1993/04/12 - PL. ÚS 43/93: DISPARAGEMENT OF STATE BODIES

HEADNOTES:

1. By employing the general and unambiguous phrase, „state body“ in § 154 of the Criminal Code, states bodies collectively and institutionally (as individual institutions) are protected to the extent provided in the definition of the material elements of the criminal offense, then in § 156 individual public authorities are so protected as well. The object of protection in § 154 para. 21) and § 156 para. 32) of the Criminal Code are not the institutions as such, in their „actualized“ form, but their mission in a democratic society: their activities which make for the undisturbed functioning of a constitutional and law-based state.

2. Section 102 of the Criminal Code3) defines the material elements of an additional offense for acts which would otherwise be subject to prosecution on the basis of § 154 para. 21) and § 156 para. 32). This duality and divergence in the legislative formulation leads to an interpretation which would remove the Parliament, the Government, and the Constitutional Court from the ensemble of state bodies, even though they are state bodies, and give them under § 1023) a superior form of legal protection, otherwise common only for the protection of abstract state symbols.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

of the Plenum of the Constitutional Court of the Czech Republic of 12 April 1994, sp. zn. Pl. ÚS 43/93 in the matter of the petition of the President of the Republic proposing the annulment of a portion of § 102 of Act No. 140/1961 Coll., the Criminal Code,3 as amended by Act No. 557/1991 Coll. and Act No. 290/1993 Coll. (the judgment was published as No. 91/1994 Coll.).

STATEMENT

That portion of § 102 of the Criminal Code No. 140/1961 Coll.,3) as amended by Act No. 557/1991 Coll. and Act No. 290/1993 Coll., which consists of the words, „its Parliament, government, or Constitutional Court“, shall be annulled on the day this judgment is published in the Collection of Laws.

REASONING

1. On 1 December 1993, the President of the Republic submitted to the Constitutional Court a petition proposing the annulment of the above-mentioned portion of § 102 of the Criminal Code3), as amended by Act No. 290/1993 Coll., which supplemented and amended the Criminal Code, and Czech National Council Act No. 200/1990 Coll., on Administrative Offenses. He based his petition on § 64 (1)(a) of Act No. 182/1993 Coll., on the Constitutional Court, which authorizes the President of the Republic to submit a petition proposing the annulment, pursuant to Article 87(1)(a) of the Constitution of the Czech Republic, of a statute or individual provisions thereof.

As the grounds for his petition, the President of the Republic stated that the criminal offense as defined in § 1023) is not in conformity with Article 17 of the Charter of Fundamental Rights and Basic Freedoms4) (hereinafter „Charter“) because, on the one hand, the criminal offense (disparagement of the Parliament, the government, or the Constitutional Court) in its conception and in the definition set down by the Criminal Code is not a „necessary measure“ in our society, and, on the other hand, the definition does not state the grounds upon which citizens' freedom of expression may be restricted. In addition to this, the petition characterizes the criminal offense of the disparagement of state bodies as indefinite and open to varying interpretations. According to the petitioner, it does not specify the conduct which a citizen must engage in, in respect of either form or of substance of the derogatory expression towards the protected institutions. The petition further concludes that such imprecise wording makes broader criminal liability possible, which could lead to the infringement of the constitutionally guaranteed freedom of expression.

In addition, in a letter dated 21 January 1994, the President of the Republic passed on to the Constitutional Court Amnesty International's opinion of § 102 of the Criminal Code,3) which it sent him in its communication of 18 November 1994 signed by its General Secretary Hervé Berger. In its opinion, Amnesty International stated that it considers § 102,3) in its current form, to be inconsistent with the Czech Republic's international obligations, in particular with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to the Act on the Constitutional Court, the body which issued the act, the annulment of which is sought, is also a party to the proceeding. Therefore, the Justice Rapporteur transmitted the President's petition to the Parliament of the Czech Republic, requesting it to submit its statement of views on the petition within the legally prescribed period. The Chairman of the Assembly of Deputies did so by official letter, dated 7 January 1994. The government draft of the contested statute was enclosed with his letter, as was the text of the Joint Reports on the government drafts from the committees of the Assembly of Deputies. The Joint Reports indicated that the Constitutional Legal Committee's proposal to repeal § 102 of the Criminal Code3) had been rejected.

