influence of intoxicants from continuing to commit a misdemeanour

In addition to the arrest, the legislator grants the police the power of short-term deprivation of liberty in the form of a special police measure to immediately prevent offenders under the influence of intoxicants from continuing to commit a

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52 Novokmet, A., *Pravo na obavijest u prekršajnom postupku – teorijski i normativni aspekt***,** Zbornik radova Pravnog fakulteta u Splitu, 3/2024, pending publication.

53 *Ibid.*

misdemeanour.[54] The condition for the application of this measure is to catch a person committing a misdemeanour *in flagranti*, and the purpose is to prevent the continuation of the misdemeanour. The measure can be specifically imposed only against a person under the influence of intoxicants or a person who shows signs of the influence of intoxicants and refuses to subject themselves to the testing to verify the presence of intoxicants in the organism and can last for 12 hours. Placing a person in a special room against that person's will indisputably constitutes deprivation of liberty,[55] and, consequently, the time spent in the special room is incorporated in the imposed sentence in accordance with Art. 40 of the MA.

From the perspective of convention standards, a 12-hour detention is not a negligible period, moreover, the ECtHR provides for significantly shorter periods, such as two hours or less, for the deprivation of liberty in the sense of Art. 5 § 1 of the ECHR.[56] Consequently, the person deprived of liberty is entitled to all the procedural guarantees from Article 5.

However, the legislator does not elaborate on the rights of a person detained in accordance with Art 137 and it does not envisage the obligation to inform them about their rights during the deprivation of liberty, as it does in the case of arrest.

Although a person under the influence of intoxicants may have reduced abilities to understand the meaning of the letter of rights, the legislator should provide for the obligation to inform the person of the rights in accordance with the Directive on the right to information. If, given the circumstances, this is not possible on the spot, it should certainly be done by the end of the 12-hour period at the latest. Yet, the law provides that the detainee may seek damages for the unfounded or illegal application of this measure. In practice, this measure, after the 12-hour deadline expires, is followed by the arrest. However, an arrest after the application of this measure will not be possible if the measure is not ordered for misdemeanour with a prescribed sanction in accordance with Art. 135.[57]

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54 Article 137(1) of the MA.

55 *Cf.* Josipović et al., *op. cit.,* note 42, p. 260.

56 Where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of detention does not affect this conclusion. *Rantsev v. Cyprus and Russia*, 2010, § 317. More about the criteria for deprivation of liberty, see Guide on Article 5 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights, 2022, pp. 8 – 9, [https://www.echr.coe.int/documents/d/echr/guide_art_5_eng], accessed 27 April 2024.

57 *Cf.* Filipović, H.; Trivunović, V., *op. cit.*, note 38, p. 88.

4. DETENTION

4.1. Grounds for detention

When setting out the conditions for determining the detention measure, the legislator started from the material-procedural criterion, which takes into account the procedural phase of initiation of misdemeanour proceedings, type and nature of the misdemeanour charged to the defendant, as well as the type and level of the prescribed sanction, and requires the existence of the specific grounds for detention i.e. *causae arresti*.

Unlike the CPA, which sets out reasonable suspicion that a person has committed a criminal offence as a general condition for pre-trial detention, the Misdemeanour Act links the possibility of ordering detention to a specific moment in the course of the proceedings, i.e. the filing of an indictment. This condition for detention stems from the requirement set forth in Art. 134 MA, that the police must bring the arrested person to the judge with an indictment or release them as soon as the need for deprivation of liberty ceases. The obligation to submit an indictment at the time of bringing arrestee before the court encourages the swift action of the prosecutor and the quick completion of misdemeanour proceedings in cases where a person is deprived of liberty. However, the problem may arise due to the fact that the legislator did not link the submission of the indictment to the existence of reasonable suspicion. Thus, it is theoretically possible for detention to be determined despite the fact that no reasonable suspicion arises from the indictment. Therefore, *de lege ferenda* it would be more appropriate to set the existence of reasonable doubt as a condition.

