

THE INTERSECTION OF MISDEMEANOR AND CRIMINAL RESPONSIBILITY IN SLOVENIAN MUNICIPALITIES

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Numerous legal procedures have been introduced into the Slovenian legal system to suppress unlawful conduct, such as the powers of the municipal warden service. The activities of the Slovenian municipal warden service could have an impact on the criminal procedure. After a brief introduction to the legal position of the municipal warden service, the author discusses the relevant powers of the Slovenian municipal warden service which could affect criminal procedures. It also focuses on the constitutional aspects of the municipal warden service's powers and on the issue of the constitutional admissibility of such evidence in a criminal procedure. The article concludes with findings as to whether and under what conditions evidence is admissible in criminal procedure in Slovenia when obtained by the municipal warden service, and with proposals for legal and constitutionally conformant actions in practice.

Keywords: municipal warden service, misdemeanor procedure, criminal procedure, evidence, admissibility

1. INTRODUCTION

Numerous legal procedures, other than criminal, have been introduced into the Slovenian legal system in order to suppress and prosecute unlawful conduct. The Slovenian police share many of its powers with other authorities, such as the municipal warden service, customs, the Slovenian Competition Protection Agency, etc. ("para-criminal" procedures). Every authority has ju-

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risdiction in its own field of work. Its powers are therefore attributed according to the object of suppression and prosecution.¹ Some of the authorities' powers, however, overlap or coincide with police powers. Furthermore, even though every "para-criminal" authority has its own objective, the execution of their powers could affect a criminal procedure in certain ways. There is, therefore, a general question of whether and under what circumstances evidence from such para-criminal procedures could be used in a criminal procedure.

This also applies to the powers given to and executed by the municipal warden service. Despite the fact that the main objective of the municipal warden service is the provision of public safety and public order in a municipality and not the execution of powers according to the Criminal Procedure Act², the activities of the municipal warden service could have a more or less direct influence on the criminal procedure through the obtaining of evidence or by affecting its effectiveness.

A municipal warden has the position of a misdemeanor authority and conducts the fast-track misdemeanor procedure according to the Minor Offences Act – I.³ The first part of this article will briefly introduce the municipal warden service, its legal position, the misdemeanor procedure conducted by the municipal warden service, and the relation between the municipal warden service procedure and the criminal procedure.

Further, the article's central chapter will discuss the relevant powers of the Slovenian municipal warden service which could affect criminal procedures; such that could directly result in the production of evidence for a criminal procedure (for example security checks, seizure of items) and other powers that influence the effectiveness of a criminal procedure in an indirect manner (for example the power to establish a person's identity and carry out an iden-

¹ Such as: prosecution of misdemeanors, protection of competition, or the financial interests of the state, etc.

² Criminal Procedure Act (*Zakon o kazenskem postopku*), Official Gazette of the Republic of Slovenia, No. 32/2012 – official consolidated version, 47/2013 and 87/2014 (hereinafter CPA).

³ Minor Offences Act – I (*Zakon o prekrških-1*), Official Gazette of the Republic of Slovenia, No. 29/2011 – official consolidated version, 21/2013, 111/2013, 74/2014 and 92/2014. The official English translation of this act is the Minor Offences Act-1, although it is, in my opinion, more appropriate to use the term misdemeanors (Slovene *prekrški*). Therefore, in this article the term misdemeanors is used, but the act is referred to as the Minor Offences Act-1 considering that it is the official translation.

tification procedure, to use instruments of restraint, and the power to detain a person or to notify authorities about a criminal act), and compare them with the powers of a police officer.

The following chapter will focus on the constitutional aspects of the municipal warden service powers and on the issue of the constitutional admissibility of such evidence in a criminal trial. Accordingly, this chapter will present the Constitution of the Republic of Slovenia and its implementation in the case law of the Constitutional Court and the Supreme Court of the Republic of Slovenia.

Further, the comparative aspect of this topic will be discussed in order to shed light on comparative solutions to the question of whether and when evidence obtained in a procedure conducted by the municipal warden service (or in para-criminal procedures in general) could be used in criminal trials as well. The article will present comparative solutions from Germany due to an important impact of German legislation on Slovenian substantive law; and from Croatia, considering that the Croatian and Slovenian systems are both descendants of common regulation in former Socialist Federal Republic of Yugoslavia.⁴

Finally, the article will conclude with findings as to whether and under what conditions evidence obtained by the municipal warden service is admissible in criminal trials procedure in Slovenia, and with proposals for legal and constitutionally conformant actions in practice. The main thesis of this article is that the stricter legislative conditions of the CPA need not be fulfilled for evidence to be admissible. However, constitutional and legislative requirements from the relevant *lex specialis* should be adhered to.

2. AN OUTLINE OF THE POWERS OF THE MUNICIPAL WARDEN SERVICE

The municipal warden service is established by a municipality or urban municipality⁵ and is responsible for public safety and public order within the territory of the municipality.⁶ The Local Police Act⁷ requires yearly security

⁴ Lavtar, R. and Kečanović, B., *Zakon o občinskem redarstvu s komentarjem*, GV založba, Ljubljana, 2007, p. 19.

⁵ Art. 2 of Local Police Act (*Zakon o občinskem redarstvu*), Official Gazette of the Republic of Slovenia, No. 139/2006.

⁶ *Ibid.*, art. 3.

⁷ The term Local Police Act is used in the official English translation, made by the

plans coordinated between the police force and the local community. Upon the proposal of the mayor, the municipal council adopts a municipal security program, based upon an assessment of the security situation in the municipality.⁸ Within its authority the municipal warden service monitors and regulates road traffic in the municipality and maintains safety on municipal public roads as well as on recreational and other public areas. They are also tasked with the protection of public property, natural and cultural heritage and public order.⁹

Within these objectives the municipal warden service is authorized to conduct fast-track misdemeanor procedures according to the Minor Offences Act-1, a municipal warden holding the position of the offence authority.¹⁰ The Minor Offences Act-1 includes general rules on the powers of all authorities in the fast-track misdemeanor procedure. The Local Police Act as the *lex specialis*, however, lists additional powers of municipal wardens, which resemble typical police powers, in an enumerative manner:¹¹ cautions; verbal directions; establishing the identity of a person and carrying out an identification procedure; security checks; seizure of items; restraining the perpetrator of a misdemeanor or criminal act; use of physical force, instruments of constraint such as handcuffs and other mechanical restraints, gas spray (instruments of restraint), and making a crime report.¹²

Unless otherwise provided for, the powers of reprimand, verbal direction, security check, and instruments of restraint should be applied according to The Police Act and executive regulations based on the principles and conditions of using these police powers.¹³

On the other hand, the rules of the Minor Offences Act-1 should be applied to the execution of the powers of municipal wardens when they are acting

ministry. Even though, in my opinion, the more appropriate term would be *municipal warden service* due to their position and powers. The official translation is used, when referring to the act itself, but not, when referring to the authority (municipal warden service).

⁸ Jere, M., *Police officers' and citizens' attitudes toward the provision of safety/security in local communities in Slovenia*, doctoral dissertation, Faculty of Criminal Justice and Security, Ljubljana, 2013, p. 26.

⁹ *Ibid.*

¹⁰ Minor Offences Act-1, art. 49; Local Police Act, art. 4.

¹¹ Lavtar, Kečanović, *op. cit.* note 4, p. 50.