In its response of 7 January 1994 to the petition of the President, the Assembly of Deputies stated that the amended version of § 102 of the Criminal Code3) was a reaction only to the changed constitutional conditions resulting from the division of the Federation and from

the adoption of the Constitution of the Czech Republic. As regards the content of the Assembly of Deputies' opinion, it states that it considers the petition proposing the annulment of only a part of § 102 of the Criminal Code3) to be unclear, where it criticizes the act's imprecise wording. According to the Assembly of Deputies' opinion, this imprecision does not refer to that part of the act, the constitutionality of which is contested, rather the phrase not affected by the petition, „[w]hoever . . . disparages". If too broad an application of this provision would result in the infringement of the constitutionally guaranteed freedom of expression, then the legal system as it stands affords - according to the Assembly of Deputies' opinion - an array of possible defenses against such an unconstitutional act, including protection afforded by a proceeding before the Constitutional Court.

2. The Constitutional Court dealt, first of all, with the issue of the petitioner's authorization to submit the petition. It assessed the objections challenging the President's right to submit a petition proposing the annulment [under § 64 (1)(a) of Act No. 182/1993 Coll., on the Constitutional Court] of a statute or individual provisions thereof unless the petition is countersigned by the Prime Minister or by the member of his government so authorized, because Article 63, paras. 2 and 3 of the Constitution supposedly makes the Prime Minister's countersignature a condition of the submission of the mentioned petition.

After consideration of these objections, the Court came to the conclusion that they are based on an interpretation that does not conform to the text and meaning of the Constitution and on this point refers to a difference in the wording of the second and third paragraphs of Article 63 of the Constitution. Article 63 para. 2 of the Constitution contains an all-purpose expression of (potential) powers, the extent of which is not defined in more detail, which may be entrusted by statute to the President of the Republic. In contrast to this, Article 63, para. 3 of the Constitution sets down the cases in which the exercise of these powers (entrusted to the President pursuant to paragraph 2) requires the countersignature of the Prime Minister or a member of the government authorized by him. Such is not the case generally whenever the President exercises his powers pursuant to Article 63 para. 2, but only when he exercises these powers by means of an issued decision (Article 63 para. 3 of the Constitution). This wording places emphasis upon the objective legal nature of such a decision: it concerns the exercise of his powers for the purpose of modifying or confirming a legal condition (even if that of particular persons). „An issued decision" cannot be understood as any sort of „decision" to pursue a certain course of action. A petition of the President pursuant to § 64(1)(a) of the Act on the Constitutional Court is not an issued decision, rather an initiative. By means of a petition, the President is carrying out solely his own power, while the power to issue decisions and by that means either to confirm or modify a legal situation belongs to the Constitutional Court.

The Constitutional Court considered another reservation that cast doubt upon both the authorization of the petitioner and the jurisdiction of the Constitutional Court to decide on the petition. As is well-known, the Constitution entrusts the Constitutional Court with the power to make decisions concerning the unconstitutionality of statutes and of individual provisions thereof. Since the petition of the President did not contest the unconstitutionality of all of § 102 of the Criminal Code3), but only a part of it, the objection was made that the petition does not relate to an „individual provision", but only

to a part of one, and since the Constitution does not provide anything concerning making decisions about fractional parts of individual „provisions“, the objection was made that the petitioner lacks the actual authorization to submit the petition, and the Constitutional Court consequently lacks jurisdiction to decide on it.

This objection must be rejected as well. Article 87 of the Constitution cannot be interpreted as creating a formal hierarchy of the law, distinguishing sections, articles, paragraphs, etc. The term „individual provisions“ does not represent merely the entirety or a unit of a legal text, understood in the formal sense, rather each part of a legal text which, without regard to technical form, „individually provides for“, that is, expresses, even if for individual or partial issues, a definite legal condition, and which is, nevertheless, a substantive legal unit with a definite and clear meaning.