The second condition, which is of substantive-legal nature, sets multiple restrictions regarding the type of misdemeanour and prescribed sanction for which detention can be ordered. First of all, it must be a misdemeanour prescribed by law and not by secondary legislation. The legislator further states that, alternatively, detention can only be determined in a case of a misdemeanour against public order and peace, a misdemeanour related to domestic violence, a misdemeanour related to the prevention of disorder at sports competitions, or a misdemeanour for which a prison sentence or a fine higher than EUR 1327.23 can be imposed. Considering that the legislator has already prescribed these specified sanctions for all misdemeanours related to domestic violence,[58] it becomes redundant to set out

[58] According to the Law on Protection from Domestic Violence, Official Gazette 70/2017, 126/2019, 84/2021, 114/2022, 36/2024.

the conditions in this way *i.e.* to mention explicitly this category of misdemeanours.[59]

Furthermore, the legislator requires the existence of one or more specific *causae arresti,* i.e. circumstances that point to the risk that the defendant may flee, that they may destroy, hide, alter or falsify evidence or traces important for the misdemeanour proceeding or that they may interfere with the misdemeanour proceeding by influencing witnesses or participants, or that special circumstances justify the risk that they will repeat the same offence.[60]

4.2. Formal prerequisites

In accordance with constitutional and conventional requirements,[61] court is the only authorised body for ordering detention in misdemeanour proceedings. The court may determine the detention *ex officio* or at the request of the prosecutor, after interrogating the defendant and determining that there are no grounds for dismissing the indictment.

Detention in misdemeanour proceedings can last as long as there are reasons for it, but not longer than fifteen days, including the time of arrest. Against minors, detention can last 24 hours, counting from the time when the detention was determined by the court.

After a non-final judgment has been passed, detention may be extended or ordered against the defendant only if prison sentence or juvenile prison has been imposed and special circumstances justify the risk that they may commit a similar misdemeanour. Detention on this ground may last fifteen days, but not longer than the imposed sentence. Furthermore, when the High Misdemeanour Court annuls the first instance judgment and returns the case for a retrial, it may extend detention up to a maximum of fifteen days if there is still the risk of reoffending. Therefore, detention in misdemeanour proceedings can last a maximum of 45 days until the judgement becomes final, except in the situation envisaged in Article 136 when the defendant does not have a permanent residence in the Republic of Croatia. Detention based on the decision of the High Misdemeanour Court in that case

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59 Furthermore, almost all misdemeanours prescribed by the Law on the Prevention of Disorders on Sports Competitions are punishable by fines over 1327.23 euros, except for the misdemeanours from Art. 38.a and Art. 39(2) for which a fine from 130 euro to 1320 euro can be imposed, which mean that for all but these two violations, detention could be determined even if the legislator did not explicitly mention this type of offense in Art. 135 MA. Act on the Prevention of Disorders on Sports Competitions, Official Gazette 117/03, 71/06, 43/09, 34/11, 114/22.

60 For details see Josipović *et. al, op. cit.,* note 42, p. 257.

61 Art 124 of the Constitution of the Republic of Croatia.

can last a total of 30 days beyond the deadline from paragraph 11 of Article 135, i.e. a total of 60 days.

The defendant has the right to appeal against the decision determining or extending detention within 48 hours. The appeal does not delay the enforcement of the decision.

In a case in which detention has been ordered, the court shall proceed with particular haste and in accordance with the constitutional principle of proportionality, considering *ex officio* whether the reasons and legal conditions for the further duration of detention have ceased and, in that case, it shall immediately terminate the detention.

Detention is determined or extended by a written and reasoned decision, which is handed over immediately to the detained defendant. Given that the Misdemeanour Act does not provide for a provision that would elaborate in more detail the content of the explanation of the decision on detention, in the way that the CPA does in Art. 124(3), and considering that in the practice of misdemeanour courts, these explanations are usually reduced to a few generic sentences, misdemeanour courts should, in accordance with Article 82(3) of the Misdemeanours Act, apply this provision of the CPA. In this sense, the grounds of the decision should set out specific and complete facts and evidence showing the reasons for detention, and the reasons why the court considers that the purpose of detention cannot be achieved by another more lenient measure and, in the case of the extension of the period of detention, the circumstances justifying its continued application should be further elaborated.

