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The relationship between criminalistics and criminal law and its reflection in the legal regulation of evidence in criminal proceedings in the Czech legal system[1]

Abstract: The paper deals primarily with the issue of evidence in criminal proceedings, in relation to the criminalistic procedures by which individual pieces of evidence are obtained. The introductory part focuses on a general analysis of the relationship between criminalistics and criminal law and on the relevance of criminalistics for legal practice.

The main part of the paper is devoted to the area of evidence. The area of evidence is the centre of gravity of the entire criminal proceedings, and therefore the upcoming recodification of the Czech criminal procedural law may bring improvements to the current situation in this area as well. *De lege ferenda* considerations will be devoted to the analysis of the question whether criminalistic methods and procedures should be regulated directly in the Criminal Procedure Code, as is the case with the so-called special methods of evidence, or whether such a procedure is not appropriate.

Keywords: Criminalistics, evidence, criminal procedural law, legal regulation

Introduction

Criminalistics and criminal law can be considered as two distinct, separate systems or disciplines. Nevertheless, there is a certain very specific relationship between them which could be called a relationship of reciproc-

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ity, because contemporary criminal law needs criminalistics in order to fulfil its purpose, i.e. to protect society from criminals.[2] At the same time, however, the opposite reciprocity is also true, where it can be said that if it were not for the existence of criminal law and its purpose, criminalistics as such would practically lose its importance (if we disregard, for example, the issue of evidence in administrative or civil court proceedings, where some criminalistic procedures are also used from time to time, but it is far from being the focus of the use of the possibilities of criminalistics). At the same time, it should be pointed out that this meaning does not refer exclusively to criminalistics as such, but to forensic sciences as a whole, where the term can be perceived more broadly. Other forensic sciences also play an auxiliary role and help to fulfil the purpose of criminal law through their knowledge and application in practice.

In this paper I will search for answers to the question whether and how criminalistic methods and procedures should be regulated by law. I will address this question almost exclusively in the context of Czech law, where these considerations are particularly topical at the present time, when a fundamental recodification of Czech criminal procedural law is planned. I will try to find an answer, or at least stimulate a discussion, to both parts of the question – whether criminalistic methods and procedures should be regulated by law at all, and, if so, how and to what extent.

In order to answer the question, I will mainly use the method of analysis of the current legislation and relevant literature where the aim of the text will be to present some *de lege ferenda* considerations that may find their application in practice.

The introductory part of this paper will be devoted to the above outlined question of the mutual relationship between criminalistics and criminal law, as the explanations given there will serve as a basis for the following parts of the paper, where the focus will be mainly on the area of evidence in criminal proceedings. It is in evidence that various criminalistic procedures and criminalistic methods are most often used, on the basis of which the evidence necessary for deciding on the guilt or innocence of a particular accused person in the main trial before the court is obtained. This only underscores the importance of criminalistics or forensic science in general to criminal law.

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[2] For more see for example Marek Fryšták, David Texl "The relationship between criminalistics nad criminal law and its importance as a non-legal science of criminal law is the teaching of criminal law at faculties of law (in The Czech Republic)". In: Henryk Malevski, Snieguole Matulienė, Gabrielė Juodkaitė-Granskienė. *Development of criminalistics theory and future of forensic expertology: liber amicorum profesoriui Egidijui Vidmantui Kurapkai* (Vilnius: Forensic Science Center of Lithuania, Mykolo Romerius University Vilnius, 2022), 133–143.

However, the question is how to regulate these individual criminalistic methodes and procedures so that their use can be as effective as possible, while eliminating the possibility of objecting to the invalidity of certain evidence before the court precisely because the appropriate instructions were not properly followed (e.g., the crime scene was contaminated by a person being present without a protective suit, a mask, etc.). There are several possibilities, the most rigorous option would be to enshrine these procedures directly in the Criminal Procedure Code (which is not excluded in connection with the already mentioned planned recodification of Czech criminal procedural law), or to use other forms of legislative acts (various regulations, directives, decrees, internal acts of procedure, etc.) or to leave the definition of individual procedures to criminalistic science alone.

It can be said that all these attitudes have their positives as well as their negatives. Finding the one that will be the most beneficial for practice is not easy, but I will try to do so in this text, or at least present the most important arguments for and against these different positions. *De lege ferenda* considerations on which of these options would be the most appropriate for practice and why will be discussed in the following sections.

I.