The protection of specific institutions from disparagement contained in § 102 of the Criminal Code3) is a legal provision containing the claim of these institutions to criminal law protection to the extent provided for in § 102, 3) as well as the general duty to refrain from committing the criminal offense. It is not determinative that the concept of „the Republic“ is also protected in the same section; what is determinative is that, as regards content, that part of § 1023) which the President requests be annulled is independently, legally definable. A petitioner cannot be forced to propose as well the annulment of those parts of individual provisions of a statute which he considers to be constitutional and which would retain their sense even if other parts of the same section were annulled.

3. The Constitutional Court is authorized to deal with a case only to the extent the submitted petition proposes: thus it is restricted in the given case to a decision on the contested portion of § 102 of the Criminal Code3). For this reason, it may not concern itself with the further initiative by which the President petitioned the Parliament to amend §§ 102 and 103 of the same statute. On the other hand, however, in its assessment of the matter, the Constitutional Court is not restricted merely to the petition itself. It is the duty of the Constitutional Court to give consideration to all aspects of the case which might contribute to the clarification of the constitutionality or unconstitutionality of a legal enactment.

The President’s petition criticizes the provisions of § 102 3) in two respects:

1. Firstly, it objects to the indefiniteness and the broad content of the term „disparagement“, which, according to the petition, without a more clearly specified meaning, allows for a very fluid interpretation because it is not evident which expression or which conduct meets the elements of this criminal offense. That fact could lead to the infringement of the constitutionally guaranteed freedom of expression, especially where the criticism of protected institutions is concerned.

2. The petition further asserts that the phrase „disparagement of the Parliament, the government, or the Constitutional Court“ is not in conformity with Article 17 of the Charter,4) according to which the freedom of expression and the right to seek and disseminate information may be limited by statute only on the condition that the statute concerns measures that are necessary in a democratic society for the protection of the rights and freedoms of others, the security of the state, public security, public health, or morals. According to the petition, no reasons, either general nor specific ones, have been

adduced in connection with § 102 of the Criminal Code3), explaining the necessity of the measure in this respect.

4. The objection that the contested parts of § 102 of the Criminal Code3) are open to diverse interpretations, which might constitute a threat to the principle of the freedom of expression, is not, in and of itself, sufficient grounds for annulling these provisions. The factual condition of a legal norm being unconstitutional is not determined by the mere possibility that the particular legal norm could be misinterpreted, rather it requires an unambiguous determination that such a conflict already exists in the text of the statute or arises therefrom, which would come into consideration if, from the text and meaning of the statute, an unconstitutional interpretation is either unavoidable or can at least realistically be assumed, or if, by its nature, the statute inspires such an interpretation.

The term „disparagement“ concerns a concept which is not an innovation in our legal order. Beginning with the Penal Code of 1852, it has been continuously applied in Bohemia and Moravia: during the First Republic it was incorporated into § 14 paras. 5 and 6 of the Act on the Protection of the Republic, supplemented by Act No. 124/1933 Coll.; and it was later incorporated into the Criminal Codes of the 1950's and 1960's. Disparagement was understood as a gross reduction in dignity, and in the contemporary criminal law theory it is understood as gross belittlement, abuse or ridicule, as a grosser attack on the dignity and honor committed in an outrageous manner.

In and of itself, the term, „disparagement“, is not understood any differently today than in the past. There is, however, a difference which cannot be overlooked, consisting in the fact that Act No. 50/1923 Coll., employed the term, „disparagement“, only in § 14, and at that only in connection with the disparagement of the Republic, therefore with a concept which is not an expression for a specific institution or competence but which is a symbol of the organization of the state as a whole. That act provided protection to individual constitutional institutions in another manner. Section 20, which can meaningfully be compared to § 102 of the current Criminal Code,3) speaks of gross impropriety toward individual constitutional bodies only in quite specific contexts: if it concerned the disruption of the exercise of their powers, and for the purpose of reducing their dignity.