4.3. Rights of a detained person

Misdemeanour Act guarantees the rights of the arrested and detained person with the same provisions (Art 86 and Art 134(2) and (3)). Given that in its essence and nature, detention measure in misdemeanour proceedings is equal to the measure of pre-trial detention from the Criminal Procedure Act and it entails all the procedural guarantees prescribed in Art. 5 of the ECHR, detainees in misdemeanour proceedings should be provided with the same scope of procedural rights as the remand prisoners in criminal proceedings. The only difference between these two measures is the maximum duration of the measures. However, a person detained in misdemeanour proceedings is not guaranteed the rights of defence in the same way as a detainee in criminal proceedings. Misdemeanour legislation prescribes very restrictive conditions for mandatory defence, i.e. mandatory defence is an exception and deprivation of liberty is not a reason for appointing an *ex officio*

defence attorney. Unlike detainees in criminal proceedings who have the right to a mandatory defence from the moment of delivery of decision ordering detention or pre-trial detention, a detained person in misdemeanour proceedings can exercise the right to a defence attorney only if they appoint one themselves. Moreover, since 2013 the legislator has expanded the right to a mandatory defence in criminal proceedings in relation to persons deprived of liberty due to the established violation of convention rights before the ECtHR in the *Prežec v. Croatia* case.[62] Subsidiary application of the provisions of the CPA on mandatory defence or free legal aid has no effect since the legislators deliberately omitted these rights. In addition, the extension of this right to misdemeanour proceedings entails costs for the state budget that the legislator, apparently, did not foresee, because otherwise it would have prescribed this right.

4.4. Detention and bail in special cases

In addition to detention as a measure to ensure the presence of the defendant and ensure the unimpeded course of criminal proceedings, the misdemeanour legislation also provides for the measure of detention against a defendant who does not have a permanent residence or place of residence in the Republic of Croatia when conditions for ordering detention in accordance with Article 135 are not met. The purpose of this measure, envisaged in Article 136, is to ensure the execution of a non-final judgment against that person. Detention for this reason can only be ordered if the defendant had previously refused to post bail offered by the court. In that case, the court will determine or extend the detention notwithstanding the conditions for ordering or extending detention from Art. 135(3).

Given the purpose of deprivation of liberty in this specific case, the detention measure from Art. 136 does not fall within the scope of Article 5(1)(c) of the ECHR but under subparagraph *a* which refers to the lawful detention of a person after conviction by a competent court.[63]

Detention for this purpose is not limited by the deadlines from Art 135 of the MA and may last until the end of the imposed prison sentence, i.e. as long as imprisonment was imposed in lieu of an unpaid fine. The defendant may file an appeal against that decision within 48 hours, which does not delay the enforcement of the decision.

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62 *Prežec v Croatia,* app. no. 48185/07, 15.10.2009.

63 For a detailed elaboration of conventional grounds for detention see Harris, O'Boyle & Warbrick, *op. cit.*, note 17, pp. 306 – 310.

The introduction of this provision into the misdemeanour legislation was justified by the fact that, in this way, the execution of numerous decisions on misdemeanours against defendants who do not have residence or permanent residence in the Republic of Croatia, and which previously could never be executed due to the lack of an appropriate legislative mechanism for the execution of misdemeanour decisions, is ensured.[64] However, the justification of such a solution in relation to EU citizens and the existing mechanisms of judicial cooperation within the EU can be discussed. Thus Commission Recommendation on strengthening detention rights emphasises that pre-trial detention decisions must not be discriminatory and automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality.[65]

When it comes to ensuring the execution of a fine by ordering detention against EU citizens, justification of the provisions of Art 136 can be questioned whereas Council Framework Decision 2005/214/PUP of February 24, 2005 on the application of the principle of mutual recognition to fines, which was implemented in Chapter VI of the Act on judicial co-operation in criminal matters with Member States of the European Union[66] regulates the recognition and enforcement of decisions on fines in the manner that is applicable in misdemeanour proceedings.[67] Therefore, there is no need for special provisions on the execution of fines that would place EU citizens in a less favourable position compared to Croatian citizens.

However, when it comes to the execution of a prison sentence, there is no adequate mechanism within the EU that would enable the execution of short-term prison sentences imposed in misdemeanour proceedings. The European Arrest Warrant can be issued only where a sentence has been passed or a detention order has been made, for sentences of at least four months,[68] and according to the Framework Decision 2008/909, the recognition and execution of the sentence can be refused

64 See Josipović et al, *op. cit.*, note 42, pp. 259, 317.

65 Paragraph 23 Recommendation.

66 Act on judicial co-operation in criminal matters with Member States of the European Union, Official Gazette no. 91/2010, 81/2013, 124/2013, 26/2015, 102/2017, 68/2018, 70/2019, 141/2020, 18/2024.

