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ENSURING THE PRINCIPLE OF RULE OF LAW IN THE PRACTICE OF CONSTITUTIONAL JUSTICE

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« The rule of law state in the practice of the Constitutional Court of the Czech Republic»

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Article 1 para. 1 of the Constitution of the Czech Republic sets forth that, amongst other items, the Czech Republic is a democratic rule-of-law state, founded on the respect of the rights and freedoms of human beings and citizens. Hence a normative principle is expressed, which defines the State as an institution with a certain quality.

The contents and the scope of such a quality cannot, however, be read out in its entirety from the principle itself. Equally, the principle in itself provides no instruction as to the methods that are to be used to reach the understanding of its contents and define its scope.

In this situation we can either refer to the concept that this principle is some sort of a leitmotiv of the whole Constitution, serving the purpose of a certain reserve for the interpretation of the Constitution. Conversely, it may be concluded that it is not an autonomous principle at all. On the contrary, using this reference point, the contents of the principle must be sought after in other specific provisions of the constitutional order.

> To be exhaustive it ought to be stated that a part of the Czech constitutional theory (hopefully, a minority thereof) deems the principle of a democratic rule-of-law state to be identical with the principle of sovereignty of statute. It is evident that this is a clear case of direct influence by the tradition of the French Revolution. It was characterised by optimism in relation to the legislator, who would supposedly always respect human rights, because (the legislator) is reasonable. On the other hand, a statute was considered an expression of a general will (volonté général), which in fact means the acceptance of the parliament sovereignty principle. However, it clearly follows from the wording of the Czech Constitution that it is based on the principle of the sovereignty of the people (Article 2 paras. 1 and 2 of the Constitution), with all implications deriving of it.

The last above-mentioned reductionalist opinion on the interpretation of the principle of a rule-of-law state was not given an ear at the Constitutional Court during the last decade. Exactly speaking, of course, the principle of legality (Article 2 para. 3 of the Constitution) was consistently defended as a sub principle following from the principle of a rule-of-law state. Thus the Constitutional Court always annulled any act that contravene the principle of legality. As an example, the Constitutional Court's rich case law concerning municipal ordinances could be quoted.

The Constitutional Court stated in one of its decisions (Pl. ÚS 17/98): The Constitutional Court confirms the constructions expressed in a number of its earlier decisions (e.g. Pl. ÚS 44/95, Pl. ÚS 4/96 etc.) under which a municipality may, within its independent jurisdiction, handle by generally binding ordinances only those tasks of public administration that the law, in the first place the Act on Municipalities, identifies as its independent jurisdiction, with the additional condition that it do so in a manner which does not conflict with constitutional acts, international treaties under Article 10 of the Constitution, or laws and legal regulations issued by central government bodies for their implementation (Article 87 par. 1 letter b) of the Constitution, § 16 par. 2 of the Act on Municipalities). A municipality may not, under any circumstances, by a generally binding ordinance regulate something that is reserved for regulation by statute.

> Under Article 104 of the Constitution the jurisdiction of a representative body can be provided only by statute, which means that a representative body may not itself expand this jurisdiction using generally binding ordinances. For these reasons a generally binding ordinance cannot ban a certain kind of propaganda.

Nevertheless, the Constitutional Court required from public authorities not only formal statute-compliance. On the contrary, instead of mere abiding by the wording of a statute it demanded

that the public authorities, in the interpretation and application of a statute, respected the purpose and objectives of a democratic rule-of-law state. Thus in one of the Constitutional Court's decisions (IV. ÚS 276/96) it states, among other:

> All political rights and freedoms are closely related to the category of responsibility as one of the decisive elements in the democratic political order. If Article 1 of the Constitution of the Czech Republic emphasizes the democratic and legal nature of our state, founded on respect for the rights and freedoms of human beings and citizens, then, the other side of this democratic coin is the inevitable social and political responsibility of individuals, political parties, the society, and the state, as well. The awareness of such responsibility, as well as institutional creation of such awareness, are, therefore essential in the competitive process of political forces, thus, also in the electoral process, where, on the one hand, the responsibility of individuals, political parties, and coalitions not only for the correctness and accuracy of the information presented during the elections is paired by the responsibility of the public administrative bodies to act in conformity with the purposes and objectives of a democratic rule of law state when they are overseeing the observance of laws and other legal regulations on elections, as well as in their approach to the application of law, in this case of Act on Elections to the Parliament of the Czech Republic.