¹² Local Police Act, art. 10.

¹³ *Ibid.*

as the misdemeanor authority in a fast-track misdemeanor procedure.¹⁴ Particularly relevant is Article 58, according to which, unless otherwise determined, the provisions of the Minor Offences Act-I governing ordinary court proceedings shall apply *mutatis mutandis* to, among others, personal searches and searches of premises; the seizure and confiscation of electronic and similar devices, and holders of information data; and the seizure and confiscation of items.¹⁵ Moreover, according to the rules on ordinary court proceedings, the *mutatis mutandis* provisions of the CPA governing examinations of the accused, examinations of witnesses, forensic issues, personal searches and searches of premises, and seizure and confiscation of items should be applied.¹⁶

3. THE POWERS OF THE MUNICIPAL WARDEN SERVICE RELEVANT FOR THE CRIMINAL PROCEDURE

The CPA regulates the execution of investigative acts for the production of evidence in a criminal procedure in accordance with the Constitution of the Republic of Slovenia¹⁷ in such a manner that the evidence is lawful and admissible in a criminal procedure. These rules only apply to the criminal procedure and the authorities within such a procedure.

If the evidence, relevant to the criminal procedure, is produced by a municipal warden in a fast-track misdemeanor procedure, the misdemeanor authority may not be required to act according to the stricter rules of the CPA.¹⁸ Criminal and misdemeanor procedures have different aims. They are conducted for the prosecution of criminal conduct of different gravity, and therefore the powers and infringements of human rights differ between the two of them.

On the other hand, since the Constitution of the Republic of Slovenia requires that all infringements of constitutional rights (and a municipal warden's power represents such an infringement) should be regulated by law and its

¹⁴ For those, which are not specially regulated in the Local Police Act.

¹⁵ Minor Offences Act-I, art. 58.

¹⁶ *Ibid.*, art. 67.

¹⁷ Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*), Official Gazette of the Republic of Slovenia, No. 331/1991, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006, 47/2013 and 47/2013.

¹⁸ In the same manner the Slovenian Constitutional Court in its decision Up-1293/08-24 from 6 July 2011, <http://odlocitve.us-rs.si/documents/4f/d3/up-1293-08.pdf> (10th February 2015).

limitations should be respected by authorities¹⁹, all powers must be executed according to the Local Police Act or other legislation to which the Local Police Act refers, in order for the evidence to be legally admissible. These limitations and conditions will be analyzed hereinafter.

3.1 Personal Security Checks

A security check is listed in the Local Police Act among the powers of the municipal warden service, but is not regulated in a *lex specialis* manner. Article 10, par. 2 of the same Act should therefore be taken into consideration. It provides that security checks should be executed according to the Police Act and according to the executive regulation based on the principles and conditions of the same police powers.²⁰

The wording of this paragraph is a bit unfortunate and unwelcome from the viewpoint of legal theory, since it refers to a specific act with limited temporal validity. A reason for this may be found in the fact that at the time of the adoption of the Local Police Act (2007), the Police Act regulated police powers. In 2013, however, new police legislation was adopted, which annulled almost the entire Police Act. The police powers are thus currently not regulated by the Police Act, but by the Act on Police Duties and Powers.²¹ For an assessment of the legality of a security check of a person carried out by a municipal warden, the Act on Police Duties and Powers should therefore be taken into consideration, since the Police Act is not valid anymore as concerns this matter and since the Act on Police Duties and Powers regulates the identical subject matter and in the same manner as the Police Act did, thus replacing the Police Act as *lex posterior*.²²

According to the new Act on Police Duties and Powers police officers of the same sex may, in the performance of the tasks as defined by law²³, conduct a personal security check if there is reason to believe that the person in question might attack someone or harm himself or herself, according to the circumstances of the case.²⁴ The personal security check is limited in regard

¹⁹ Constitution of the Republic of Slovenia, arts. 15 and 135.

²⁰ Lavtar, Kečanović, *op. cit.* note 4, p. 52.

²¹ Act on Police Duties and Powers (*Zakon o nalogah in pooblastilih policije*), Official Gazette of the Republic of Slovenia, No. 15/2013.

²² The general interpretative rule *lex posterior derogat legi priori* should be applied.

²³ Act on Police Tasks and Authorities, art. 51.

²⁴ *Ibid.*

to the allowed depth of invasion of a person's privacy, and to its purpose. It shall therefore consist only of a body search of the person, his or her belongings and vehicle in order to establish whether the person is armed or carries other dangerous objects.²⁵ The police officer is allowed to examine by touch the person's clothing, gloves, head-covering and hair, and footwear.²⁶ This security check represents the lightest potential intrusion, since it cannot include a physical examination or personal search. The police officer can also examine the objects which are found on the person and which could conceal a weapon or other dangerous objects.²⁷ Also vehicles, which are in immediate proximity and reach of the searched person, can be searched; this includes the interior of the car, the car boot and other luggage space and vehicle equipment, but not its hidden places.²⁸ Furthermore, a security check is also an obligatory part of apprehending and taking in a person.²⁹

These powers and limitations could also be applied to municipal wardens.³⁰ It is therefore important that:

- a municipal warden has the intent of securing the safety of himself or herself or the searched person and not the intent of providing evidence³¹, and that
- the limitation as to the depth of a security check is respected and that the security check is differentiated from personal search and body examination.³²

This also implies that for the security check itself the conditions from the Local Police Act and the new police legislation should be applied, whereas the continuance of the procedure should be in compliance with the CPA if the evidence is relevant for a criminal procedure.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, arts. 57, 58 and 66; Lavtar, Kečanović, *op. cit.* note 4, p. 53.

³⁰ A police officer could also conduct a more detailed security check of the person before placing the person into detention, but since a municipal warden does not have the power to place a person in detention, the power of a detailed security check should also not be acknowledged. See Act on Police Duties and Powers, art. 51.

³¹ Lavtar, Kečanović, *op. cit.* note 4, p. 54.

³² Gorkič, P. and Šugman Stubbs, K., *Dokazovanje v kazenskem postopku*, GV založba, Ljubljana, 2011, p. 137.

3.2 Seizure of Objects

Seizure of objects is regulated in the Local Police Act in the same manner as security check. Again, it gives a legal basis for the application of seizure of objects by a municipal warden, but does not regulate the conditions and limits of this power. Instead, it refers to the Police Act³³ and to the executive regulation on the principles and conditions for using the same police powers. Therefore, the Act on Police Duties and Powers regulates seizure of objects as a general power of seizure.

According to the latter the police officers shall confiscate objects, when exercising police tasks prescribed by the law, intended for assault or self-infliction of harm, as well as items that can seriously endanger public order or the general safety of people or property.³⁴ Seizure should be performed in such a manner as not to inflict unnecessary damage. A written confirmation of the seizure should be issued by the police.³⁵ Seized objects should be handed over to a competent body that has competence for the subsequent procedure.³⁶ In the opposite case, when proceedings are not initiated, the objects must be returned, unless they are hazardous objects or objects which must be confiscated according to a relevant law.³⁷ When not returned, the object must be destroyed by a commission or handed over to the body competent for its destruction. The person must be notified.³⁸

According to this regulation, a municipal warden has the authority to seize objects when performing duties of the municipal warden service. If seizure is to be legal, certain conditions must be fulfilled:

- seized objects must be of a certain nature; intended for assault or self-infliction of harm, or items that can seriously endanger public order or the general safety of people or property;
- seizure must be executed when performing duties of the municipal warden service as prescribed by law;

³³ Again, and under the same arguments, the new Act on Police Duties and Powers should be applied. Also, the police powers in the pre-trial procedure, according to CPA, should not be relevant, since the Local Police Act refers specifically to police legislation.