Criminalistics (and also other Forensic sciences) has played an important role in crime fighting for several decades (if not hundreds) of years. Its major development occurred primarily in the 19th and early 20th centuries, when many of the classic criminalistic methods that are still used today were developed.[3] This was in response to the increase in crime associated with technological advances, developments in transport and deep social divisions. In order to fight crime effectively, it was necessary to develop new methods that would lead to easier detection of criminals. Criminalistics was instrumental in making crime fighting more effective, establishing itself as a new science and assisting criminal law.[4]

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[3] See also Jiří Straus, František Vavera et al. *Dějiny kriminalistiky* (Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2012), 40 and following.

[4] On the basic definition of the relationship between criminalistics and criminal justice, cf. e.g. Goodwin University "Criminal Justice vs. Criminology vs. Criminalistics; What´s the Difference?", February 2, 2024, https://www.goodwin.edu/enews/criminology-vs-criminal-justice/.

The definition of criminalistics varies from author to author.[5] In general, however, it can be stated that it is an independent science (although criminalistics is largely dependent on criminal law) which examines the emergence or disappearance of criminally relevant traces, pays attention to their search and securing, in order to detect the perpetrator of a criminal activity. Among the textbook definitions of criminalistics one can mention, for example, the one by Prof. Straus: *Criminalistics can be defined as an independent scientific discipline which investigates and clarifies the regularities of the origin, extinction, search, seizure, examination and use of criminal traces, other forensic evidence and criminally relevant facts and develops methods, procedures, means and operations according to the needs of the criminal law and the criminal procedure in order to successfully detect, investigate and prevent crime.*[6]

At the same time, however, criminalistics is not the only discipline that is helpful to criminal law and criminal justice in general. In fact, a wide range of other forensic sciences can be named, with criminalistics being just one of them. One can then continue to speak, for example, of criminology which can be seen as the study of crime. Its main contribution is that it deals with the causes of illegal behaviour and the possibilities of its prevention. It is also concerned with issues of punishing offenders and its effectiveness. It also includes forensic psychology which seeks to understand the mindset and perceptions of both offenders and victims of crime. Knowledge from the field of forensic psychology can be beneficial for the conduct of various procedural tasks, such as interrogation or confrontation. Closely related to forensic psychology is the field of profiling which can help to identify a particular offender. Forensic medicine, which is particularly useful for the investigation of violent crimes, should not be overlooked.

From what was outlined above, it can be concluded that the subject of criminalistics as a separate science is the criminalistic (criminally relevant) trace. The concept of a criminal trace implies all the others elements that are dealt with and further investigated by criminalistics, such as the creation, existence or disappearance of a criminal trace. The subject of criminalistics as a science is very specific because, unlike other sciences, criminalistics does not investigate a certain agency or real existing objects, but only a reflection of their action, which is the criminal trace. Svoboda

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[5] For example see Jiří Straus et al. *Úvod do kriminalistiky* (Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2004), 7. or Ivo Svoboda et al. *Kriminalistika* (Ostraba: KEY Publishing, 2016), 20 and following. Or Britannica "criminalistics" March 1, 2024, https://www.britannica.com/topic/criminalistics.

[6] Jiří Straus et al. *Úvod do kriminalistiky (*Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2004), 7.

rightly remarks: *It is characteristic of criminology that unlike other sciences, which have the possibility to investigate real objects, it investigates phenomena and processes only on the basis of traces, i.e. indirectly. Forensic science cannot observe, measure, describe the original objects, create their functional models, or experimentally verify the validity of the derived findings*.[7]

The purpose of criminalistics is primarily to facilitate the detection of the perpetrator of a crime, mainly thanks to the possibility of individual identification on the basis of certain criminalistic methods and procedures (e.g. dactyloscopy, recognition, etc.). In this way, it helps to fulfil the purpose of criminal law, which is in general the protection of society against offenders. More broadly, the purpose of criminal law is to protect the interests of society, the constitutional establishment, and the rights and legitimate interests of natural and legal persons. The means of achieving the purpose of the criminal law are the threat of punishment, the imposition and execution of penalties and protective measures.[8]

Although it has already been mentioned herein several places that criminalistics is generally perceived as an independent science, its close relationship with criminal law (and other forensic sciences) cannot be denied. It was criminal law that gave rise to criminalistics. If criminal law (in its current, modern form) did not exist, criminalistics would lose its importance and its social contribution would be relatively negligible. It could then be a purely theoretical discipline which could be dealt with practically only in academia, without any further connection with practice.