The principle of legality in a wider sense, in this case better expressed the prohibition of arbitrariness as an expression of a rule-of-law state, was even imposed by the Constitutional Court on itself. In its decision of March 2003 (Pl. ÚS 11/02) that concerned an act, by which the salaries of judges of the ordinary courts were reduced, the Constitutional Court stated thus:

> If the Constitutional Court, a constitutional body, that is, a public authority, is not itself to act arbitrarily, it must feel itself to be bound by its own decisions, and its jurisprudence may depart therefrom only under certain circumstances. Since the Constitutional Court, rather it above all, is obliged to respect the bounds of the constitutional state, in which arbitrary conduct by public authorities is strictly forbidden, the Constitutional Court is also subject to the prohibition on arbitrary conduct. The above postulate can also be seen as an essential attribute of a democratic state governed by the rule of law. (Article 1 para. 1 in conjunction with Article 9 para. 2 of the Czech Constitution). The first circumstance in which the Constitutional Court may depart from its own jurisprudence is a change of the social and economic relations in the country, a change in their structure, or a change in the society's cultural conceptions. A further circumstance is a change or shift in the legal environment formed by sub-constitutional legal norms which in their entirety influence the examination of constitutional principles and maxims without, of course, deviating from them but, above all, not restricting the principle of the democratic state governed by the rule of law (Article 1 para. 1 of the Czech Constitution). A further circumstance allowing for changes in the Constitutional Court's jurisprudence is a change in, or an addition to, those legal norms and principles which form for the Constitutional Court its binding frame of reference, that is, those which are contained in the Czech Republic's constitutional order, assuming, of course, that it is not such a change as would conflict with the limits laid down by Article 9 para. 2 of the Czech Constitution, that is, they are not changes in the essential attributes of a democratic state governed by the rule of law. Pay relations of judges in the wider sense should be a stable non-reducible quantity, not a shifting factor with which the governmental grouping of the moment can engage in trade-offs, for example, because they consider judges' salaries to be too high in comparison with the salaries of state employees or of other professional groups. In other words, if it is

> acceptable for the principle of equality to apply in the sense mentioned above as regards an exceptional, economically justified reduction in salary for all, the equality of all above-mentioned groups as regards the final salary level cannot be accepted (not even as a target category). The striving toward such equality departs from the bounds of constitutionality; it is a political aim which finds no support in the constitutionally conceived principle of equality. In its material sense, this principle finds its bounds in the expression, "similar things should not be arbitrarily subject to different rules, but also unequal things should not be arbitrarily subject to the same rules". The principle of equality cannot be conceived of as the leveling of outcomes, for it must be interpreted as a guarantee of equal initial opportunity. The legislature evidently did not, however, respect the principle of equality as interpreted in this manner.

In any case, the Constitutional Court interpreted the principle of a rule-of-law state as a multi-layer principle and rejected the reduction thereof to a mere principle of legality. The scope and contents of the principle of a rule-of-law state is continuously complemented by the Constitutional Court's case law.

As early as the very first decision of the Czech Constitutional Court on the Act on the Lawlessness of the Communist Regime (Pl. ÚS 19/93), the Constitutional Court expressed its view on the necessity of a value orientation of a rule-of-law state, striving to fulfil the idea of justice. It stated among other:

> As is known, the process of the creation of the modern constitutional state in Central Europe was not completed until after the First World War. At the same time, remarkable results in the positivistic elaboration of procedural rules and guarantees had already been achieved earlier, and they strengthened citizens' legal certainty and the stability of laws. However, the positivistic tradition carried over into the post-war constitutions (including the Czechoslovak Constitution from 1920) in its later development many times exposed its weakness. Constitutions enacted on this basis are neutral with regard to values: they form the institutional and procedural framework, which is capable of being filled with very diverse political content because their criteria for constitutionality is merely the observance of the jurisdictional and procedural framework of constitutional institutions and procedures, thus criteria of a formal, rational nature. As a consequence of this, in Germany the National Socialist domination was accepted as legal, even though it gnawed out the substance and in the end destroyed the basic foundations of the Weimar democracy. After the war, this legalistic conception of political legitimacy made it possible for Klement Gottwald to "fill up old casks with new wine". Then in 1948 he was able, by the formal observance of constitutional procedures, to "legitimate" the February Putsch. In the face of injustice, the principle that "law is law" revealed itself to be powerless. Consciousness of the fact that injustice is still injustice, even though it is wrapped in the cloak of law, was reflected in the post-war German Constitution and, at the present time, in the Constitution of the Czech Republic.

The effort to reach the idea of justice as a feature of the rule of law state here in an individual case, i.e. in the proceedings on a constitutional complaint, is expressed in another decision of the Constitutional Court (III. ÚS 74/94): "First of all, it must be emphasised (...) that the supreme value in the courts' decision-making is definitely the individual justice, obviously within the limits of law, including procedural rules."