67 With the exception that the execution of the fine can be refused if the financial penalty is below EUR 70 or the equivalent to that amount. Article 7 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, [2005] OJ L 76, p. 16–30.

68 Article 2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190.

when there are less than six months left to serve the sentence.[69] Consequently, the obligation to post a bail as a mechanism for ensuring the execution of prison sentence, and in case of refusal to post a bail, the determination of detention after first instance judgements has been rendered, does not seem as unjustified way of ensuring the effective execution of a prison sentence under domestic law. This provision, considering its purpose and available EU mechanisms for efficient enforcement differs from some worrisome practices among EU member states aimed at ordering pre- trial detention in criminal proceedings based on the fact of non-existence of residence in that MS although the presence of such a defendant, *i.e.* the unimpeded conduct of the proceedings, can be ensured by adequate mechanisms of judicial cooperation.[70]

5. DETENTION CONDITIONS FOR PERSONS DEPRIVED OF LIBERTY IN MISDEMEANOUR PROCEEDINGS

In addition to the establishment of minimum standards of procedural guarantees for detainees, another important aspect in the analysis of the position of persons deprived of liberty refers to the conditions in which these persons carry out the measure of detention. Inadequate detention conditions, in addition to leading to inhuman and degrading treatment, can pose an obstacle to the successful exercise of procedural rights.[71]

Article 2 of the Prison Sentence Enforcement Act defines two categories of persons deprived of liberty in misdemeanour proceedings: a person against whom detention measure has been ordered by a court decision and is spending the misdemeanour detention in prison (detained misdemeanour defendant, *kažnjenik na prekršajnom zadržavanju*) and a person against whom a prison sentence in

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[69] Article 9 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008] OJ L 327, pp. 27–46.

[70] *Cf.* Fair Trials, *A measure of last resort? Practice of pre-trial detention decision making in EU*, 2016, p. 22, [https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf], accessed 12 June 2024. See also Jonckheere, A.; Maes, E., *Report Regional Research, Available statistical data and research on flight risk in pre-trial (detention) proceedings*, National Institute of Criminalistics and Criminology (NICC), Brussels, Belgium, 2024, pp. 12 -14, [https://www.fairtrials.org/app/uploads/2024/05/Report-NICC-on-available-statistical-data-and-research-on-flight-risk-04042024.pdf], accessed 12 June 2024.

[71] Pleić, M., *Procedural rights of suspects and accused persons during pretrial detention – impact of detention conditions on efficient exercise of defence rights*, EU and Comparative Law Issues and Challenges Series, Vol 4 (2020): EU 2020 – Lessons from the past and solutions for the future / Duić, D.; Petrašević, T. (eds), Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2020 p. 506.

misdemeanour proceedings has been imposed or a fine was replaced by a prison sentence (misdemeanour convict, *kažnjenik*).[72] The legislator uses the archaic term misdemeanour convict (*kažnjenik*) which does not adequately reflect the position of these persons, especially when it comes to a person against whom detention measure has been ordered, because it implies or prejudges that the person has already been convicted of a misdemeanour.

Enforcement of a prison sentence imposed in misdemeanour proceedings is regulated by chapter XXVI of the Prison Sentence Enforcement Act. However, this act does not prescribe the mode of enforcement of the procedural detention measure, so in accordance with Art. 82 of the Misdemeanour Act, the provisions of the Criminal Procedure Act related to the enforcement of pre-trial detention should be applied.

Pursuant to Art. 186 of the Prison Sentence Enforcement Act, misdemeanour convicts are housed separately from the remand prisoners and detained misdemeanour defendants. As a rule, misdemeanour convicts are housed separately from other convicted prisoners. However, there is no provision on the obligation to separate detainees in misdemeanour detention from other categories of persons deprived of liberty, although this would implicitly follow from the provisions of Art. 13. paragraph 9,[73] In the reality of the Croatian prison system, detainees on misdemeanour detention are held in the prison premises together with remand prisoners. Although both of these categories are persons who have not yet been convicted in criminal or misdemeanour proceedings and are still within the institute of presumption of innocence, considering the nature of the offence, the gravity of the offence charged against them, the fact that remand prisoners are often previously convicted, accused of serious crimes of organised crime, etc., placing them in the same premises together can negatively affect misdemeanour detainees.