It is therefore obvious that in order for modern criminal law to fulfil its purpose, some other sciences that are helpful to it must also be used among which we include criminalistics. Other such sciences, which are collectively referred to in theory as the auxiliary sciences of criminal law, are, for example, criminology, forensic medicine or forensic psychology. Although these sciences are independent sciences, their social contribution occurs only in conjunction with criminal law through which they help to fulfil its purpose.

One of Czech most important criminalistics theoreticians of criminalistics, Prof. Ján Pješčak, also dealt with the relationship between criminalistics and criminal law, albeit in the socialist period. He states: *[...] we consider criminalistics neither a legal science nor a purely technical science.*

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[7] Ivo Svoboda et al. *Kriminalistika* (Ostrava: KEY Publishing s. r. o., 2016), 27.

[8] On the issue of the search for truth through criminal justice see for example Ho Hock Lai. A *Philosophy of Evidence Law* (Oxford: Oxford University Press, 2008), 51 and following. On the issue of the balancing law enforcement and individual rights see also Walter Signorelli. *Criminal Law, Procedure, and Evidence* (Boca Raton: CRC Press, 2011), 3 and following.

In relation to these sciences it is a separate science. Therefore, it has a separate place in the system of sciences (within the social sciences). [...] Criminalistics is neither a branch nor a part of law. Nor can it be a branch or part of the science of law for the very reason that the science of law is always a science of law. Criminalistics is not law and therefore cannot be a legal science.[9] He further states, *Criminalistics has a close and intimate relationship with the science of socialist criminal procedural law and the science of socialist substantive criminal law. Criminal procedural law, to which criminalistics is closest, forms the legal basis of activities in the detection and investigation of crimes. Experience shows, however, that the application of procedural norms does not in itself guarantee a successful investigation of a case. The use of various tactical methods is also a prerequisite for a prompt, successful and objective investigation of a case. However, this issue is not examined by criminal procedural science. The issue of investigative tactics is dealt with by criminalistics.*[10] In conclusion, Pješčak summarizes, *The relationship between criminalistics and criminal law can be characterized as follows: they share a common service role, the protection of social relations against criminal acts. They are distinguished by the means and methods by which their social function is realized.*[11]

In the final part of the introduction, it can be summarized that criminalistics is an independent discipline, which, alongside some other sciences, such as criminology or forensic psychology and other disciplines, ranks among the so-called auxiliary sciences of criminal law. This fact predetermines the relationship that exists between criminalistics and criminal law. As already indicated above, this relationship can be understood as one based on the reciprocity of two systems (two separate sciences) that can fulfil their common goal best in cooperation with each other. In order for criminal law to fulfill its objective, various criminalistic methods and procedures must be employed to detect the perpetrator of a crime and bring him/her to justice. At the same time, criminal justice depends on the existence of criminal law, for without it, it would largely lose its meaning and significance.

This interrelationship then manifests itself on several levels, one of which is the legislative level. As the two phases of the pre-trial phase of criminal proceedings, the investigation and any subsequent investigation are generally carried out by the police authority.[12] In its activities, the

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[9] Ján Pješčak et al. *Kriminalistika* (Praha: Naše vojsko, 1986), 15.

[10] Ján Pješčak et al. *Kriminalistika* (Praha: Naše vojsko, 1986), 15.

[11] Ján Pješčak et al. *Kriminalistika* (Praha: Naše vojsko, 1986), 15.

[12] In exceptional cases, however, a situation may arise in which an individual act or the entire investigation is carried out by a public prosecutor, cf. § Section 174(2)(c) of Act No 141/1961 Coll., Code of Criminal Procedure.

police authority makes use of various means of criminalistic techniques, especially in the search, seizure and evaluation of traces that may later serve as evidence in court proceedings. The police authority also makes use of criminalistic procedures which may include, for example, interrogation, on-site examination or conducting a search. In general, the use of criminalistic techniques, such as dactyloscopy, mechanoscopy or tracing and many others, is not regulated at all in the Criminal Procedure Code and its regulation is, thus, left to other legal acts or only to general criminalistic doctrine.

The situation is different for criminalistic-tactical procedures. Some of them are regulated directly in the Criminal Procedure Code, in particular, the so-called special methods of evidence. The following passages of the text will be devoted to a closer analysis of the current legal regulation and *de lege ferenda* considerations on possible conceptual changes to the current situation concerning the legislative anchoring of the means of criminalistic technique and criminalistic tactics (criminalistic procedures).

II.

