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LAW AS AN INSTRUMENT FOR ENSURING PUBLIC SECURITY

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Abstract: *Public security is closely linked to the concept of public authority. Law is understood as one of the important instruments for ensuring public security and in its modern form it is not conceivable or functional without addressing the issues of formal publication. The legal order as a whole is subject to a number of pressures that ultimately reduce the necessary degree of stability of the law. The belief in the almost unlimited possibilities of legal regulation is at odds with the real possibilities of legislative action. The volume of legislation regulating the activities of public authorities and the public security segment is steadily growing and is becoming difficult to be understood and grasped by the stakeholders. The paper concludes by outlining the problematic cases encountered by public authorities in the Czech Republic. The recent state of crisis legislation in the legal and security environment of the Czech Republic is also mentioned.*

Key words: *Court, Charter, Freedom, Law, Limits, Security.*

Introduction

In this article, the authors want to define a very topical issue faced by public authorities in the Czech Republic and abroad. At present, due to COVID-19 pandemic and conflict in

Ukraine, there is a great instability, which state authorities in all EU Member States have to fight. In this article, we will try to describe each instrument in more detail.

Aim of the paper

The presented professional article reflects the scientific research activities performed in the framework of the scientific sub-task No. 3/1 entitled *"Analysis and expected development of competencies of the Police of the Czech Republic and police security entities in selected areas"*, as well as the ongoing scientific project entitled *"Optimization of state crisis management"*. The project focuses on a review of crisis legislation with regard to current security threats. The aim of the paper is to inform foreign partners about current developments in the Czech Republic.

Protection of human rights while ensuring public security

Ensuring public security is undoubtedly one of the fundamental assumptions of the full and uninterrupted exercising of the entire range of human rights and freedoms. History has convincingly showed us many times that human rights and freedoms without restrictions cannot be fully implemented in a comprehensive range or to the required minimum standard. The protection of human rights (including freedoms) (Authors´ note) in European countries is now based on a comprehensive system of multi-level legislature, which combines international law, EU, and national constitutional levels. Human rights are traditionally incorporated into many international treaties, including the European Convention on the Protection of Human Rights and Fundamental Freedoms, and constitutional documents such as the Charter of Fundamental Rights and Freedoms of the Czech Republic (as part of the constitutional order of the Czech Republic) (Authors´ note). In the scope of European Union law, the main reference framework since the entry in to force of the Lisbon Treaty is the Charter of Fundamental Rights of the European Union, which in terms of the case law of the Court of Justice of the European Union both synthesizes international and national standards for human rights and also strengthens the autonomy and unity of the legal order of the European Union (SCHEU, 2019, p. 3).

In the context of ensuring public security, it is necessary to mention the key features of the current concept of protection of human rights and freedoms, which can be considered as follows: (Author´s comment: We must understand these contexts as being key in relation to the protection of human rights. It is a relationship whereby the more the security (the more human rights restrictions), the more the human rights (the less security).

a) Complexity of legal regulation - legal regulation addresses human rights and freedoms in the necessary scope and respects the need to prepare rights for other possible situations and circumstances, which bring about the accelerated development of human society. This process will never be entirely completed, and the list of necessary legal limits will at no time be exhaustive and without the possibility of further expansion and refinement.

b) Multi-level regulatory assistance - the practical and ever-increasing need for communication across countries, international organizations, and groups, as well as the rational demand for global discussion and communication on key issues, puts pressure on the requirement to functionally link international, national, and other (e.g., EU) levels of legislation.

c) Mutual respect - between the various levels of legislation in the protection of human rights and freedoms. Last but not least, the effort to eliminate as much as possible the existing differences in valid and effective legislation on the individual levels of regulatory assistance.

d) Harmonization - of the whole system of multilevel regulatory assistance covering the protection of human rights and freedoms, including mechanisms and institutions for dispute settlement.

e) Instruments for the interpretation and application of legal norms - effort is aimed at achieving a situation where multi-level regulatory assistance will not be burdened by diametrically different interpretations or applications of specific legal norms, especially by judicial authorities. It cannot be overlooked that the existence of a multilevel structure for the protection of human rights and freedoms carries risks in their creation, interpretation, and application.