³⁴ Act on Police Duties and Powers, art. 51.

³⁵ *Ibid.*, art. 54.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

- the *due process* of seizure should be observed (written confirmation, handing over to authority, etc.).

If seizure is executed according to the above mentioned legislative conditions and limitations, the seized object should be considered legal and admissible evidence even in a criminal procedure.³⁹

3.3 Instruments of Restraint

Although instruments of restraint (physical force, handcuffs, mechanical restraints, gas spray, etc.) could not directly result in the production of evidence relevant for a criminal procedure, they can still be of relevance for a criminal procedure since they could adversely impact its effectiveness and the legality of subsequently obtained evidence.

Unlike the above mentioned powers, instruments of restraint are regulated in the Local Police Act as *lex specialis* in terms of police legislation. Physical force and gas spray can only be used by a municipal warden if an imminent attack upon the municipal warden or a third person could not be diverted in a different manner.⁴⁰ Instruments of constraint, such as handcuffs and other mechanical restraints, should only be applied against a person who may be restrained by a municipal warden according to the Local Police Act if he or she resists restraint or wishes to escape.⁴¹ There are, therefore, limitations as to the use of the instruments of restraint; instruments of constraint can only be used against a person who may be restrained by a municipal warden⁴², and physical force and gas spray only against an imminent attacker.

Even though *lex specialis* regarding the use of instruments of restraint exists, the Local Police Act, similarly as the two previously mentioned powers, refers to the police legislation that regulates instruments of restraint quite extensively.⁴³ In my opinion, the stricter and narrower conditions of the Local Police Act should be applied when a municipal warden applies instruments of restraint and not the more lenient conditions according to the police legislation,

³⁹ Lavtar, Kečanović, *op. cit.* note 4, p. 54.

⁴⁰ Local Police Act, art. 14.

⁴¹ *Ibid.*

⁴² These are: the perpetrator of a criminal act, who is prosecuted *ex officio* or on the basis of the injured party's motion, or the perpetrator of a misdemeanor, who has been caught in the act of committing the criminal act of misdemeanor. See Local Police Act, art. 13.

⁴³ Act on Police Tasks and Authorities, art. 72.

which allows for broader use of physical force, instruments of constraint and gas spray by police officers.⁴⁴

The basic principles and rules of the police legislation, such as the principle of legality⁴⁵, the principle of subsidiarity⁴⁶, the exclusion of certain persons as targets of these powers⁴⁷, the execution upon the order of a superior except in certain cases⁴⁸, and the duty to perform first aid⁴⁹, should, in my opinion, also be respected when the instruments of restraint are applied by a municipal warden.

Also, the limitations for the use of instruments of constraint from the Act on Police Duties and Powers should be considered, since the Local Police Act regulates only the limitation as to the types of persons against whom they may be applied, but not the conditions for their use. Therefore, in my opinion, handcuffs and other mechanical restraints should only be used if, according to the circumstances, it could be expected that the person would show resistance or harm himself or herself, attack someone or escape, or if the instrument is necessary for the safe execution of apprehension and bringing in of a person or detention of a person.⁵⁰

Interestingly, the conditions for the use of the instruments of restraint, especially the conditions of the use of gas spray and physical force, according to the Local Police Act, strongly resemble the conditions and circumstances of self-defense according to the Criminal Code-1.⁵¹ There arises the question of the differentiation between self-defense, on the one hand, and instruments of restraint on the other. In such a case, the rules of which legal institution should be applied?

Generally speaking, as for the rules for the use of instruments of restraint, the *lex specialis* rule should prevail. Self-defense rules from the CC-1 represent the *lex generalis* rule that could be applied to any person: municipal wardens, police

⁴⁴ *Ibid.*, arts. 79, 80 and 82.

⁴⁵ *Ibid.*, art. 74.

⁴⁶ *Ibid.*, art. 75.

⁴⁷ *Ibid.*, art. 76.

⁴⁸ *Ibid.*, art. 77.

⁴⁹ *Ibid.*, art. 78.

⁵⁰ *Ibid.*, art. 79.

⁵¹ Self-defense shall be understood to mean such a defense as is absolutely necessary for the perpetrator to avert an immediate and unlawful attack on himself or on any other person. See art. 22 of Criminal Code-1 (*Kazenski zakonik – 1*), Official Gazette of the Republic of Slovenia, No. 50/2012 – official consolidated version (hereinafter CC-1). See also Lavtar, Kečanović, *op. cit.* note 4, p. 67.

officers or others. However, from a comparative point of view, there has been a reluctance to admit the right to self-defense to policemen and other holders of public authorities whose conduct is regulated by specific rules.⁵² Therefore, when a situation is regulated in a specific manner by a law, such as the Local Police Act, combined with the Act on Police Duties and Powers, these *lex specialis* rules should be applied. Only when a situation is not regulated by a law, general rules on justification and excuses should be applied, such as self-defense.⁵³

3.4 Establishing the Identity of a Person and Carrying Out an Identification Procedure

Establishing the identity of a person and carrying out an identification procedure is also listed as one of the powers of the municipal warden service. According to the Local Police Act, a municipal warden may establish the identity of a person who by his or her behavior and actions at a particular location or at a particular time gives reason for suspicion that he or she might endanger the safety of people or property, is committing or has committed a criminal act prosecuted *ex officio* or a misdemeanor.⁵⁴ The identity is established by demanding from the person to show his or her identity card or other valid and relevant document on the basis of which his or her identity could be established.⁵⁵

If this does not suffice, the person's identity should be established on the basis of other documents which include data on the person in question, and with the help of other persons who know this person.⁵⁶ The person must be notified about the reasons for establishing his or her identity.⁵⁷ If, after executing these powers, the municipal warden is still unable to establish the identity of the person, the person shall be restrained and the police notified so that they could establish his or her identity.⁵⁸ A municipal warden has only limited me-

⁵² Fuchs, H., *Österreichisches Strafrecht, Allgemeiner Teil*, Springer, Vienna, 2008, p. 166; Triffterer, O., Rosbaud, C. and Hinterhofer, H., *Salzburger Kommentar zum Strafgesetzbuch, vol. I*, Lexis Nexis, Vienna, 2009, p. 32; Jescheck, H. H. and Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, Duncker & Humblot, Berlin, 1996, p. 364; Novoselec, P. and Bojanić, I., *Opći dio kaznenog prava*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013, p. 209.

⁵³ Kienapfel, D. and Höpfel, F., *Strafrecht, Allgemeiner Teil*, ManzscheVerlags- und Universitätsbuchhandlung, Vienna, 2007, p. 63.

⁵⁴ Local Police Act, art. 12.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

ans to establish a person's identity, whereas the police could also apply other more invasive means, according to police legislation⁵⁹, which are not available to a municipal warden.