The following passage will be devoted to the issue of evidence in criminal proceedings. However, given the nature of this paper and its limited scope, it is clear that there is no room for a comprehensive discussion of this issue. Therefore, the author will try to define the general framework of evidence, i.e. to focus on the concept of evidence, the purpose of evidence in criminal proceedings and its statutory regulation. In addition to this, however, with regard to the thematic focus of the paper, the criminalistic aspects of evidence will also be discussed, as the process of evidence is the area where the knowledge of criminalistics is most often used.

In the literature we encounter a large number of different definitions that aim to define the concept of proof (law of evidence).[13] The process of proof can be defined on the basis of its nature, its purpose and its meaning. The essence of evidence can be defined as a certain procedure of the criminal law enforcement authorities, the purpose of which is to clarify the facts relevant to the criminal proceedings, which may form the basis for a substantive decision issued at the end of the main trial. The purpose of the evidence is then to clarify the facts to such an extent that the various prosecuting authorities can take appropriate decisions which will

[13] In the context of the Czech law see for example this definition: Pavel Šámal, Jan Musil, Josef Kuchta et al. *Trestní parvo procesní* (Praha: C.H.Beck, 2013), 346. A broader definition of evidence can be found, for example, in the dictionary, see Collins Dictionary: "Evidence", https://www.collinsdictionary.com/dictionary/english/evidence.

serve the very purpose of the criminal proceedings. The purpose, or rather the importance, of evidence is to define the procedure to be followed by the various prosecuting authorities in order to obtain the factual basis for the subsequent stages of the proceedings and for their decisions.

Evidence in criminal proceedings does not take place only in the main trial, and thus in the public session before the court, but, on the contrary, evidence takes place in various modified forms throughout the criminal proceedings, i.e. from the beginning of the preliminary proceedings. According to the general theory of criminal procedural law, the preparatory proceedings are divided into two phases – the examination phase (before the prosecution of a particular person) and the investigation phase (after the prosecution of a particular person). The purpose of the investigation phase is primarily to establish whether a criminal offence has actually been committed (or whether the act committed can be classified under one of the criminal offences listed in a special part of the Criminal Code, or whether it is, on the contrary, an offence to be dealt with in administrative proceedings or a civil offence). Even in this phase, evidence must be taken, albeit at a qualitatively different level than in the main trial before the court. It must be proved that the act in question has occurred and that it constitutes a criminal offence. In the investigation phase, evidence is also gathered against specific suspects and this phase is concluded by the prosecution of a specific person who, thus, acquires the status of an accused. In the investigation phase, the collection of evidence and the entire investigation is then directed against one particular person, i.e. the accused. However, the rule must always be observed that facts are proved both against and in favour of the accused. If, in the opinion of the police authority, the evidence obtained against the accused during the preparatory proceedings is sufficient, the police authority shall hand over the entire file to the public prosecutor, including the proposal to bring charges. The public prosecutor may then return the case to the police authority for further investigation (in particular, in a situation where the public prosecutor considers the evidence collected to be insufficient), or may bring the indictment to court and the accused becomes the accused on the date of the main trial.

However, the taking of evidence in pre-trial proceedings has many specifics. It is primarily at this stage that evidence is sought, evaluated and collected for the purposes of later stages of the criminal proceedings. Procedural evidence in the form of a trial is conducted minimally in the preparatory proceedings since, in accordance with the dictum of Section 160(1) of Act No. 141/1961 Coll., on Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure" or "CPC"), procedural evidence should be conducted, in principle, only after the prosecution of

a particular person has been initiated. At the examination stage, i.e. before the prosecution of a particular person is initiated, evidence is limited to those cases where postponing the act of taking evidence until the next stage of the criminal proceedings could render the evidence worthless or impossible to take. An example of this would be evidence obtained as a result of urgent and non-repeatable actions (e.g. questioning a witness whose health is likely to deteriorate).[14]

The burden of proof is concentrated in the main trial before the court. This is where the evidence of all facts relevant to the decision on the merits takes place. The evidence at the main hearing is subject to the exercise of many rights of the parties who may, in particular, propose the taking of particular evidence and, after the taking of that evidence, may comment on it. The court may also take evidence which neither party proposes to take, but which the court finds relevant to the correct assessment of the case. The main hearing also involves the application of certain general principles relating to evidence (in particular, the principle of orality and the principle of immediacy, the principle of free evaluation of evidence and the principle of establishing the facts beyond reasonable doubt).[15] [16]

Evidence is also adduced to a limited extent in some of the other phases following a decision on the merits. Evidence is mainly used in the context of ordinary and extraordinary appeals, but can also be found in enforcement proceedings.