Different interpretations of different sources by different judicial bodies at an international, EU, and national level may theoretically jeopardize not only the consistent application of human rights in Europe, but also their transparency and authority. Therefore, the professional literature usually points to the need for dialogue between the different courts (SCHEU, 2019, p. 3).

Subjective right to ensure public security?

In areas where the term public security is used, other terms are also frequently encountered. These are always accompanied by interconnections and blurred boundaries. They include, for example, national security, internal and external security, public order, security situation, and others. In our opinion, consideration of whether and to what extent public security limits human rights and freedoms is essential. We believe that:

a) Ensuring public security is a collective interest. The consequence of this claim is the need to implement a proportionality test to balance this collective interest against the interests of the individual (e.g., freedom of movement, personal freedom, and others). This assumption is understood routinely and without major reservations.

b) Public security can also be understood as the subjective right of an individual, as a subjective human right. However, case law (e.g., settled in the European Court of Human Rights) tends to suggest that an independent, individually tailored right to security does not exist.

c) Reluctance to understand the right to safety as the subjective law of the individual stems from the fear that it may claim specific protective mechanisms from responsible subjects (i.e., executive and legislative authorities).

Here, it is important to determine the entity to whom the obligation to ensure public security is bestowed. Existing relationships and strategies can be demonstrated, for example, as follows:

It is clear from the definition of the competencies of the European Union and the Member States that competence in the field of public security remains with the Member States themselves. Pursuant to Article 4(2) of the Treaty on the European Union, the Union respects the basic functions of the state, in particular those related to the provision of territorial integrity, maintaining public order, and national security. There is no doubt that the European Union does

not have the power to adopt legislative or executive measures ensuring public security in the individual Member States or in the Union as such (SCHEU, 2019, p. 8).

Therefore, it is clear that:

a) If a structure (model) is accepted whereby the right to security is recognized as a separate subjective right, then this obligation must be borne by the Member State of the European Union. On the one hand, it is limited by the boundaries of the security of society as a whole, and on the other hand the boundaries of the security of the individual.

b) In cases where there is no link to European Union law and thereby a Member State does not apply European Union law within the meaning of Article 51 of the Charter of Fundamental Rights of the European Union, Article 6 of the Charter of Fundamental Rights of the European Union shall not apply at all, and such rights cannot be evoked before a national court or the Court of Justice of the European Union (SCHEU, 2019, p. 9).

c) Setting the environment for functional public security is considered a legitimate requirement from the point of view of modern democratic and legal states. The second generally accepted pillar recognizes the need to establish a system for the protection of human rights and freedoms. Both requirements seemingly stand against each other. It is true that in times of crisis, it is often necessary to restrict human rights and freedoms. However, for practical reasons, a lower standard of protection of human rights and freedoms must be seen as a temporary solution. Security, and human rights and freedoms are always two sides of the same coin. In an environment where an adequate level of security is not ensured, human rights and freedoms cannot be well applied without the absence of significant restrictions.

d) No measures of an executive, legislative, technical, economic, or other nature have the potential to create a system of absolute security. From the above, it is clear that the solution is always a compromise, both from the point of view of the individual components of state authority and the relationship between the individual and the state. This compromise is necessary as it keeps public security at the required level and ensures the ability to deal with real and external excesses.

e) Regulatory assistance in the area of public security often relies on the institution of public authority. We also find links between the exercise of public power, public authorities, and others. The Constitutional Court gives the necessary definition in the conditions of the Czech Republic as follows: “Public authority is a power that authoritatively decides on the rights and obligations of subjects, either directly or indirectly. An entity whose rights or obligations are decided by a public authority is not on an equal footing with it and the content of the decision of that authority does not depend on the will of the entity” (Ruling of the Constitutional Court from 10 November 1998, file number I ÚS 229/98/ č. 138/1998 Sb. N. U. US). Therefore, public authority can be understood to mean (albeit with a certain degree of simplification) activity of the superior authority, the focus of which lies in authoritative decision-making on rights and obligations. This process is equipped with a strengthening mechanism, namely the superior position of a public authority over the entity whose rights and obligations are being decided upon. This mechanism ensures the enforcement of decisions in a situation where the entity does not submit to the public authority voluntarily (apart from cases of illegal and unjust decisions). A similar opinion can be found in Czech theory as well as in the works of other authors. For example, Prof. Gerloch states that, “Public authority is the ability to impose a will expressing the public interest on individuals, social groups, and society as a whole or as a community” (GERLOCH, 2009, p. 1078). An apparent exception is the judgment of the Supreme Administrative Court of the Czech Republic of 24 November 2011,