3.5 Restraining the Perpetrator of a Misdemeanor or Criminal Act

A municipal warden can restrain, at the place of the commission, a person caught in the act of committing a criminal act subject to prosecution *ex officio*, or on the injured party's motion⁶⁰, or a misdemeanor, for a maximum period of one hour or until the police arrive.⁶¹

In relation to the perpetrator of a criminal act this rule represents a *lex specialis* regulation in comparison to the CPA, according to which any person may apprehend a person found in the act of committing a criminal act subject to prosecution *ex officio*. Accordingly, he shall be bound to deliver the perpetrator to the investigating judge or the police forthwith or, where that proves impossible, immediately notify either one thereof.⁶² A municipal warden, therefore, has the identical power as any other person, but with limitations. Since a municipal warden is an official, stricter limitations are put upon him, i.e. he can restrain a person for only an hour. His duty remains the same: he has to notify the appropriate authority, but with less hesitation.

A municipal warden can also restrain a person when the establishment of the person's identity was unsuccessful. Again, the police must be notified and the person can be restrained only until their arrival. No similar power could be found in the Minor Offences Act-1 referring to an ordinary person, but the Act on Police Duties and Powers confers a similar power (temporal limitation of free movement)⁶³ to the police for the execution of a certain police power or other official act.⁶⁴

Also, according to the Minor Offences Act-1, the police have additional powers; the perpetrator who has been caught when committing a misdemea-

⁵⁹ Act on Police Duties and Powers, art. 41.

⁶⁰ The addition of an injured party's motion is unnecessary, because the criminal acts prosecuted by a state prosecutor upon the injured party's motion are also criminal acts prosecuted *ex officio*.

⁶¹ Local Police Act, art. 13.

⁶² CPA, art. 160; Lavtar, Kečanović, *op. cit.* note 4, p. 65.

⁶³ Act on Police Tasks and Authorities, art. 56.

⁶⁴ Which could also be a misdemeanor procedure, or in case of taking in persons according to the Minor Offences Act-1.

nor should be taken in if his or her identity could not be established, if he or she does not have a dwelling, if he or she might leave the country because he or she resides abroad and could, therefore, escape responsibility for a misdemeanor, if the circumstances justify the assessment that the perpetrator would continue the misdemeanor or repeat it, or if there is justified suspicion that the perpetrator might hide, destroy or remove evidence of a misdemeanor. In such cases the perpetrator should be taken to court without delay.⁶⁵

To conclude, as regards the restraining of a person, the police have more powers than a municipal warden, whose powers seem auxiliary in relation to those of the police.

3.6 Making a Crime Report

A municipal warden is obliged to report to the police the commission of a criminal act prosecuted *ex officio*, according to the act on criminal procedure, if he ascertains that a criminal act is being prepared, committed, or has been committed.⁶⁶

Again, this is a *lex specialis* regulation in relation to the general rules on the duty to report a crime as determined in the CPA. However, it does not have any added value, but rather only refers to the CPA. Accordingly, any person may report a criminal act liable to public prosecution.⁶⁷ All state bodies and organizations with public authority shall be bound to report criminal acts liable to prosecution *ex officio* which were brought to their attention in any way.⁶⁸ Cases where failure to report a crime is itself considered a criminal act are defined by law.⁶⁹ The municipal warden service as such is not a state body, but a local self-government body, and not an organization with public authority. Therefore, the municipal warden service does not have the duty, as such, to report every criminal act prosecuted *ex officio*.

In relation to this, the CC-1⁷⁰ includes two relevant criminal acts: failure to inform authorities of preparations to commit a crime⁷¹, and failure to provide

⁶⁵ Minor Offences Act-1, art. 110.

⁶⁶ Local Police Act, art. 15.

⁶⁷ CPA, art. 146.

⁶⁸ *Ibid.*, art. 145.

⁶⁹ *Ibid.*, art. 146.

⁷⁰ See CC-1.

⁷¹ *Ibid.*, art. 280.

information regarding a crime or perpetrator.⁷² The former is committed by anyone who, knowing of preparations to be undertaken for the commission of a criminal act for which the punishment of more than three years imprisonment is prescribed by statute, fails to inform the competent authorities thereof early enough for the committing of the offence in question to be prevented, and if the perpetration of such an offence is subsequently attempted or accomplished.⁷³ Accordingly, there is no general duty to report criminal acts for which a sentence of three years or less of imprisonment is prescribed. This also applies to a municipal warden.

The criminal act of failure to provide information regarding a crime or perpetrator is, however, committed by anyone who knows of a perpetrator of a criminal act for which the sentence of no less than fifteen years imprisonment is prescribed, or who knows of the commission of such a criminal act and fails to inform the competent authorities thereof, whereby such information is crucial for the discovery of the perpetrator of the crime.⁷⁴ A stricter obligation is placed upon an official. An official commits this act if he knowingly fails to submit a report of a criminal act prosecuted *ex officio* of which he comes to know during the performance of his official duties, and for which the punishment of more than three years imprisonment is prescribed under the statute.⁷⁵

Since a municipal warden is an official in a fast-track misdemeanor procedure according to the Local Police Act⁷⁶ and the Minor Offences Act-1, he is strictly obliged to report any criminal act that has been executed, for which a penalty of more than three years is prescribed.

Interestingly enough, the Local Police Act states that the crime report should be submitted to the police. This is probably the consequence of a misguided general belief that the police are the recipient of crime reports according to the CPA. But according to the latter the state prosecutor's office is officially the recipient of crime reports.⁷⁷ In practice, however, it is easier to reach the police than the state prosecutor so the majority of crime reports are submitted to the police. The police are, in turn, obliged to immediately notify the state prosecutor so that he may direct the pre-trial procedure.⁷⁸

⁷² *Ibid.*, art. 281.

⁷³ Except for persons as in art. 280 of CC-1.

⁷⁴ *Ibid.*, art. 281.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, art. 99; Local Police Act, art. 4.

⁷⁷ CPA, art. 147.

⁷⁸ *Ibid.*

Eventually, this was changed by an amendment to the CPA (CPA-L).⁷⁹ According to this amendment the police are not required to immediately notify the state prosecutor about a crime report if it is a case of a criminal act for which compulsory notification to the state prosecutor is not required according to the regulation.⁸⁰ In such a case the state prosecutor is notified after information from the citizens had already been gathered and other measures necessary for the decision of the state prosecutor have been undertaken, but no later than 30 days after the crime report.⁸¹

4. THE CONSTITUTIONAL ASPECT OF THE POWERS OF THE MUNICIPAL WARDEN SERVICE'S

As mentioned above, the issue of obtaining evidence for criminal proceedings in a procedure conducted by a municipal warden is part of a wider and more general issue of evidence obtained in para-criminal procedures. The usually stricter conditions of criminal law apply only to authorities in criminal procedure⁸², whereas the constitutional conditions for infringing a relevant constitutional right should be applied in all legal procedures, including the para-criminal.⁸³

Firstly, when a municipal warden's power resulting in evidence represents an infringement of a constitutional right, its constitutional point of view and the constitutional regulation of a relevant constitutional right therefore becomes relevant. The municipal warden's powers must be executed and the evidence produced in accordance with the Slovenian Constitution. The latter represents the minimum common denominator of procedural standards in criminal and misdemeanor procedures conducted by a municipal warden for the evidence to be admissible in criminal procedure.

The duty to observe the constitutional conditions could also be inferred from Article 18 of the Slovenian Criminal Procedure Act, according to which

⁷⁹ Criminal Procedure Act-L, Official Gazette of the Republic of Slovenia, No. 47/2013.