The central legal regulation in the Czech Republic regulating evidence in criminal proceedings is the Criminal Procedure Code. The entire Title 5, starting with the provision of Section 89 of the Criminal Procedure Code, is specifically devoted to evidence. As regards the systematisation of this legislation, Title 5 is divided into seven sections.

With regard to the topic of the paper, it cannot be omitted to state that some of the statutory provisions are directly related to criminalistic doctrine. Criminalistic procedures and also criminalistic methods are directly manifested in the search and securing of various means of evidence, as well as in their further use and evaluation. In the section on evidence, for

[14] In the context of the issue of evidence, the investigation of criminal offences in which the regional court is hearing proceedings at first instance has its own specific features. According to the provisions of Section 169(1) of the Criminal Procedure Code, *The police authority shall take evidence to the extent necessary for bringing charges or for another decision of the public prosecutor; it shall not be bound by the conditions under which witnesses may be questioned pursuant to Section 164(1)*.

[15] Pavel Šámal, Jan Musil, Josef Kuchta et al. *Trestní parvo procesní* (Praha: C.H.Beck, 2013), 347.

[16] For more about principles of criminal procedure see also Mario Chiavari "Principles of Criminal Procedure and Their Application in Disciplinary Proceedings". "International Review of Penal Law", vol. 72, no. 3 (2001), 721–728.

example, the law expressly provides for the interrogation of the accused, although from the point of view of criminalistics this is insufficient and must be supplemented by specialist publications on criminalistic tactics. The inadequacy (from a criminalistic point of view) can be found, for example, in the fact that the law prohibits the asking of suggestive and capricious questions, but does not define them in any way, leaving their definition to doctrine and case law practice. Another area of statutory regulation of evidence that is closely linked to criminalistics is the regulation of so-called special methods of evidence in section three.

In general, in relation to criminalistics, it can be stated that the Criminal Procedure Code contains only a minimum of provisions directly devoted to criminalistic procedures, and when it does contain such provisions, they are of a relatively general nature (see, for example, the regulation of the interrogation of the accused). Another fact is that these statutory provisions are devoted almost exclusively to criminalistic tactics (conducting interrogation, confrontation, recognition, etc.), while the procedures of the police authority in accordance with criminalistic technique (individual methods of searching for clues and securing them) are not dealt with in Czech criminal procedural law. Thus, instead of statutory regulation, these procedures are in the Czech Republic found exclusively in internal acts issued by the police presidium, namely binding instructions of the Police President.

III.

Certain special methods of proof are regulated in Section 3 of Title 5 of the Criminal Procedure Code. These are confrontation (Section 104a of the Criminal Procedure Code), recognition (Section 104b of the Criminal Procedure Code), investigative experiment (Section 104c of the Criminal Procedure Code), reconstruction (Section 104d of the Criminal Procedure Code) and on-site examination (Section 104e of the Criminal Procedure Code). According to the statutory designation "some", it is clear that the list of these so-called special methods of evidence is not exhaustive, and, therefore, this group may include other special methods of evidence that are not regulated in the law and result only from the findings of criminalistic science (criminalistic theory).

The law establishes a binding procedure for these particular evidentiary processes which must be followed in order for the result of such a process to be usable as evidence in the main trial or, where applicable, in a public hearing. If the statutory procedure is deviated, the evidence so

obtained could be considered illegal and thus not usable for the purpose of evidence in the proceedings before the court.

The issue of certain special methods of evidence has not always been regulated in the Criminal Procedure Code and was only incorporated into it on the basis of the amendment made by Act No. 265/2001 Coll., which came into force at the beginning of 2002. At present, this regulation is celebrating its more than twenty-year anniversary. Until 2002, no legislative attention was paid to these criminalistic tactical procedures; however, the abundance of their use and some problematic aspects associated with them forced the legislator to select these most frequently used criminalistic tactical procedures and to enshrine them directly in the text of the law.

There are currently discussions about whether additional criminal-tactical procedures should be incorporated into the Criminal Procedure Code, especially now that the long-planned recodification of Czech criminal procedural law is being prepared. The recodification of the Czech criminal procedural law is planned in the sense that a completely new law will be adopted which will make this legal regulation more comprehensive. The current Czech Criminal Procedure Code was established in the 1960s and has undergone a number of amendments, as a result of which the legislation is no longer clear. Therefore, the Czech legislator has decided to go down the route of adopting a completely new law to replace the Criminal Procedure Code that has been in force until now. However, the legislative process has been ongoing for some time and it is still uncertain whether and when the new legislation will be adopted. Even so, this situation offers a wide scope for *de lege ferenda* considerations, where the planned recodification may be the expected opportunity to establish a new concept of criminal procedure.