A similar differentiation is made in the rules on this issue in other countries. That which makes the Czech Republic exceptional does not consist in the fact that it protects the Republic and the highest constitutional bodies by means of separately defined criminal offenses, rather by the manner in which it protects them: namely, that no distinction is made between the material elements defining the offense of the disparagement of particular constitutional bodies, which are charged with carrying out specific duties and furnished with specific powers, and those defining the offense of disparagement of the Republic as a symbolic concept expressing the organization of the state as a whole. In a constitutional state, the protection of particular institutions with decision-making powers is always narrower and more restrictively defined: it is limited to the performance of their constitutional offices and forms a part of the whole system of the restraint upon state power by means of a clear definition of the intrusion into civic rights only to the extent necessary. In a constitutional state, the sovereign people protect themselves and the primacy of their civil rights also against possible abuses of power even from their own state and its agents.

From this point of view, it is important to take note of the circumstance that, in addition to the criminal act of the disparagement of „the Parliament, the government, or the Constitutional Court“, under § 1023) , the Criminal Code has further provisions which offer additional criminal law protection to these institutions. Criminal offenses against the exercise of powers by a state body or by a public official are defined in Chapter Three. A clear correlate to the material elements of § 1023) is contained in particular in §§ 154(2)1) and 156(3) of the Criminal Code.2)

In the case of the first provision, § 154(2),1) the material elements of the offense are worded as the gross insult to or the slander of a state body, then in the second case, § 156(3),2) of a public official. Criminal law theory and judicial practice attach the fulfillment of the same requirements to these two concepts („disparagement“ and „gross insult or slander“). They concern an attack upon the honor, reputation and dignity of the body; in addition, the belittling expression may be committed in a variety of ways - orally, in writing, pictorially, by a gesture, or even by a physical act, the level of intensity of which does not amount to violence.

The degree to which § 1023) and §§ 154(2) 1) or 156(3) 2) are actually in conformity with each other depends, however, on how one assesses the contexts into which they are placed.

While it is possible, when making the determination that these provisions are in conformity with each other, to doubt the usefulness of such a resolution of the problem; legally, however, this repetition cannot be contested since the legal principle applies, „superfluum non nocet“ (abundance gives rise to no harm). At the same time, the concept of the „disparagement of the Czech Republic“ in the first part of § 102 of the Criminal Code, 3) and which does not form a part of the petitioner’s objection, remains separate from the Constitutional Court’s deliberations. It is necessary to note that the concept „the Republic“ differs from that of „state bodies“: it is an abstract expression meaning the organization of the state as a whole.

Such is not the case with actual, specific state institutions, such as the Parliament, the government, and the Constitutional Court, which perform concrete missions, are endowed by the Constitution with specific functions and powers, and are „actually established“ and even furnished with suitable personnel. Since § 154 of the Criminal Code1) employs the general and unambiguous term „state body“, it protects state bodies as a group and institutionally (that is, as individual institutions) to the extent provided for in the definition of the offense, as does § 1562) for individual public officials.

In the case of §§ 154(2) 1) and 156(3), 2) the Third Chapter of the Criminal Code makes more precise the purpose and the scope of the criminal law protection provided in them. The actual objects of protection are not the institutions in and of themselves in their „actually established“ form, rather it is the mission which they perform in a democratic society: their work arranges for the undisturbed functioning of a constitutional and law-based state. Thus, the truest objects of protection are the set of values on which a democratic state is founded and on the basis of which it proceeds. Thus, the elements of the criminal offense of the gross insult to, or the slander of, a state body or a public official may only be satisfied if the state body or the public official is attacked in an

offensive manner (that is, by a gross insult or slander) and in direct connection with the exercise of its or his powers: in the exercise of these powers or for the exercise of them.

As a consequence of this distinction, there is no doubt that § 1023) defines a separate criminal offense for acts which otherwise would already be subject to prosecution on the basis of §§ 154(2)1) and 156(3)2) of the Criminal Code. For this reason, the maxim, „superfluum non nocet", cannot be applied to § 1023). That duality and the division of legal regulation, thus, leads to an interpretation whereby the Parliament, the government, and the Constitutional Court are withdrawn from the ranks of state bodies, even though they are state bodies, and are provided in § 1023) with a superior form of legal protection, which is otherwise typical only for the protection of abstract symbols of the state.