Considering the tendencies to strengthen the rights of persons deprived of liberty, which is particularly visible in the revised international and European penitentiary documents, the Mandela Rules, and the European Prison Rules, these two categories of persons deprived of liberty should be placed separately. In the event that it is necessary to place them in the same premises, all the criminal characteristics, previous convictions, the gravity of the criminal offence and the misdemeanour charged against them should be taken into account.

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72 Prison Sentence Enforcement Act, Official Gazette No. 14/2021, 155/2023.

73 According to Art. 13 (9), different categories of persons deprived of liberty in penitentiaries or prisons may exceptionally be accommodated together and participate in daily activities in accordance with the house rules of said penitentiary or prison when such accommodation is necessary for health safety or provision of adequate medical care.

Detention measures determined in misdemeanour proceedings and prison sentences imposed in misdemeanour proceedings as well as fines replaced by prison sentences imposed in misdemeanour proceedings are usually carried out in prisons as organisational units of the administrative organisation of the closed prison system.[74] Statistical data and reports on the state of the prison system in the Republic of Croatia in recent decades indicate that inadequate prison conditions and overcrowding are generated to a greater extent in prisons as organisational units where the turnover of persons deprived of liberty is more frequent.

Thus, paradoxically, persons deprived of liberty in misdemeanour proceedings, convicted of minor offences or misdemeanours, are exposed to worse conditions than persons convicted of criminal offences who serve their prison sentences in semi-open or open facilities.

Although compared to the period ten years ago, when the ECtHR issued a number of judgments against the Republic of Croatia due to inadequate prison conditions,[75] in recent years the number of persons deprived of liberty in prisons and penitentiaries has continuously decreased, and accommodation capacities have increased. In the last two years (2021 and 2022), there has been an increasing trend in the number of prisoners, which is also reflected in the increase in the occupancy of existing capacities.[76] The number of persons deprived of liberty in misdemeanour proceedings has also been decreasing over the years. If we observe the 10-year period, from 2013 (4529) to 2022, that number has halved. A significant decrease in the number of prisoners was already visible in 2014,[77] and then a slight decrease continued every year since. This corresponds to data on the general decrease in the number of prisoners since 2010 when overcrowding reached its peak.

In 2022, persons in misdemeanour detention accounted for 11.03%, while prisoners accounted for 3.56% of the total population of persons deprived of liberty, i.e. a total of 13.6% of the total prison population.[78] If we observe the absolute numbers (1907), it is clear that this is not an insignificant number of persons de-

74 Article 24.

75 Prison occupancy on 31/12/2013 ranged between 110% and 208%, which implies the impossibility of ensuring minimum standards on detention conditions. Izvješće o uvjetima života u zatvoru, Constitutional Court of Republic of Croatia, U-X-5464/2012, 12/6/2014, Zagreb, p. 7.

76 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2022. godinu, Vlada Republike Hrvatske, Zagreb, 2024., p. 9, [https://www.sabor.hr/izvjesce-o-stanju-i-radu-kaznionica-zatvora-odgojnih-zavoda-i-centara-za-2022-godinu-podnositeljica?t=144170&tid=212570], Accessed 27 April 2024.

77 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2014. godinu, Vlada Republike Hrvatske, Zagreb, 2015, p. 45, [https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080848/IZVJESCE_STANJE_KAZNIONICE_ZATVORI_2014.pdf], Accessed 27 April 2024.

78 Izvješće o stanju i radu kaznionica, zatvora i odgojnih zavoda za 2022. godinu, *op. cit.,* note 75, p. 11.

prived of liberty in misdemeanour proceedings, so almost two thousand persons deprived of liberty in misdemeanour proceedings pass through the prison system annually, and it is necessary to ensure the respect of fundamental rights in accordance with the established penitentiary standards.

Although deprivation of liberty in misdemeanour proceedings, either as a detention measure determined during the proceedings or as a misdemeanour sanction, lasts significantly shorter than the prison sentence imposed in criminal proceedings and the pre-trial detention measure, we should by no means relativise and underestimate the period that these categories of persons deprived of liberty spend in prison, especially because the prison sentence imposed in misdemeanour proceedings can last up to 120 days.

