

Public Interest in the Case Law of the Constitutional Court of the Czech Republic

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Introduction

The Constitutional Court is a judicial body entrusted with the protection of constitutionality; however, it is set apart from the system of general courts. Compared to institutions with an analogous mission in the context of Europe, it is one of the most powerful in terms of the scope of its powers. Constitutional complaints against unlawful interference by public authorities with fundamental personal rights and freedoms guaranteed by the constitutional order, and, on the national level, directly by binding international standards (in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union), represent - in addition to the review of constitutionality of laws and international treaties, decisions on issues concerning elections and political parties, actions filed against the president of the country, resolution of conflicts of jurisdiction or enforcement of decisions of international courts - its by far most extensive agenda. Constitutional complaints may be filed by individuals and self-governed territorial entities (municipalities, regions) within two months from the exhaustion of all procedural remedies available to them under the law for the protection of their rights. Access to the Constitutional Court is free; however, the complainant must be legally represented by an attorney-at-law. Cases are usually heard by tribunals consisting of three judges, or, in rare instances, by a plenum of fifteen judges. Decisions of the court are binding on all bodies and persons, established case law is of a quasi-normative (precedential) nature. The Constitutional Court of the Czech Republic has been in existence since the inception of the country, i.e., since 1993 (its predecessor operated briefly during the first Czechoslovak Republic, but not during the Nazi and Communist totalitarian regimes), and its seat is in Brno, i.e., outside the legislative and executive power center.

The position of general interest in the human rights agenda of the Czech Constitutional Court is somewhat ambivalent: on the one hand, it is a tool giving effect to the guarantees of fundamental rights where their *status positivus*, i.e., guarantee claims against public authorities, is invoked, for instance, in the areas of social rights or access to services of general economic interest; on the other hand, in necessary cases and to the extent necessary, it

exerts a restricting influence over the exercise of fundamental rights - typically in the case of freedom of speech of the media in conflict with the protection of privacy of those on whom the media are reporting and who invoke their *status negativus* against interference with their private sphere; in the above-described constellation, the general interest of informing the public is then a kind of "antithesis" of the liberal essence of fundamental rights in a democratic society, based on the rule of law. The role of the Constitutional Court is thus obvious: to seek and effectively enforce, on the level of constitutional law, a fair, i.e., duly substantiated, balance between competing, qualitatively mutually incommensurable social values: fundamental rights and general interest. At the same time, under conditions stipulated by the constitutional Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the Charter of Fundamental Rights of the European Union, as the case may be, the boundaries of fundamental rights and freedoms may be regulated only by law, must apply equally to all identical cases, must examine the substance and purpose of such rights and freedoms, and must not be misused for purposes other than those for which they were laid down. The mutual relationship of fundamental rights and general interest is *exclusive* where the two values cannot be fully upheld side by side, and one must (partly) give way to the other, but *inclusive* in those cases where respecting one of the values is a condition for the fulfillment of the other. These general maxims generally form a part of constitutional doctrines in all European countries. However, the interpretation and application of these principles in the daily practice of constitutional justice may vary.

The Czech Constitutional Court does not view itself as the sole guarantor of this task: rather, it strives to ensure that the protection of fundamental rights against unlawful interference or qualified inactivity of public authorities, as well as cases of their legal restriction, are under control already at the level of the general judicial system, with respect to which the Constitutional Court is in a subsidiary position (as *ultima ratio*). Its attitude is due i.a. to the fact that general interest is primarily of an extra-legal (political) origin, and is vague as a legal notion, cannot be defined in an exhaustive manner on general level, and it only assumes features graspable in terms of constitutional law in the context of a specific law, to which numerous provisions of the catalogues of human rights law refer. It only gains full normative form on the basis of case law, i.e., interpretation in connection with a specific situation and individual case. This is due to the fact that the meaning of the notion of "general interest" varies in different legal relations and areas. The constitutional Charter expressly refers to it only in connection with forced restriction of ownership (expropriation) in its Article 11 (4). Elsewhere, the Charter permits restriction of a fundamental right, for instance,

on the grounds of public security and order, health and morality, crime prevention, etc.; the Constitutional Court encompassed same under the notions of "public goods" or "public good". It noted in that context that any restrictions of the exercise of fundamental rights is only conceivable when there is an extremely intense general interest, their negative impacts need to be minimized, and they may only be used as the last resort; their consequences must not outweigh the benefit associated with the general interest in the implementation of restrictive measures. The Constitutional Court seeks a balance between the two values by applying the proportionality test.