Ref. No. 7 As 66/2010. In this judgment, the exercise of public authority is not strictly tied to the activities of the superior authority (this requirement is absent in the above definition by Prof. Gerloch – authors' note), but rather to the requirement to exercise public authority by public law. However, in a detailed comparison, we must conclude that the opinions of the Constitutional Court of the Czech Republic and the Supreme Administrative Court of the Czech Republic are not in logical contradiction. There is only the requirement that certain situations and specific cases dealt within them can also use the extended definition. The presented matter also touches on the concept of public authority as a category covering state authority in the classical concept, and so-called residual public authority. This is a situation where public authority is exercised by the state authorities and residual public authority is exercised by non-state public corporations.

A direct reference to the norms of the constitutional order of the Czech Republic in relation to public authority can be found in the valid and effective Constitution of the Czech Republic, which enshrines the possibility of submitting a constitutional complaint against a decision or other intervention of a public authority in constitutionally ensured fundamental rights and freedoms (Constitutional Act 1/1993 Coll., Constitution of the Czech Republic, No. 87, 1d, as amended). The Constitution of the Czech Republic and the Charter of Fundamental Rights and Freedoms use the term state authority in other provisions, although it clearly means public authority in general (Cf., e. g. Contitutional Act 1/1993 Coll., Constitution of the Czech Republic, as amended, and Charter of Fundamental Rights and Freedoms as part of the constitutional order). The term public authority can be found in a number of legal regulations at the level of common law (For example, Act 500/2004 Coll., Code of Administrative Procedure, Act 111/2009 Coll., the Basic Registry Act, Act 300/2008 Coll., on electronic acts and authorized conversion of documents). The situation here is not facilitated by the common practice of legislators to choose other vague definitions for certain entities (sometimes only on the basis of the fact that they have a public status). For example, public law originators (Cf. Act 499/2004 Coll., on archiving and records management) or public law signatories (Cf. Act 297/2016 Coll., on trust services for electronic transactions, as amended by Act 183/2017 Coll.). However, it is true that legal practice has learned to work with public authority, distinguish between public authorities, and work within the fundamental limits of the exercise of public authority.

With the necessary degree of generalization, it can be stated that the legislator (sometimes the constitutional legislator) intends to bind legal norms (such as generally binding rules of conduct) and legal facts in certain cases to situations where a body or official exercises public law competence (established by law) or acts by virtue of its function. In these cases, the term public authority is used.

A confusing legal framework for public security?

One of the conditions for the establishment, functioning, and provision of a functional model of public security is the legal framework. Within its boundaries, legal norms are created in the area of public security, and institutions, and mechanisms of their functioning and provision are formed. Law plays a key role here.

Modern society has become accustomed to the relative advantages of the process and results of legal regulation. In particular, the possibility of state coercion (coercion by the public authorities) strengthens the belief in its unlimited abilities and possibilities. This belief

sometimes borders on absolutization. The graded inflation of legal regulations places increasing demands on all recipients of legal norms. We forget that each regulation (including legal) has its limits, which cannot be exceeded permanently and without adverse consequences. The recipients of legal norms cannot be overloaded with such a large number of legal regulations (such as a model and required rules of conduct and behavior) that they are not able to absorb and subsequently transform into real life (VÍŠEK, KROUPA, 2020, p. 177).

Promises of politicians to steadily reduce the volume of legislation, simplify, and minimize the legal order, and clean up unused but still valid and effective legal norms appear regularly before each election.