In the framework of the new law, it will then also be necessary to answer the question of whether and to what extent criminalistic methods and procedures should be regulated by law. The new legislation may also respond to many of the shortcomings of the current legislation (e.g. in the area of so-called special methods of evidence which are currently conceived in such a way that they should be used only in court proceedings, which, however, is contrary to their essence and also to established practice). Some other criminalistic methods, such as the method of scent identification (odorology) or polygraph examination, may also be newly regulated in the framework of the recodification.

However, it should not be forgotten that although the current legislation in this area may seem insufficient at first sight, it is also supplemented by a relatively abundant case law which fills legislative gaps in this respect.

IV.

Much has already been written about the relationship between criminal law (especially criminal procedural law) and criminalistics in the introductory passages of this text. The knowledge of criminalistics is used especially in the field of evidence, when criminalistics helps in fulfilling the purpose of criminal law. In fact, criminalistics researches and develops appropriate means, methods and procedures for the successful investigation of crimes and the detection of their perpetrators. This knowledge is primarily intended for use by law enforcement authorities. Criminalistic methods and procedures are applied both at the pre-trial stage and in court proceedings. In many places, criminalistics appropriately complements certain procedural acts enshrined in the Criminal Procedure Code, thereby facilitating the application of these institutes in practice.

Given that the relationship between criminalistics and criminal law is one of interdependence, it is obvious that this relationship permeates the entire material of criminal procedural law and, therefore, cannot always be reflected in legislation. Initially, criminalistic procedures and methods were in the Czech Republic practically not regulated in the Criminal Procedure Code at all; the situation changed significantly only with the aforementioned amendment to the Criminal Procedure Code in 2001, when the so-called special methods of evidence were included in the Code.

From the writen above, the question arises as to the applicability of criminalistic methods and procedures that are not enshrined in the law at all and are regulated either by other legislative acts or not regulated at all, and the basis for their possible application is only professional publications. From the essence of the entire criminal procedure and taking into account its meaning and purpose, it can be concluded that even those criminalistic-tactical procedures that are not directly enshrined in the Criminal Procedure Code or other regulations may still be applicable. The purpose is to fight crime, to combat it and to find the perpetrators of crime. Therefore, all the means offered by the current state of knowledge in this area must be used, regardless of whether such a procedure is provided for in law or not. Criminalistics works with a very wide range of different methods and procedures, and it is, therefore, clear that not all of them can be enshrined in law. At the same time, it is a very dynamic and developing field of science, and therefore frequent amendments to procedural regulations would be necessary, which would certainly cause difficulties in practice.

Thus, it can be summarized that the interdependence of criminal law and criminalistics is considerable and this relationship is also (or mainly) manifested in the field of evidence in criminal proceedings. As outlined

above, for practical reasons, it is impossible for all criminalistic methods and procedures to be regulated in law, yet it is advisable that the most frequently used ones have their own legislative anchorage (see e.g. regulation of special methods of evidence). The fact that a criminalistic procedure is not regulated in law does not mean that it may not be used in practice. The use of such procedures is perfectly legitimate, but certain general conditions must be met, such as that the procedure is not explicitly excluded by the Criminal Procedure Code, that it is used to obtain criminally relevant information, that guarantees of legality are observed, etc. Nevertheless, there are discussions among the professional public as to whether the law should regulate more criminalistic-technical or criminalistic-tactical procedures, whether the regulation should be more elaborate or whether it should leave more scope for the courts to decide, etc.

V.

Criminalistic-tactical and criminalistic-technical procedures are encountered in many places in the field of evidence. However, these individual procedures are not always regulated in the central rule of criminal procedural law, the Criminal Procedure Code.

As it has emerged from the preceding explanations, the Czech Criminal Procedure Code deals only with selected criminalistic-tactical procedures, such as interrogation or examination, while others are regulated in the section devoted to certain special methods of evidence. However, the legislation contained in the Criminal Procedure Code does not deal with criminalistic techniques at all.

The procedures of criminalistic techniques, whose main purpose is to search for and secure criminally relevant clues, must therefore have their own regulation. This regulation is taken care of by the Police Presidium of the Czech Police, in the form of the so-called binding instructions of the Police President. These instructions of the President of the Czech Police are internal acts of management and are therefore primarily addressed to the police authority, while access to them is considerably limited in the case of other law enforcement authorities, and possibly also the general public. Indeed, the President of the Police instructions is not published anywhere on a regular basis, nor are they accessible via the various internet search engines.