⁸⁰ A Decree on the cooperation of the state prosecutorial service, Police and other competent state bodies, and institutions in the detection and prosecution of perpetrators of criminal offences, and the operations of specialized and joint investigation teams has been issued. The Decree also enumerates criminal acts, of which the state prosecutor must be notified.

⁸¹ CPA, art. 147.

⁸² See the decision Up-1293/08, *op. cit.* note 18.

⁸³ *Ibid.*

the court may not base its decision on *evidence obtained in violation of human rights and basic freedoms provided by the Constitution*, nor on evidence which was obtained in violation of the provisions of criminal procedure and which, under the CPA, may not serve as the basis for a court decision, or which was obtained on the basis of such inadmissible evidence.

Such is also the position of the Slovenian Constitutional Court. In fact, from the viewpoint of the Slovenian Constitution it is completely irrelevant which piece of legislation or type of procedure is applied by the state authority to obtain evidence. On the contrary, it is essential to establish whether such power by which the evidence is obtained infringes any constitutional right at all. The issue of which constitutional right was infringed and whether constitutional conditions of such infringement are respected or not is also important, taking into consideration the specific provisions on human rights in the Constitution, as well as the general constitutional principles, such as the principle of legality⁸⁴ and its element *lex certa*, the principle of proportionality⁸⁵ as an element of the rule of law, the principle of subsidiarity⁸⁶, and the rule of law itself.⁸⁷

A clear answer to the question about the conditions under which evidence from para-criminal procedures, including evidence obtained in a misdemeanor procedure by a municipal warden, could be used in a criminal procedure was given by the Constitutional Court in cases No. Up-1293/08 (2011)⁸⁸ and U-I-40/12-31 (2013).⁸⁹

The Constitutional Court decision Up-1293/08 deals with the powers of the Slovenian Custom Service. Particularly relevant were the powers to search a vehicle and question a person at the national border and, accordingly, the privilege against self-incrimination and the right to privacy. In this decision the Constitutional Court made a step towards a substantive assessment of a certain power of a state authority from the viewpoint of constitutional conditions. It is in fact not important which legal act regulates a particular measure

⁸⁴ Constitution of the Republic of Slovenia, art. 153.

⁸⁵ Šturm, L., *Komentar Ustave Republike Slovenije*, Fakulteta za državne in evropske študije, Ljubljana, 2010, p. 55.

⁸⁶ *Ibid.*, 56; Lavtar, Kečanović, *op. cit.* note 4, p. 45.

⁸⁷ Constitution of the Republic of Slovenia, art. 2.

⁸⁸ Decision Up-1293/08, *op. cit.* note 18.

⁸⁹ Decision U-I-40/12-31 from 11 April 2013, <http://odlocitve.us-rs.si/sl/odlocitev/US30070> (11th February 2015).

- the CPA or another act. On the contrary, it is essential that the measure is regulated and performed according to the constitutional limits of a certain constitutional right.⁹⁰ According to this decision, the privilege against self-incrimination does not apply only in the formal criminal procedure, but from the moment of the *de facto* beginning of a criminal procedure. Furthermore, the privilege against self-incrimination should also apply in para-criminal procedures, in which the *de facto* criminal investigation is run under the pretenses of other (inspection or supervisory) procedures, and in which officials actually focus on the collecting of evidence for subsequent criminal procedures.⁹¹ This obviously signifies that other state authorities, including the municipal warden service, should not intentionally, in a pre-emptive manner, collect evidence for criminal procedures and thereby surpass the CPA's standards. This also implies that evidence obtained by the municipal warden service could only be admissible if obtained in good faith and unexpectedly (*bonae fidei*).

The second case (U-I-40/12-31) deals with the powers of the Slovenian Competition Protection Agency (the Agency), which are linked to the suspension of territorial and communication privacy. Dealing with powers typical of the criminal procedure the Constitutional Court once again turned to the constitutional conditions applicable to all legal procedures notwithstanding their form. Accordingly, the Constitutional Court assessed the Agency's power to inspect business communication and stated that a court order was necessary in order to prevent abuse and discrimination. In addition, it concluded that the Agency also needed a court order for a detailed inspection of premises, closed to customers and the public. Hence, according to constitutional law, in every case an assessment should be made from the viewpoint of the substance, nature and invasiveness of a certain measure.⁹²

The Supreme Court of the Republic of Slovenia has since followed the reasoning of the Constitutional Court in the decision in Up-1293/08.⁹³ Pre-

⁹⁰ Decision Up-1293/08, *op. cit.* note 18.

⁹¹ *Ibid.*; Zgaga, S., The use of intelligence data in law enforcement and judicial processes: constitutional aspects, in Čaleta, D. and Shemella, P. (Eds.), *Intelligence and combating terrorism: new paradigm and future challenges*, Institute for Corporative Security Studies, Ljubljana, Center for Civil-Military Relations, Naval Postgraduate School, Monterey, 2014, p. 195.

⁹² Decision Up-1293/08, *op. cit.* note 18. See also Zgaga, *op. cit.* note 91, 196.

⁹³ For example the decisions of Slovenian Supreme Court 30354/2012-111 from 12 June 2013, [http://www.sodisce.si/znanje/sodna_praksa/search.php?q=sklep%20G%2030/2012&database%5BSOVS%5D=SOVS&_submit=i%EF%BF%](http://www.sodisce.si/znanje/sodna_praksa/search.php?q=sklep%20G%2030/2012&database%5BSOVS%5D=SOVS&_submit=i%EF%BF%92)

viously, the Supreme Court actually issued formalistic decisions, according to which the CPA standards applied only in criminal procedures, whereas the admissibility of evidence obtained in para-criminal procedures depended solely on whether the evidence was obtained legally according to the *lex specialis* regulation, for example the Local Police Act.⁹⁴ Such formalistic argumentation naturally had to be declined since it enabled the bypassing of constitutional standards and ignored the constitutional aspect of the problem altogether.

As a second step, an assessment should be made as to which concrete constitutional rights are infringed by certain powers and whether constitutional protection should be awarded at all in a concrete case or not. For example, in the case of a security check the *lex specialis* constitutional regulation of the protection of the right to privacy and personality rights⁹⁵ is relevant. Accordingly, the inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed. Since the Constitution does not include any additional conditions for the infringement of these rights, they can only be infringed upon by the rights of others and by law.⁹⁶

Seizure of objects could represent an infringement of the constitutional right to private property⁹⁷ which, again, is not constitutionally conditioned. The regulations of both constitutional rights are very general and do not contain any reference to the legislative regulation. General constitutional principles should still be respected.⁹⁸

Instruments of restraint and the act of restraining the perpetrator at the place of the commission of a criminal act or misdemeanor represent an infrin-

BD%C3%A8i&showType=table&order=date&direction=desc&page=4&id=2012032113054804 (11th February 2015) and I Ips 3279/2010-88 from 13 December 2012, <http://sodisce.si/vsrs/odlocitve/2012032113053424/> (11th February 2015).