This creates a situation where certain legal regulations are often no longer complied with, no one is able to effectively control their compliance and resolve cases of violations, and the recipients of legal norms are not really able to familiarize themselves with them and comply with the prohibitions and orders contained within them, or exercise their rights effectively. Positive laws and the state as their monopolistic creator lose authority through this process. General disrespect for the law is rampant in society, and legal liability is being replaced by legal irresponsibility. Legally limited rights and freedoms of man and citizens are pushed out of their natural position. The environment of general legal uncertainty leads to the politicization of law and the strengthening of the repressive function of the state (VÍŠEK, KROUPA, 2020, p. 178).

In extreme cases, appropriate repression and regulated legal violence as the last resort of the state are replaced by the same elements, but used by entities outside the effective control of the state and the public. Public security is increasingly affected by the illegal activities of coercive, lobbying, criminal, and elitist organizations, which, although unelected, participate in de facto public authorities, including public security.

A modern legal state cannot completely relinquish legal responsibility for the uninterrupted exercising of rights and freedoms. On the other hand, it has the right to require a person (citizen) not to expose him or herself to increased danger and meet basic requirements in this area, not to violate established legal orders and prohibitions, and not to exceed the limits of legal permission (VÍŠEK, KROUPA, 2020, p. 178).

The need for legal certainty also plays a key role in public security. If a law should create order in society, it must play a stabilizing role. However, it is exposed to legitimate pressures on the need for certain dynamics in response to reasonable movements in society. The stability of law and the need to respond to accelerating societal developments are at odds. Only the passage of time can reveal the degree of efficiency here (GERLOCH, 2013, pp. 264-265).

The demands of some on the stability of the legal order and the achieved level of the legal environment regularly and repeatedly come into conflict with the interests of others, who, on the other hand, for different reasons require different dynamics of social relations and different dimensions of the legal order. Ever increasing advances in human society legitimately promotes even more sophisticated technologies for enforcing powers, particularly in the field of public security.

By defining the area of freedom, the law also guarantees it. In today's society, the task of authority behind the law is to protect the freedom of everyone. An essential component of guaranteeing freedom is the setting of its legal limits. If the boundaries of freedom are not clear, there will be no freedom (GERLOCH, 2013, p. 261).

There are several available models of legal certainty. However, it is possible to acknowledge the following conclusions:

a) The stability of the law has a major impact on its level of knowledge and compliance.

b) Awareness of what is or is not permitted under the law may also prevent infringements in the field of public security.

c) Considering the current rapidly changing social relations in the field of public security, the stability of the law cannot be confused with the requirement to preserve the existing legal regulation.

d) Legal certainty and legal stability must represent important limits and objectives of law-making. Together with other mechanisms, they can then work together effectively to prevent breaches of public security law.

e) If a law has been violated, then high-quality and unambiguous legislation is the basis for a speedy, fair, and socially justifiable solution of an appropriate type and degree of intensity, with an appropriate preventive and repressive effect.

f) Other instruments, political, economic, technical, and others, must also coordinate their activities with the law.

g) Legislative activity in the field of public security undoubtedly has certain limits. These do not concern the limitation of the amount of legislation, where the legislator has a free field. The only limitation is a rational consideration of how many legal rules can be directed towards their recipients, without the risk of a dysfunction of the legal framework of public security as a whole. Anthropological limits are inherent in humans as a biological species. In general, the law should regulate only those social relations that are not accidental (they repeat), are certain (we can know their content), and are legally regulated (i.e., they can be regulated by law).

The modern legal state must be assessed primarily as a state guaranteeing security in the extent mainly bounded by fundamental human rights and freedoms. A material legal state conceived in this way is confronted with the requirements of the formal legal state. The concept of a formal and material legal state is expressed in the concentrated form of the convergent propensity of the development of jusnaturalism and juspositivism after World War II. The current legal state reflects in the basic principles of its core postulations of both legal positivism and jusnaturalism, and together with recent legal theory it is characterized by an effort to achieve a certain synthesis of jusnaturalism and juspositivism (VEČEŘA, 1998, p. 7).