Several examples of case law of the Constitutional Court pertaining to general interest in the context of selected legal areas

- 1) Not every *collective interest* can be viewed as a general interest of the society: only an interest that can qualify as an interest of *general benefit* can be understood as such. In many cases, the satisfaction of collective interests of certain groups may be in harsh conflict with the general interests of the society (Decision I. ÚS 198/95 of March 28, 1996 - restriction of ownership title by the establishment of a lien).
- 2) General interest arises from the need to satisfy a necessity of life of a broader unit - state, territorial, social, etc. However, it is not conditioned on an *absolute necessity* of such satisfaction. Were it conditioned on that, the institute of expropriation would be practically debased, and the private interest of owners would be disproportionately raised above general interest (Decision Pl. ÚS 34/97 of May 27, 1998 - process of reparcelling in territories subject to incomplete land-consolidation proceedings; in its decision, the Constitutional Court referred to the case law of the Supreme Administrative Court of the First Republic; controversially: Resolution Pl. ÚS 26/13 of August 5, 2014 – Mining Act).
- 3) General interest cannot be seen solely in the interest of the state or its institutions, but also in the need of the society to (fairly) *define the rights of public owners in cases of their mutual conflict*. According to the case law of the German Federal Constitutional Court, the condition of general interest within the meaning of Article 14 (3) of the GG is satisfied when expropriation (...) presumes heightened, *substantively objective* public interest. According to the European Court of Human Rights, measures pursuant to Article 1 (1) of the Protocol to the ECHR must follow *legitimate political purposes*. These definitions have a common denominator: their *generality*, which is due to the

broad spectrum of situations in which such condition needs to be examined (Decision III. ÚS 455/03 of January 25, 2005 - unauthorized construction).

- 4) General interest is established in the course of an administrative proceeding by the *measuring of various particular interests*, having considered all conflicts and comments. The *ratio decidendi* of the decision, with the issue of existence of general interest representing the central issue, must then clearly indicate why general interest prevailed over a number of private, particular interests. It must be *found* in the process of deciding on a particular issue: it cannot be determined *a priori*. For those reasons, the determination of public interest in a specific case is typically *a power vested in the executive, rather than legislative, power* (Decision Pl. ÚS 24/04 of June 28, 2005 - weir plants on Elbe river).
- 5) A certain aspect of human existence becomes a *public good* when it cannot be divided into parts and attributed to individuals as shares conceptually, substantively and legally: unlike public goods, fundamental rights and freedoms are characterized by their distributivity. Aspects of human existence such as personal freedom, freedom of speech, participation in politics and the related right to vote, the right to hold public office, the right of association in political parties, etc. can be conceptually, substantively and legally divided into parts and those can be attributed to individuals (Decision Pl. ÚS 15/96 of October 9, 1996 - sale of apartments of the armed forces in houses owned by the city of Kroměříž).
- 6) Assessment of the nature of environmental protection as a public good within the meaning of the Preamble and Article 7 of the Constitution *does not exclude the existence of a subjective right* to a favorable environment (Article 35 (1) of the Charter), as well as the right to *seek* same to the extent defined by the law (Article 41 of the Charter) (Decision III. ÚS 70/97 of July 10, 1997 - on protractions in proceedings).
- 7) Based on the above definition aspects of the delineation of public goods protected by constitutional law, the effort to procure *internal peace in the society* has to be added: it consists in due solution of crimes and just punishment of their perpetrators by means of fair trial (Article 80 (1) and Article 90 of the Constitution, Articles 39 and 40 of the

Charter). The individual instruments for the attainment of this public goods (good) include evidence contemplated by the Rules of Criminal Procedure, including the *identification of persons and things* (Section 93 (2) and Section 103 of the Rules of Criminal Procedure) (Decision III. ÚS 256/01 of March 21, 2002 – reconnaissance).

- 8) The prosecution of crimes, or their prevention, detection and investigation, as well as the fair punishment of perpetrators, can undoubtedly be viewed as a constitutionally approved general interest, or a purpose which, on general level, justifies interference with *the right to informational self-determination* (Decision Pl. ÚS 24/11 of December 20, 2011 - access of penal authorities to data on telecommunication traffic).
- 9) The need to *protect information sources* is so strong that many *journalists* feel bound by professional codes of ethics which prohibit them from disclosing their sources. Many journalists refer to such codes even before courts, when ordered to disclose the identity of their sources. Despite that, situations sometimes occur where the interests of journalist and the right of the public to information clash with the interests of more or less powerful individuals or institutions. Such conflict frequently relates to issues of justice, usually when the information in question is - or might be - relevant to a criminal or civil proceeding. The Constitutional Court then has to apply the test of proportionality to the conflict, and consider whether in the particular case, the public interest in the disclosure of the journalist's information source is so strong as to prevail the constitutional right to freedom of speech, from which the right of the media to keep a source of information secret is derived (Decision I. ÚS 394/04 of September 27, 2005 - the right of a journalist not to disclose his/her information source to penal authorities).
- 10) In the mutual weighing of two contradictory provisions where (...) the mutual conflict of existing constitutional values, i.e. (...) the right to defense in criminal proceedings, which includes the right of the accused to view documentary evidence and the right of free choice of counsel, and the principle of protection of state interest in the secrecy of certain information, plus the international security commitments of the Czech Republic, the gravity of potential interference with the general interest in *complying with a commitment under international law* (Decision Pl. ÚS 7/09 of May 4, 2010 - ad