By prescribing criminal law protection of constitutional institutions in § 102, 3) the statute likewise places limits upon the citizens' exercise of their fundamental rights and basic freedoms. In a law-based state, however, a statute is not merely an internal memorandum for the state machinery, and the Criminal Code is not a set of internal directive for criminal courts. A statute is a publicly issued means which should, first of all, lay out for the citizens themselves what they are permitted to do and what they must not do, what they are still permitted to do what they must no longer do.

It is a precondition for citizens to assert civil rights that a clear boundary be drawn between those exercises of freedoms which are the constructive foundation of a democratic and critical society and those which aim at the destruction of universal human and democratic values. For this reason, democratic states acknowledge that certain restrictions on the exercise of civil and human rights and freedoms are justified. The principle of the law-based state is underpinned by the primacy of the citizen before the state, thus, also the priority of the fundamental civil and human rights and freedoms. A law-based state is also characterized by the awareness that it is necessary both to keep such measures to a minimum and to fight against the temptation on the part of the state and the individuals holding power in it to acquire more power than they strictly need.

Since every law containing commands and prohibitions intrudes upon the freedom of the individual and upon his fundamental rights, it is necessary to consider whether and to what extent the law's commands are clearly and precisely defined, but also whether its aims are proportionate, appropriate, and needed.

In a constitutional state, not only is the manner in which the courts are capable of interpreting the laws important, but so is how they will be interpreted by the civic public. Legal uncertainty for the citizens means the loss of the credibility of the law-based state and, equally, an impediment to civic activity. While even lay persons can manage to comprehend the elements of the criminal act defined in § 154(2)1) and § 156(3),2) when it comes to § 102, 3) they find themselves in doubts as to where criticism ends and where disparagement of constitutional institutions begins, since no definite connection at all is made between the factual event and the role or function, the activities or at least the powers and the exercise of them by individual institutions. In this manner, it is not even specified what in these institutions is worthy of special criminal law protection so that in such circumstances the term „disparagement" acquires a considerably sweeping and indeterminate meaning. There is no doubt about the fact that this vague indeterminacy could be understood as a relic of old patrimonial regimes which generally

left certain issues to the unrestrained discretion engendered by murkily worded provisions, which made possible, whenever required, interpretations „ad usum Delphini“.

Another component of the law-based state is the principle of proportionality, meaning a proportionate relation of correspondence between the ends sought and the means employed. The boundary for proportionality and for the acceptability of the intrusion by § 102 of the Criminal Code3) upon civil rights is laid down, in particular, in Article 17 of the Charter,4) which defines both the freedom of expression and the extent to which it can be restricted. Under Article 17(4) of the Charter,4) the freedom of expression and the right to seek and disseminate information may be restricted by law only in cases that concern measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public safety, public health, or morals. On the basis of Article 4 para. 1 of the Charter, the imposition of duties by statute must respect the maintenance of the fundamental rights and basic freedoms; and under para. 4, the essence and significance of these provisions must be preserved, and the restrictions upon them must not be misused for purposes other than those for which they were enacted.

After due consideration of this issue, the Constitutional Court is inclined to the view that none of the prerequisites set down in the Charter the necessity of a separate provision in an indeterminate form, as is found in § 102 of the Criminal Code.3) The requirement that the fundamental rights and basic freedoms may be restricted only in exceptional cases also results from the fact that the Czech Republic is that type of law-based state which is „founded on respect for the rights and freedoms of man and of citizens“ (Article 1 of the Constitution). In a modern, substantive, law-based state, the necessity and proportionality of a rule must be considered as well from the perspective of the primacy of the fundamental rights and basic freedoms.

Likewise, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „Convention“) lays similar claims upon our legal order from the perspective of the international law commitments of the Czech Republic and sets conditions similar to those in Article 17 of the Charter.4) In particular, it limits statutory intrusions upon these rights and freedoms to „measures which are necessary in a democratic society“ for the protection of values which are essentially the same as those enumerated in Article 17 of the Charter4) (the text of the Charter conformed to Article 10 of the Convention). In consequence, when assessing § 102 of the Criminal Code, 3) a great deal of significance is placed on the concepts of legality and of statutory restrictions upon civil rights as these are understood by the international community on the basis of the Convention, as well as on the interpretation of them in the case law of the European Court of Human Rights.