⁹⁴ For example the decisions of Slovenian Supreme Court I Ips 234/98 from 22 January 1999, http://www.sodisce.si/znanje/sodna_praksa/search.php?q=id:23394&database%5BSOVS%5D=SOVS&database%5BIESP%5D=IESP&database%5BVDS%5D=VDSS&database%5BUPRS%5D=UPRS&_submit=i%C5%A1%C4%8Di&order=changeDate&direction=desc&page=0&id=23394 (11th February 2015), I Ips 46/2004 from 21 October 2004, <http://www.sodisce.si/vsrs/odlocitve/25215/> (11th February 2015) and I Ips 72/2004 from 21 April 2005, http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/25499/ (11th February 2015).

⁹⁵ Constitution of the Republic of Slovenia, art. 35.

⁹⁶ *Ibid.*, art. 15.

⁹⁷ *Ibid.*, art. 33.

⁹⁸ Lavtar, Kečanović, *op. cit.* note 4, p. 58.

gement of the constitutional freedom of movement.⁹⁹ Accordingly, everyone has the right to freedom of movement, to choose his place of residence, to leave the country and to return at any time. This right may be limited by law, but only when necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order, or if the defense of the state so demands. If a person is restrained and the instruments of restraint are used according to the Local Police Act, the principle of legality is respected, since these powers are regulated by law, and substantiated by the reason for ensuring the course of criminal proceedings or for protecting public order.

Last but not least, for establishing the identity of a person Article 35 of the Constitution of the Republic of Slovenia is relevant. According to this Article, the protection of the right to privacy and personality rights is guaranteed.¹⁰⁰ Since there is no constitutional reference for the legislator, general constitutional rules should be applied. Such an interpretation has already been given by the Slovenian Constitutional Court for annulling or declaring unconstitutional certain provisions of the Slovenian CPA due to their conflict with basic general constitutional principles, such as *lex certa*¹⁰¹ and the principle of proportionality¹⁰² as part of the rule of law. This has also been confirmed by Slovenian Constitutional Court in the mentioned decisions Up-1293/08 and U-I-40/12-31.

After establishing which constitutional provision is relevant, only the last step in the constitutional assessment of evidence from para-criminal procedures remains, and that is the assessment of whether the regulation or execution of a concrete measure (by a municipal warden) violates the constitutional conditions for infringing a relevant constitutional right.¹⁰³

5. COMPARATIVE EXPERIENCES

In search for an adequate solution to the intersection of the misdemeanor and criminal procedures in Slovenian municipalities, comparative experience could also be relevant. Therefore, the German and Croatian regulations will be

⁹⁹ Constitution of the Republic of Slovenia, art. 32.

¹⁰⁰ Lavtar, Kečanović, *op. cit.* note 4, p. 64.

¹⁰¹ See decision U-I-18/93 from 13 July 1993, <http://odlocitve.us-rs.si/sl/odlocitev/US17816> (11th February 2015).

¹⁰² See decision U-I-25/95 from 27 November 1997, <http://odlocitve.us-rs.si/sl/odlocitev/US18710> (11th February 2015).

¹⁰³ See the decisions Up-1293/08, *op. cit.* note 18, and U-I-40/12-31, *op. cit.* note 89.

discussed first from the viewpoint of the relationship between misdemeanors and criminal acts, the legal position of the local police and the use of evidence from para-criminal procedures, considering especially the exclusionary rules applied in criminal procedures of these two states.

5.1 Germany

The German experience is presented due to the important impact of German criminal law on the general part of Slovenian substantive criminal law. Like Slovenian, German criminal law also distinguishes between criminal acts (*Straftat*)¹⁰⁴, misdemeanors (*Ordnungswidrigkeit*) and disciplinary offences (*Disziplinarmaßnahme, Ordnungsmittel, prozessuales Zwangsmittel*).¹⁰⁵

Contrary to Slovenia, however, Germany has not yet implemented the local police on the federal or state level. The police is under the jurisdiction of the state, even though it could be organized on the local level as well.¹⁰⁶ Certain federal states, such as Baden-Württemberg, Bayern, Hessen, Sachsen and Berlin, have organized voluntary police (*Freiwilliger Polizeidienst* or *Sicherheitswacht*).¹⁰⁷ For example, the state of Baden-Württemberg established the *Freiwilliger Polizeidienst* as early as in 1963. In 1985 the state of Baden-Württemberg issued a law named *Gesetz über den Freiwilligen Polizeidienst*¹⁰⁸, which regulates the legal position of the voluntary police. According to this Act, the voluntary police is part of the police and consists of volunteers.¹⁰⁹ Depending on the situation, a voluntary policeman reinforces local policemen with performing certain tasks, strictly defined by the law: securing buildings and devices, securing and supervising road traffic, patrolling, or technical work, such as driving and working at the telecommunication exchange.¹¹⁰ Unless otherwise provided, general

¹⁰⁴ Dammar, H. R., Fairchild, E. and Albanese, J., *Comparative criminal justice systems*, Wadsworth, Belmont, 2013, p. 83; Frister, H., *Strafrecht, Allgemeiner Teil*, C.H. Beck, München, 2011, p. 77.

¹⁰⁵ *Ibid.*, p. 4; Jescheck, Weigend, *op. cit.* note 52, p. 14.

¹⁰⁶ Meško, G., Lobnikar, B., Jere, M. and Sotlar, A., Recent developments of policing in Slovenia, in Meško, G., Fields, C. B., Lobnikar, B. and Sotlar, A. (Eds.), *Handbook on Policing in Central and Eastern Europe*, Springer, New York, 2013, pp. 263 – 286.

¹⁰⁷ Dammar, Fairchild, Albanese, *op. cit.* note 104, p. 114; Lavtar, Kečanović, *op. cit.* note 4, p. 20.

¹⁰⁸ Available at <https://www.polizei-bw.de/UeberUns/Seiten/Freiwilliger-Polizeidienst.aspx> (11th February 2015).

¹⁰⁹ Gesetz über den Freiwilligen Polizeidienst, art. 1.

¹¹⁰ *Ibid.*

regulation applicable to the Police also applies to the voluntary police.¹¹¹ The voluntary police are called into service if the police tasks cannot be fulfilled solely by the regular Police.¹¹² In relation to third persons, a voluntary policeman holds the same position as a policeman¹¹³, according to the *Polizeigesetz* (PolG) of Baden-Württemberg.¹¹⁴

Since a voluntary policeman holds certain police powers while performing the tasks according to the *Gesetz über den Freiwilligen Polizeidienst*, the exercise of these powers could lead to the voluntary policeman obtaining evidence relevant for a criminal procedure and the issue of their admissibility in criminal procedure could arise. Exclusion of evidence is regulated in a very heterogeneous way in German law.¹¹⁵ German doctrine recognizes independent exclusionary rules, which always lead to exclusion of evidence (also obligatory exclusionary rules), and dependent exclusionary rules, based on a grave breach of a rule regulating the collection of evidence. These, in turn, include obligatory and relative exclusionary rules, according to which the court weighs the pros and cons for exclusion of evidence.¹¹⁶

The category of obligatory exclusionary rules also includes exclusion of evidence obtained in violation of certain fundamental provisions of German *Grundgesetz*¹¹⁷, such as the violation of the right to privacy, right to privacy of correspondence, mail and telecommunications, and inviolability of home.¹¹⁸ Since this category is based on the exclusion of evidence “irrespective of the activities of the law enforcement agencies” or “the misconduct, the violation of provisions regulating evidence collection”¹¹⁹, this category could be applied in a broader manner to all legal procedures. The constitutional limits are therefore as relevant in Germany as in Slovenia. The second category of violations

¹¹¹ *Ibid.*

¹¹² *Ibid.*, art. 5.