the principle of proportionality in the weighing of a commitment under international law against the right to defense).

- 11) The selection of payers of a levy is not groundless and arbitrary, and the general interest pursued by the law (protection of the national economy and minimization of negative social impacts) is clear and obvious (Decision Pl. ÚS 17/11 of May 15, 2012 - taxation of electricity generated by photovoltaic (solar) plants).
- 12) The private law requirement of observance of contracts - the *pacta sunt servanda* principle, or contractual freedom - and the employee's duty of loyalty to the employer, cannot *a priori* exclude another general interest, i.e., the interest in employees being able to approach public authorities in situations where important social interests are threatened by the employer, such as protection of public health, environmental protection or protection of clean water, or in situations where such public goods have actually been compromised. In this particular case, when deciding whether the sending of a letter alerting public authorities to the fact that the employer - a waste water treatment plant - *does not follow operating regulations* by the employee can constitute grounds for termination of employment with immediate effect due to a particularly gross violation of the work discipline, general courts failed to conduct an adequate assessment and comparison of the general interest in environmental protection and public health on the one hand, and the interest in *observance of contracts* on the other hand (Decision III. ÚS 298/1 of December 13, 2012 - loyalty to the employer).
- 13) The aim of parliamentary elections is not only to obtain a differentiated mirror image of political leanings of the electorate. The set up of the electoral system must give consideration to the ability to govern, derived from the volition of a reliable parliamentary majority, to adopt effective, practically enforceable decisions. General interest thus requires that certain integration stimuli be incorporated into the electoral system, for instance, a closing clause concerning the entry of political parties into the scrutiny for the conversion of votes obtained into mandates, provided its amount does not jeopardize the representative democratic substance of the elections. Such modification of the principles of proportional representation (Article 18 of the Constitution) represents a legitimate restriction of the equality of the right to vote and

free competition of political parties (Articles 21 and 22 of the Charter) (Resolution Pl. ÚS 2/14 of August 19, 2014 – Česká pirátská strana).

European dimension of general interest

General interest in countries taking part in the European integration process does not necessarily have a national dimension only. The justice system in EU member states adopted a supranational level of general interest, embodied in particular in secondary legislation of the EU, directly applicable on national level, as a legal restriction of fundamental rights at national level. One of the first cases where the European Court of Justice addressed this conflict (measures under the Common Agricultural Policy v. constitutional protection of ownership) included for instance judgments in 11/70 *Internationale Handelsgesellschaft* 44/79 *Hauer*. The constitutionalization of EU law also serves to strengthen the respect of EU bodies for key general interests of the member states, as represented by references to "national identity" (Article 4 (2) of the TEU), or rather "compliance with domestic regulations and practice", which leave room for the implementation of general interest, while applying the EU human rights standards at national level (see in particular Title IV of the Charter of Fundamental Rights of the European Union).

The Czech Constitutional Court indicated a good many times that it is aware of this dimension of the problem (cf. for instance its "Lisbon" decisions – Pl. ÚS 19/08 and Pl. ÚS 29/09).

Summary

The Czech Constitutional Court does not understand general interest as a sum of particular interests, nor does it view it as a value of an absolute nature, conditioned on total necessity. When seeking a fair balance that would justify the exceptional piercing of otherwise inviolable, unalienable, permanent and irrevocable fundamental rights (Article 1 of the Charter) under a democratic rule of law, the court examines the specific context of the case and applies the proportionality principle. Guided by these points of reference, the Constitutional Court often finds itself on the thin line between judiciary reserve and activism. The high number of constitutional complaints and the relatively low number of complainants succeeding before the European Court of Human Rights in Strasbourg testify to the authority it earned from the public through its approach to this thankless task, and the respect afforded to the court by public authorities. The Constitutional Court welcomes the opportunity to share its experience with other supreme guardians of constitutionality in Central and Eastern Europe.