Even in the area of public security, the legal state explicitly recognizes, and lawfully enshrines and protects human rights and freedom at least within the scope of adopted international standards. Any reduction must only be made under predetermined conditions, and limited in time until its objective is achieved. Similar requirements must be created as a failsafe in the event of emergency situations and conditions. The setting up of remedies and ensuring a public control mechanism also play an important role.

Legal orders are not and cannot be built ad infinitum in terms of a framework of procedural means for the protection of rights, or the organization of review courts. Each legal order is accompanied by a certain number of errors. The purpose of review proceedings or review bodies is to minimize such errors, and not to eliminate them entirely. The framework of review courts is, therefore, the result of balancing efforts to achieve the rule of law on the one hand, and the effectiveness of decision-making and legal certainty on the other (Judgment of the Constitutional Court of the Czech Republic dated 31 October 2001, Ref. No. PI. ÚS 15/01).

Hypertrophy of the legal system (including the area of public security) has an impact on orientation in valid and effective legislation. Reality largely relativizes the possibility of

consistent implementation of the rule, *"Ignorance of the law does not excuse, or the principle of legal license"* (Cf. e. g. Constitutional Act 1/1993 Coll., Constitution of the Czech Republic, as amended. Similarly, the Cahrter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic). The promulgation of legislation is the cornerstone of the process of mediating rights and an elementary requirement for fulfilling the requirement of legal certainty. Historically, the principle of material publication, whereby the recipient of the legal norm had to really encounter the source of the law, worked for a long time. Collections of laws only fulfilled an archiving function. This was replaced by the principle of formal publication, which assumes the promulgation of legislation in a legally established manner. Hence, the promulgation of a legal act in a specific charter or electronic collection of laws, expressly determined for this purpose by law. Another way of promulgation is excluded under the standard security situation.

Conclusion - what next?

a) The law gives way to a turbulent security environment

Unfortunately, it must be said that the current need to ensure security has led democratic governments to take certain unavoidable measures, and which are legally questionable at least. An example is the blocking of websites spreading disinformation in connection with the conflict in Ukraine. On Friday, 25 February 2022, the CZ.NIC association removed eight such websites from zone.cz. Only three hours later, through a request from the National Center for Cyber Operations (NCKO), Czech operators were asked by the Director of the NIX.CZ association to block another 22 websites, which were identified by NCKO and the Hybrid Threat Center as spreading disinformation and propaganda. Many operators subsequently heard NCKO's calls and blocked pro-Kremlin disinformation websites. Almost immediately, voices condemned the move as an unprecedented violation of freedom of speech. This procedure has no support in the Czech legal system. The public authorities justified this act as a form of necessary defense, as they wanted to protect public security in the Czech Republic in order to prevent demonstrations, etc.

The legal aspects of the "shutting down" of websites in the Czech Republic described by the public authorities as spreading disinformation. This is associated with a number of legal controversies. It can be divided into two groups. The first consists of the actions of public authorities and the second the actions of CZ.NIC and NIX.CZ.

As far as the first matter is concerned, the controversy lies primarily in the existence of a law that would allow public authorities to ask private law persons to perform the described intervention. It must be recalled that under Article 2(3) of the Constitution of the Czech Republic and Article 2(2) of the Charter of Fundamental Rights and Freedoms, state authorities may do only what the law expressly requires them to do in the manner provided by law. The principle of *praeter legem* cannot be applied, and it is directly unconstitutional.

This statutory limitation also appears in relation to the present case in Article 17(4) of the Charter, as the inaccessibility of websites means an interference with freedom of expression, but also the right to free access to information. The right to conduct a business may also be affected, see Article 26 of the Charter. It is also possible to consider an interference with property rights pursuant to Article 11 of the Charter. Here, too, restrictions are possible, but again subject to legal grounds.

The prohibition set out in Article 17(3) of the Charter, i.e., the prohibition of censorship, is fundamental. The measure can be considered to have had the characteristics of censorship. If this were proven, then intervention would not be possible even with legal grounds, because the existence of such a law is prohibited.