The only possible way to gain access to binding instructions of the President of the Police (or other internal management acts that may regulate various criminalistic procedures – e.g. instructions of the Office of the Criminal Police and Investigation Service, instructions of the Director

of the Criminalistic Institute, etc.) is to submit a request under Act No. 106/1999 Coll., on free access to information. The obliged entity (in this case the Police of the Czech Republic, or the Police Presidium, or another department of the Police) must allow the applicant to inspect the requested documents (binding instructions of the President of the Police) in compliance with the conditions of Section 5(3) of the above-mentioned Act and in a manner allowing remote access. However, the disadvantage of such a procedure is its length and overall complexity.

The key criminalistic procedures in the field of criminalistic techniques are regulated by means of binding instructions of the President of the Police. Just to name a few, the instruction of the President of the Police No. 103/2013, on the performance of certain acts of the police bodies of the Police of the Czech Republic in criminal proceedings, as amended; the instruction of the President of the Police No. 275/2016, on identification acts; the instruction of the President of the Police No. 100/2018, on criminalistic technical activities or Instruction of the President of the Police No. 177/2018, on the subject matter, functional and local jurisdiction of the expert institutes of the Police of the Czech Republic. Furthermore, the instruction of the Director of the Criminalistic Institute No. 34/2019, on selected criminalistic technical activities, is also widely used in practice.

Separate internal acts of procedure are issued on some criminalistic methods, among which can be mentioned, for example, the instruction of the President of the Police No. 313/2017, on trace identification, which was issued in response to the decision of the Constitutional Court from the beginning of 2016[17], where the Constitutional Court, through the judge rapporteur, prof. Jaroslav Fenyk, stated that the method of scent identification can continue to be used in practice, but in court proceedings the result of the application of this method can only be used as indirect evidence, which means that such evidence must be supplemented by other direct or indirect evidence.

To conclude this section, it can be stated that the regulation of criminalistic procedures (whether in the field of criminalistic tactics or criminalistic techniques) is highly fragmented. Some of the procedures of criminalistic tactics are regulated directly in the Criminal Procedure Code, but their selection is limited, and others are regulated either by internal acts of the procedure or not regulated at all and result only from criminalistic doctrine. Most of the procedures of criminalistic techniques are then regulated through internal acts of management, mainly the binding instructions of the President of the Police, which have already been discussed above. Nevertheless, there remain other procedures (mainly in the field of

[17] Ruling of the Constitutional Court of 7 April 2016, Case No. IV ÚS 1098/15.

criminalistic technique) which are not regulated in any way, and the possibilities and the way of their use are, thus, mainly derived from the scientific literature and various researches. In the interest of easier application in practice, it would, thus, be useful to unify the regulation of individual procedures, to facilitate work with the various sources of this regulation (e.g. by publishing binding instructions of the President of the Police, issuing various collections of these regulations, etc.) and to respond more quickly to new trends emerging in criminalistics.

Conclusion

The introductory part of the paper was devoted to a general definition of the relationship between criminalistics and criminal law. It can be reiterated that criminal law as a whole, and especially criminal procedural law, is closely intertwined with criminalistics. It is a relationship of interdependence between two separate sciences. The fulfilment of the purpose of modern criminal procedure depends on the knowledge of criminalistics, thanks to which the perpetrators of crime are detected. At the same time, criminalistics, as an auxiliary science of criminal law, is dependent on the existence of criminal law, by its very nature.

Evidence, as a legally defined procedure of law enforcement authorities, takes place at all stages of criminal proceedings. In the preparatory proceedings, it takes place only to a limited extent; in the proceedings before the court, we find its centre of gravity. Evidence, which is exclusively a procedural activity, is closely related to criminalistics, which, as an independently established scientific discipline, develops specific procedures that help to detect and investigate criminal activity, as well as to prevent it and, in general, to fulfil the purpose of the entire criminal procedure, which is to protect society from perpetrators of criminal offences.

In practice, it happens that some criminalistic methods are at the same time procedural acts under the Criminal Procedure Code (e.g. questioning of a witness, examination of a place, etc.). On the other hand, the Criminal Procedure Code does not regulate the use of all criminalistic methods, as it is not realistic for this procedural regulation to contain all possible procedures in the field of criminalistic technique and criminalistic tactics.

A certain specificity, where the legal regulation of procedural acts fully corresponds to the criminalistic science and is directly based on it, is the regulation of the so-called special methods of evidence, which was included in the Czech Criminal Procedure Code only on the basis of one of

its amendments, namely in 2002. It is worth noting that the list of special methods of evidence listed in the Act is not exhaustive, which the legislator appropriately emphasises by using the word ‚some'.