The European Court of Human Rights in the *Muršić v. Croatia* case determined the criteria for evaluating the compliance of the conditions of the stay in prison with the prohibition of humiliating treatment from Art. 3 of the ECHR.[79] Thus, the Court found that even shorter periods of deprivation of liberty can lead to a violation of Art. 3. A strong presumption of a violation of Article 3 occurs when the area of personal space available to a person deprived of liberty is less than three square meters. This presumption can only be rebutted if certain factors are cumulatively met, *inter alia*, if the reductions in the required minimum personal space of three square meters are short, occasional and minimal.[80] Accordingly, the Court found that in the period of 27 days in which the applicant disposed with less than 3 sq.m of personal space in the Bjelovar Prison, the conditions of the applicant's detention subjected him to hardship beyond the unavoidable level of suffering inherent in detention and thus amounting to degrading treatment prohibited by Article 3 of the ECHR.[81]

In the light of such conclusions, it is clear that the detention measure itself, which as a rule lasts 15 days, but can last up to 45 days after the pronouncement of the first-instance judgment, or in special cases 60 days, can result in violations of the fundamental human right to the prohibition of torture, inhuman and humiliating treatment.

6. CONCLUSION

Although misdemeanours are not formally classified as criminal offences under national (Croatian) law but are minor violations of fundamental social values,

[79] *Muršić v. Croatia,* app. No. 7334/13, 20/10/2016.

[80] *Ibid.*, §§137-138.

[81] *Ibid.,* §153.

deprivation of liberty in misdemeanour proceedings has essentially the same legal nature as in criminal proceedings and entails all procedural guarantees from Art. 5 of the ECHR. Despite the fact that national jurisprudence has not encountered any major problems in the application of the detention measure in misdemeanour proceedings, several potentially contentious issues should be pointed out.

The first is the question of ensuring mandatory defence when ordering detention, which is not recognised by the misdemeanour law. Though not all procedural mechanisms and guarantees from the Criminal Procedure Act can be implemented in misdemeanour proceedings, when it comes to deprivation of liberty measures, this issue should be taken with caution and efforts should be made to harmonise the procedural position of detainees in misdemeanour and criminal proceedings. Therefore, *de lege ferenda* we should consider the introduction of mandatory defence or at least the right to a defence attorney at the expense of budget funds in the event of a detention decision. In addition, it would be advisable to review the provision on conditions on detention according to which, in order to determine detention, it is required that an indictment has been filed, while at the same time, the existence of a reasonable suspicion that the defendant has committed a misdemeanour is not necessary for the indictment to be filed.

As for the rights of the arrested persons, the obligation to provide a written letter of rights should be *de lege ferenda* envisaged and thus enable the enforcement of procedural guarantees from the Directive on the right to information. In addition, every detainee, not only the ones arrested and under interrogation, should be informed upon the arrest of the right not to testify and the right to a defence attorney.

Furthermore, controversies regarding the interpretation of the question of whether the police are authorised to arrest only a person whom they have personally caught committing an offence or also the person whom other citizens have caught in the act should also be resolved and a new legal basis for the arrest should be introduced. However, this is part of a larger and more significant issue regarding the compliance of misdemeanour legislation on arrest without a court order with the constitutional provision on arrest, and it is necessary to establish conditions for arrest that will correspond to the wording of the Constitution or else bring the constitutional requirements closer to the reality of criminal law *largo sensu*.

Also, provisions on special measures of deprivation of liberty prescribed in Art. 136 and 137 of the MA should be thoroughly reviewed.

In addition to the protection of the procedural rights of persons deprived of liberty in misdemeanour proceedings, the position of the detainee during the en-

forcement of the detention measure should also be taken into account. The major problem with overcrowding in the last two decades is visible in closed conditions, i.e., in closed-type penitentiaries and in prisons where misdemeanour detainees are placed. Clearly, inadequate prison conditions adversely affect the categories of prisoners who have committed or are under suspicion of having committed minor offences, which are significantly different from criminal offences in terms of the severity of the consequences and the nature of the crime. Therefore, it is necessary to separate this category of persons who have been detained in misdemeanour proceedings from the remand prisoners.

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