In this context, a problem arises with the interpretation of the term "state security", on which a possible law allowing the inaccessibility of websites would be substantiated. The term "state security" has so far been interpreted in the sense that it is a threat to the very existence of the state, or its functioning. In a broader sense, it may be concluded that blocking these disinformation websites has an impact on the safe functioning of the Czech Republic. If we were to think in a broader sense of "state security", it would be possible to apply the provisions of Article 12(a) of Act 2/1969 Coll.

The second issue focuses on the conduct of the above-mentioned associations, and this may also be considered legally disputed. It is doubtful that eight inaccessible websites would endanger the operation of the Czech Internet or be a threat to cyber security. Their problems were of a different nature.

From the above, it can be concluded that this is not a standard intervention. It is a question of whether it is a violation of the constitutional order of the Czech Republic, and only judicial practice will find an answer.

b) The need to optimize state crisis management on a legal basis

First of all, it should be mentioned that, among other things, this issue is addressed by the scientific project of the Police Academy of the Czech Republic in Prague entitled *"Optimization of State Crisis Management"*. The output of the project will be a number of relevant recommendations for optimizing state crisis management. The aim of the project is to identify and analyze management processes related to state crisis management, including setting critical places in the decision-making process, as well as identifying factors that are critical to optimizing the security system of the Czech Republic, based on an explorative factor analysis, and contextual interviews. The project responds to the basic socio-political uncertainties and the task of the Government from 2015. Its results will be included in the documents for optimizing the security system of the Czech Republic. Optimization is needed in connection with the change in threats and risks that modern states in general, and the Czech Republic in particular are facing. We perceive many shortcomings in the solution to the COVID-19 (VÍŠEK, KROUPA, 2022, pp. 479-499) pandemic and a number of other shortcomings related to the Ukrainian refugee crisis in 2022. In this context, we want to emphasize that the Czech Republic has elaborated a range of crisis or emergency situations. An action plan focusing on a large-scale migration wave only takes into account 20,000 people arriving to the Czech Republic in one month. However, experience has shown that as of 10 April 2022, a total of 300,000 people had arrived in the Czech Republic from Ukraine. Therefore, it is clear that, in this sense, the prepared concept materials cannot be completely relied upon, and such documents or legislation will need to be transformed, so that they are more flexible and adaptable to specific situations. Another example may be that a valid concept for deciding on a state of emergency, including the legal framework, has been adopted at a time of another type of state of emergency. Constitutional regulation of a state of emergency assumes an attack by regular armed forces. It requires sufficient time for decision-making and assumes normal functioning of all state authorities, including the Parliament of the Czech Republic. A state of emergency can only be declared by Parliament. The adoption of a resolution on the declaration of a state of emergency must be approved by an absolute majority of all senators. A declared

state of emergency is followed by certain necessary steps, e.g., declaration of mobilization, approval of a war budget, adoption of economic measures for the emergency situation, etc. Without declaring a state of emergency not everything can be performed. The global transformation of threats and risks means that a state of emergency may occur inadvertently, so there may not be time for decision-making, as the current legislation envisages. There will be no time for the government to submit a proposal and for both chambers of Parliament to discuss it. Parliament may also not be able to come to a decision, e.g., it may not be able to meet in person, or a potential cybernetic attack may prevent meeting remotely. These are selected aspects that domestic legal and security instruments do not take into account. It should be noted that non-state actors have a significant competitive advantage in this respect and better adapt to the possibilities arising from globalization, especially from the use of information and communication technologies, transport, and trade. Therefore, it is time for the Czech government to wake up to a new method of decision-making during a state of emergency, which will require updating strategic documents and legislation. This new method of decision-making must be more flexible, fast, and comprehensive in order to encompass the entire security system. In a democracy, there is a crucial legality of decision-making, i.e., responsibility, who bares it and why. Legitimacy is based on the universal consent of all those concerned. Citizens should be able to identify with the new method of decision-making, and it is important to ensure that the change in speed, flexibility, and complexity will not deny the principles of the rule of law.

List of used abbreviations

CR – Czech Republic
EU – European Union
NCKO – National Center for Cyber Operations
PA ČR – Police Academy of the Czech Republic in Prague
UN – The United Nations
USA – United States of America

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