¹¹³ *Ibid.*, art. 6.

¹¹⁴ Available at <http://www.landesrecht-bw.de/jportal/?quelle=jlink&query=PolG+BW&max=true&aiz=true#jlr-PolGBW1992rahmen> (11th February 2015).

¹¹⁵ Gess, S., Germany: Balancing truth against protected constitutional interests, in Thaman, S. C. (Ed.), *Exclusionary rules in comparative law*, Springer, Heidelberg, 2013, p. 113.

¹¹⁶ *Ibid.*, p. 116.

¹¹⁷ Available at <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf> (11th February 2015).

¹¹⁸ Gess, *op. cit.* note 115, p. 113.

¹¹⁹ *Ibid.*, p. 116.

of statutory provisions on the collection of evidence¹²⁰ could however only be applied in a case where the *lex specialis* regulation of voluntary police powers is breached.

5.2 Croatia

Croatia (as Germany and Slovenia) recognizes three main forms of unlawful conduct; criminal acts (*kazneno djelo*), misdemeanors (*prekršaj*) and disciplinary offences (*stegovno djelo*).¹²¹

Contrary to Slovenia, Croatia has not yet implemented local or voluntary police in a broad manner. Similarly to Germany, where the voluntary police is limited to certain states, the only city with local police in Croatia is its capital; Zagreb, where the local police was established within its local self-government. The local police includes the departments of communal and traffic local police (*odjel komunalnog redarstva, odjel prometnog redarstva*).¹²² Among other powers, the local police issue fines in case of violations of communal and traffic legislation and thereby conducts a misdemeanor procedure. In case of traffic violations the local police act according to the Road Traffic Safety Act (*Zakon o sigurnosti prometa na cestama*) and the Misdemeanour Act (*Prekršajni zakon*).¹²³

Again the issue of admissibility and relevance of evidence from such a misdemeanor procedure for a criminal procedure could arise. Article 10 of the Croatian Criminal Procedure Act¹²⁴, which regulates inadmissible evidence, should therefore be mentioned. According to this Article, judicial decisions may not be founded on evidence obtained in an illegal way (illegal evidence). Illegal evidence is evidence obtained in a way representing a violation of the prohibition of torture, cruel or inhuman treatment guaranteed by the Constitution, domestic law or international law; evidence obtained in a way representing a violation of the fundamental human rights to defense, dignity, reputation, honour and inviolability of private and family life, guaranteed by

¹²⁰ *Ibid.*

¹²¹ Novoselec, Bojanić, *op. cit.* note 52, pp. 54 – 56.

¹²² Available at <http://www.zagreb.hr/default.aspx?id=53944> and <http://www.zagreb.hr/default.aspx?id=53946> (11th February 2015).

¹²³ Available at <http://www.zagreb.hr/default.aspx?id=53946> and <http://www.zakon.hr/z/52/Prekr%C5%A1ajni-zakon> (10th February 2015).

¹²⁴ Available at <http://www.zakon.hr/z/174/Zakon-o-kaznenom-postupku> (11th February 2015).

the Constitution, domestic law and international law;¹²⁵ evidence obtained in a way representing a violation of criminal procedure provisions expressly provided in the Criminal Procedure Act or obtained through other illegal evidence (“fruits of the poisonous tree”).¹²⁶ With the exception of the definition, which explicitly refers to the violation of the Criminal Procedure Act, all other (human rights) grounds for excluding illegal evidence could, in my opinion, also apply to evidence originating from para-criminal procedures.

6. CONCLUSION

With the new Slovenian Local Police Act the municipal warden service gained powers similar to the police powers from the Act on Police Duties and Powers or the previous Police Act. The municipal warden service has a narrower and more specified scope of work, prescribed by the Act on Local Self-Government and other *lex specialis* legislation, and deals mostly with misdemeanors. When encountering criminal acts, municipal wardens should restrain the perpetrator and notify the police to proceed with the criminal procedure. This also applies to establishing the identity of a person, when minor intrusions of a person’s privacy do not suffice. Also, according to the principle of proportionality, it is constitutionally desirable and appropriate that the municipal warden service, dealing with a lesser form of criminal conduct than the police, has less invasive powers than the police. Arming the municipal warden service with the same powers as the police would contradict the principle of proportionality.

Even though they deal mostly with misdemeanors and only incidentally with criminal acts, actions of municipal wardens could still affect the criminal procedure. Firstly, their powers, according to the Local Police Act, could directly result in the production of evidence relevant for a criminal procedure, such as a security check or seizure of objects. Other powers could impact the

¹²⁵ Criminal Procedure Act, art. 10: “Evidence obtained in violation of fundamental human rights to defense, dignity, reputation, honour and inviolability of private and family life, guaranteed by the Constitution, domestic law and international law, shall not be deemed illegal: by an action whose illegality is excluded pursuant to the Criminal Code; and in proceedings for severe forms of criminal offences in regular criminal proceedings where the violation of the rights, with regard to its force and nature, is significantly lesser with regard to the severity of the criminal offence.” However, the court decision may not be founded exclusively on such evidence.

¹²⁶ *Ibid.*

effectiveness of a criminal procedure indirectly, for example: instruments of restraint, identifying and restraining¹²⁷ the perpetrator at the place of the commission of a criminal act, and making crime reports.

However, the admissibility of evidence produced by the municipal warden service could be questioned later in the criminal procedure. According to Article 18 of the CPA, the court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence obtained in violation of the provisions of criminal procedure and which, under the CPA, may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence.

This rule should also be taken into consideration in assessing the admissibility of evidence obtained by the municipal warden service. Therefore, such evidence is inadmissible, if it has been obtained in violation of human rights and basic freedoms provided by the Constitution. At this point the regulation of relevant constitutional rights, which are infringed upon by certain powers of the municipal warden service according to the Local Police Act, becomes relevant (for example the protection of the right to privacy and personality rights, freedom of movement), as well as the general constitutional principles, such as the principle of legality, principle of proportionality and of subsidiarity. If the regulation of a certain power contradicts these specific regulations or general constitutional principles, evidence, obtained in such a manner, should be considered inadmissible and excluded. Such is also the case law of the Slovenian Constitutional Court and the Supreme Court.

Secondly, according to the CPA, the court may not base its decision on evidence obtained in violation of the provisions of criminal procedure, and which, under the CPA, may not serve as the basis for a court decision. This cannot be interpreted to mean that the municipal warden service should follow the stricter rules of the CPA when executing their powers. The CPA applies to criminal procedures, and the municipal warden service does not conduct criminal procedures. On the other hand, it should be required that the evidence should be lawfully obtained according to the rules from the Local Police Act or in reference to police legislation.