Additional sub principles that the Constitutional Court derived from the principle of a rule-of-law state are the principle of legal certainty, the principle of the citizens' faith in the law as well as the principle of prohibition on retroactivity of legal norms or their retroactive interpretation. All these principles are addressed in a decision (IV. ÚS 215/94) that points out:

> The principle of legal certainty and the protection of the citizens' faith in the law without doubt are among the hallmarks of a rule of law state. The prohibition on retroactivity of legal norms, or the retroactive interpretation of them, then, also makes up a component of legal certainty. This prohibition, which for the field of substantive criminal law is explicitly stated in Article 40 para. 6 of the Charter of Fundamental Rights and Basic Freedoms, may be deduced from Article 1 of the Constitution of the Czech Republic with regard to other legal fields. Thus, if someone acts in reliance on some statute, he should not be disappointed in his reliance. Among the principles of the rule of law state should be counted also the principle that the period during which a proceeding did not go forward can not be counted to the detriment of a party, with the exception of cases when the party to the proceeding did not take proper steps to advance it.

A very important sub principle implied by the principle of a rule-of-law state, is the principle of proportionality. As the Constitutional Court mentions in one of its decisions (Pl. ÚS 3/02):

> This principle arises from the premise that interference in fundamental rights or freedoms can occur, even though their constitutional framework does not expect this, in the event that they are in mutual conflict or in conflict with another constitutionally guaranteed value which is not of the nature of a fundamental right or freedom (a public good). However, in these cases it is always necessary to evaluate the purpose (aim) of such interference in relation to the means used, and the measure for this evaluation is the cited principle of proportionality (in the wider sense), which can also be called a ban on excessive interference with rights and freedoms. This general principle contains three principles, or criteria, for evaluating the admissibility of interference. The first of these is the principle of capability of meeting the purpose (or suitability), under which the relevant measure must be capable of achieving the intended aim, which is the protection of another fundamental right or public good. Next is the principle of necessity, under which it is permitted to use, out of several possible ones, only the means which most preserve the affected fundamental rights and freedoms. The third principle is the principle of proportionality (in the narrower sense) under which detriment in a fundamental right may not be disproportionate in relation to the intended aim, i.e. measures restricting fundamental human rights and freedoms may not, in the event of conflict between a fundamental right or freedom with the public interest, by their negative consequences exceed the positive elements represented by the public interest in these measures.

A problem may arise in the application of the proportionality principle whenever a public good is in collision with a fundamental right . What is meant by a public good was described by the Constitutional Court (Pl. ÚS 15/96) as follows:

> "The constitutional principles concerning the status of the individual in society contain the protection of individual rights and freedoms, as well as the protection of public goods. The difference between them consists in their distributability. It is typical for public goods that their benefits are not divisible, so that people may not be excluded from the enjoyment of them. Public goods include, for example, national security, public order, and a healthy

> living environment. Certain aspects of human existence become public goods under the condition that it is not possible, conceptually, materially, or legally, to separate them into parts and allocate these parts as shares to individuals."

Thereby, however, the Constitutional Court has not yet settled with the question whether all the mentioned public estates are capable of curtailing the colliding fundamental right, or whether all the mentioned public estates find their foundation in the Constitution, in the form of explicitly stated principles. In the specific case it was a collision of fundamental rights arising from Article 10 of the Charter and the public purpose, which is the proper discovery of criminal offenses and the just punishment of the perpetrators within the framework of due process, which projects onto the constitutional plane through Article 80 para. 1 and Art 90 of the Constitution and Article 39 and Article 40 of the Charter.

Hence a collision was in place between fundamental rights on one hand, specifically human dignity, personal integrity, good reputation and name (Article 10 of the Charter of Fundamental Rights and Freedoms) and the competency provision on the other hand entrusting the State Prosecutor's office with representing public prosecution in criminal proceedings (Article 80 para. 1 of the Constitution) and the competency provision setting forth the task of courts to provide protection to rights and decide on the guilt and penalty for criminal acts (Article 90 of the Constitution). That which is stated above clearly implies that the quoted provisions of the Constitution do not contain an expression of value principles. Another problem of the quoted decision lies in that fact that the State, which was standing against the claimant, was recognized as a subject of fundamental rights, although there was a case concerning only fundamental right to a fair trial.

The question in the given case is whether, using the test of proportionality, public interest should be involved, which is derived from competency or organisational provisions of the Constitution, or, as the case may be, is not mentioned at all by the Constitution. I assume that such a practice should be approached with a great deal of scepticism. This is because such a practice could lead to the curtailing of fundamental rights to an extent never envisaged by the legislator. The Constitutional Court becomes, by using such an approach, a creative legislator, which can be permitted only in the case of promoting the standards of protection of the fundamental rights of individual persons. In no case, however, this is possible in a situation when the creativity of the Constitutional Court would reduce the protection of the fundamental rights in favour of an easier functioning of the public authorities or the State. After all, a rigorous respect for fundamental rights in all their scope and their efficient protection are an essential prerequisite of a rule-of-law state. In addition to that, the Constitutional Court's mission is provide such a protection in the final instance.