A separate part was devoted to the legal regulation of criminalistic procedures in the Czech Republic. It was stated that the legal regulation in this area is highly fragmented, which makes it difficult to orientate in it and apply it correctly. Some of the procedures are contained directly in the Criminal Procedure Code, others are regulated within the framework of internal procedural acts issued by the Police of the Czech Republic, which are mainly binding instructions of the President of the Police. Nevertheless, some criminalistic methods and procedures remain completely unregulated by legislation and the basis for their application is only the current state of knowledge in criminalistics.

The question remains how to deal with the current situation and how to improve it. The planned recodification of the Czech criminal procedural law, which is the reason behind this paper, provides a great opportunity to do so. The current regulation of criminalistic procedures, contained in the Criminal Procedure Code, is rather casuistic in nature and requires further supplementation from the perspective of criminalistics. For example, if an investigator were to base the conduct of an interrogation solely on the statutory regulation, it can be stated that this would be insufficient. Therefore, this regulation must be supplemented by the general theses of criminalistic doctrine, and it is also important to educate those working within the law enforcement agencies and their general awareness of criminalistics.

The question is whether it would be appropriate to include more detailed provisions directly in the Criminal Procedure Code. In my opinion, generaly no, because the Criminal Procedure Code is not intended to be a kind of "manual" for police investigators, but only to set the legal boundaries for the application of various criminalistic procedures. At the same time, however, it is necessary that the regulation contained in the Criminal Procedure Code should be suitably supplemented by other means in which certain shortcomings can be found in the current system, stemming primarily from the incoherence of the legal regulation. It would be advisable to supplement the legal regulation with internal acts of procedure within the Police, which is currently being done, but these internal acts do not reflect all possible criminalistic methods and procedures. It is also problematic that they are not publicly accessible and can only be obtained on the basis of a request under Act No. 106/1999 Coll.

Another question is whether the Criminal Procedure Code should include regulation of more criminalistic procedures; in this context, for

example, odorology is often discussed[18], i.e., the method of odor identification of persons and things, which has so far been regulated only by the instruction of the President of the Police, which was issued on the basis of the jurisprudence of the Constitutional Court. The method of scent identification of persons (odorology) and things is a relatively new method in criminalistics, yet it offers considerable prospects for its use in practice, where it can also help in individual identification. It is a very complex procedure which also involves the use of a service (police) dog, which plays a central role in the identification process. It is, therefore, necessary to define rigorously the procedure for using this method, as any deviation from the established procedure may mean both contamination of the trace in the process of its provision and influence of the service dog in the process of identification itself. In view of this, it is clear how important it is to establish a precise procedure for carrying out scent identification, and to do so in such a way that this procedure is binding, which alone can eliminate the possibility of the result of this method of identification being invalidated (it is, therefore, not sufficient to regulate it on a doctrinal level only). The previous regulation of this procedure was not sufficient, many mistakes were made (either contamination of the traces or influence of the service (police) dog) and the courts were rather sceptical about the use of this (otherwise very promising) method in practice.

The situation changed only after the Constitutional Court issued the ruling quoted above which set out exactly what should be emphasized in the process of scent identification and also established other conditions for its use. On the basis of this ruling, a new binding instruction from the President of the Police was adopted on the subject of scent identification. It can, therefore, be concluded that there has been an improvement in the current situation, yet it might be advisable to enshrine the method of scent identification directly in the Criminal Procedure Code, preferably alongside other special methods of evidence, because of its significant specificities.

In conclusion, it can be stated that emphasis must be placed on the quality of the legal regulation in the area of evidence as this is one of the key parts of the criminal process. High-quality and sophisticated legislation, which will also reflect the findings of the so-called auxiliary sciences of criminal law (including criminalistics), will certainly contribute to the fulfilment of the purpose of criminal law as a whole. It should be borne in mind that the better and more sophisticated the legislation is, the more likely the law enforcement authorities will avoid certain procedural errors

[18] Pracovní tým Metoda pachové identifikace a Oddělení koncepce a strategické koordinace Policejního prezidia České republiky: "Rizika aplikační praxe metody pachové identifikace v Policii České republiky", https://www.pecina.cz/files/Zaverecna_zprava_PPCR_bez-data.pdf.

which may ultimately render evidence useless in court proceedings. In particular, if it is also a key piece of incriminating evidence, the purpose of the entire criminal proceedings is jeopardised as a result of errors by the prosecuting authority and inadequate legal regulation.

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