This is also required by the case law of the Slovenian Constitutional and the Supreme Court and the constitutional principle of legality. According to the Constitution, human rights and fundamental freedoms shall be exercised

¹²⁷ Lavtar, Kečanović, *op. cit.* note 4, p. 66.

directly on the basis of the Constitution. The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as provided by the Constitution.¹²⁸ The relevant powers must therefore be regulated with a law. Not only does the principle of legality mean that the infringements of constitutional rights must be defined as *lex certa* by law, but also that the state authorities should follow such law. Therefore, failure to comply with legal requirements could result in an infringement of the principle of legality and the evidence would be inadmissible.¹²⁹

The second requirement demands that the municipal warden service should not perform their powers *malae fidae*, executing their powers with the intent to find evidence of a criminal act. The abuse of powers or a circumvention of the usually stricter CPA conditions is therefore prohibited.¹³⁰ The municipal warden service should act within the scope of the Local Police Act. A security check, for example, should be performed with the intent to prevent an attack or self-infliction of harm, not with the intent of finding evidence.¹³¹ An analogy to the American plain view doctrine should be made. According to this doctrine, evidence obtained in a house search is admissible even though it refers to a criminal act other than the one for which the court order for the house search was issued (among others), provided that the finding was incidental or unexpected.¹³² This prohibition of abusive and arbitrarative actions of state

¹²⁸ Constitution of the Republic of Slovenia, art. 15.

¹²⁹ In such a manner also the Supreme Court I Ips 360/2002 from 12 December 2002, http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/24427 (11th February 2015): "The potential finding that preconditions for safety check did not exist, could potentially raise doubt regarding the admissibility of the evidence, obtained with the safety check." (author's translation). See also Žaberl, M., *Temelji policijskih pooblastil*, Fakulteta za policijsko-varnostne vede, Ljubljana, 2006, p. 197.

¹³⁰ Similarly, the Supreme Court in I Ips 11861/2010 from 11 July 2012, http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113047137/ (11th February 2015): "Objects, which were not defined in the court order for house search, but found in the course of the house search and refer to another criminal act, could only be seized if the investigators stumble upon them or their finding is unintentional or unexpected (plain view theory)." (author's translation).

¹³¹ Žaberl, *op. cit.* note 129, p. 199.

¹³² Zupančič, B. M. *et al.*, *Ustavno kazensko procesno pravo*, Pasadena, Ljubljana, 2001, p. 559.

authorities could also be deduced from the rule of law regulated in Article 2 of the Slovenian Constitution, the principle of legality from Articles 120 and 153, and the positions of the Constitutional and the Supreme Court of Slovenia.¹³³ The “fruit of the poisonous tree” doctrine is also particularly relevant for those powers of the municipal warden service that only indirectly influence criminal procedure.¹³⁴ According to Article 18 of the CPA, the court may not base its decision on evidence obtained on the basis of inadmissible evidence.¹³⁵ Therefore, evidence which is not, in itself, inadmissible, but was produced on the basis of inadmissible evidence obtained by unlawful unconstitutional conduct of the municipal warden service, should also be considered inadmissible. The unlawfulness should, again, not be assessed from the CPA’s point of view.

As for those powers of the municipal warden service that are not listed and regulated in the Local Police Act or relevant police legislation, the general rules of the Minor Offences Act-1 pertaining to the powers of a misdemeanor authority in the fact-track misdemeanor procedure should apply. Judicial confirmation is needed for most of the powers which represent an infringement of constitutional rights.

Comparatively speaking, certain selected states have had a long and rich tradition of local and/or voluntary police and have consequently also given such police broad powers (certain German states), whereas others (for example Croatia) have only recently implemented community policing with limited powers. In all cases, however, execution of such powers of local and/or voluntary police could result in evidence, directly or indirectly relevant for the criminal procedure. And like in Slovenia, admissibility of such evidence in criminal procedure also depends on the constitutionality of the evidence and not on the application of strict criminal procedure standards in para-criminal procedures.

¹³³ Lavtar, Kečanović, *op. cit.* note 4, p. 43.

¹³⁴ But not only for this category; “the fruits of the poisonous tree” doctrine could also be relevant for those powers of the municipal warden service that directly produce evidence.

¹³⁵ Zupančič *et al.*, *op. cit.* note 132, p. 818.

Sažetak

Sabina Zgaga *

PRESJEK PREKRŠAJNE I KAZNENE ODGOVORNOSTI U SLOVENSKIM OPĆINAMA

Novim Zakonom o komunalnom redarstvu (Zakon o občinskom redarstvu) lokalne jedinice komunalnog redarstva u Sloveniji stekle su ovlasti slične onima koje ima policija. Iako se njihovo djelovanje u prvom redu odnosi na prekršaje, djelovanje prometnih redara može izravno utjecati i na kazneni postupak; na primjer, može rezultirati prikupljanjem dokaza relevantnih za kazneni postupak. Prema čl. 18. slovenskog Zakona o kaznenom postupku sud ne može temeljiti svoju odluku na dokazima koji su pribavljeni kršenjem ljudskih prava i temeljnih sloboda zajamčenih Ustavom, dokazima koji su pribavljeni protivno odredbama Zakona o kaznenom postupku za koje je predviđeno da se ne smiju uporabiti kod donošenja sudske odluke te onim dokazima za koje se doznalo na temelju nezakonitih dokaza. To pravilo treba uzeti u obzir i prilikom prosuđivanja dopustivosti dokaza koje je pribavilo komunalno redarstvo. Stoga neće biti dopušteni dokazi koji su pribavljeni kršenjem ljudskih prava i temeljnih sloboda zajamčenih Ustavom. Također, sud ne smije temeljiti svoju odluku na dokazima koji su pribavljeni protivno odredbama Zakona o kaznenom postupku i za koje je predviđeno da se ne smiju uporabiti kod donošenja sudske odluke. To, međutim, ne treba tumačiti tako da komunalno redarstvo prilikom prikupljanja dokaza treba slijediti odredbe Zakona o kaznenom postupku, već bi bilo dovoljno da su dokazi pribavljeni u skladu sa zakonom koji uređuje odnosnu materiju kao lex specialis. Nadalje, komunalno redarstvo ne bi se smjelo koristiti svojim ovlastima malae fidei, tj. s namjerom pronalaska dokaza kaznenog djela. Svi ti zahtjevi mogu se pronaći u odlukama Ustavnog suda Republike Slovenije te Vrhovnog suda. Posebno relevantna u pogledu neizravnog utjecaja komunalnog redarstva na kazneni postupak jest i doktrina o “plodovima otrovne voćke”.

Gledajući s poredbenog aspekta, pojedine zemlje imaju dugu i bogatu tradiciju lokalnog i/ili dobrovoljnog redarstva (Njemačka), dok su druge (Hrvatska) tek nedavno uvele komunalno redarstvo s ograničenim ovlastima. U svim slučajevima, međutim, uporaba tih ovlasti može rezultirati prikupljanjem dokaza koji mogu biti izravno ili neizravno relevantni za kazneni postupak. Kao i u Sloveniji, i u tim zemljama dopustivost takvih dokaza u kaznenom postupku ovisi o tome jesu li prikupljeni u skladu s ustavnim pravima, a ne prema strogo određenim standardima kaznenog postupka koji bi bili primjenljivi u tim parakaznenim postupcima.

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U skladu sa svim navedenim, temeljna teza rada može biti potvrđena. Stroža zakonska pravila Zakona o kaznenom postupku ne moraju biti ispunjena u pogledu dopustivosti u kaznenom postupku dokaza koje je pribavilo komunalno redarstvo, međutim oni moraju biti prikupljeni u skladu s ustavnim pravima te posebnim zakonskim odredbama kojima je uređeno djelovanje tih tijela.

Ključne riječi: komunalno redarstvo, prekršajni postupak, kazneni postupak, dokaz, dopustivost