The position of the European Commission for Human Rights, as well as the European Court of Human Rights, is that a legal norm can be considered a statute only if it is formulated with sufficient precision to enable citizens to conform their behavior to it (the Sunday Times case, 1979). In another case (Malone v. United Kingdom, 1984), the Court expressed the view that is bound by the condition to regulate matters only within the confines of an authorized goal and to provide citizens with due protection from arbitrary action. In addition, the state may not refer merely generally to necessity as the reason for limiting the rights and freedoms of individuals (Greek Case, Commission Report, 1969).

In instances of a potential conflict between the freedom of expression and the state's right to restrict it in cases of necessity, the European Court for Human Rights proceeds on the basis of heightened protection of the individual because it considers the freedom of expression to be one of the main foundations of a democratic society, even in the case of information or ideas that insult, shock, or disturb the state, or a portion of its population. According to the Court, this position corresponds to the requirements of pluralism, tolerance, and openness in a democratic society (the Case of Handyside v. United Kingdom, 1976).

The European Court's decision in the Lingens v. Austria case (1986) distinctly characterizes its approach to this issue. The Austrian Chancellor succeeded before the Austrian courts in his action for the protection of honor after a journalist called into doubt his capability of performing his office. The European Court, on the contrary, decided that the judgments of the Austrian courts represented an illegal intrusion upon the freedom of expression (Article 10 of the Convention) and came to an extraordinarily important conclusion: in the Court's view, the freedom of the press offers public opinion one of the best means of learning about and evaluating the thoughts and positions of leading political figures. The freedom of political discussion is the genuine core of the concept of a democratic society, which dominates the entire Convention. The European Court further decided that the bounds of acceptable criticism are wider for politicians as such than for private persons: in contrast with private persons, a politician unavoidably and consciously exposes himself to searching oversight of his own words and gestures, both by the press and by the general public. Article 10(2) of the Convention allows for the protection of third persons' reputations, and politicians enjoy this protection as well, but in such a case, the demands of protection must be moderated by the interest in the free discussion of political issues.

5. After considering all the circumstances and contexts to which § 102 of the Criminal Code3) applies, the Constitutional Court of the Czech Republic has come to the conclusion that the indeterminate and undefined criminal law protection of the Parliament, the government, and the Constitutional Court in § 102 of the Criminal Code3) exceeds the bounds of the constitutional order and the international commitments of the Czech Republic, since, in a situation where §§ 154(2)1) and 156(3)2) already provide sufficient criminal protection of state bodies, it introduces, as a result of its generality and indeterminacy, an element of excessive protection which, due in addition to the undefined nature of the object of protection, deviates both from the generally recognized principles of the law-based state and from the strictures of Article 17 of the Charter,4) by which the intrusion of the state upon civic rights is limited to those measures which are by their nature necessary for the preservation of certain values. § 1023) cannot qualify as such a necessary measure, if only due to the fact that the protection provided to state bodies in §§ 1541) and 1562) is sufficient and, from the perspective of defining the object of protection, more precise. In this vein, the conception of § 102 of the Criminal Code3) is likewise in conflict with the international obligations of the Czech Republic and the case decisions of the European Court of Human Rights.

By not defining the actual object of criminal law protection, § 102, 3) in reality protects a patrimonial position, that is, a position within the institutional hierarchy of state bodies, even though the object of protection should be the fulfillment of the role and function which the Parliament, the government, and the Constitutional Court hold in a democratic

society. Since § 154 of the Criminal Code1) contains and defines the protection of the exercise of powers by state bodies, and consequently their function in a democratic society as well, and since the Parliament, the government and the Constitutional Court are, without doubt, also state bodies, the notion is created that § 1023) introduces for the above-stated constitutional bodies some sort of absolute institutional protection which, moreover, is not in this case bound to the exercise of their powers. Thus, the interpretation of the concept of disparagement loses its boundaries and its connection to the functions performed by these constitutional bodies. In § 102 of the Criminal Code, 3) the term „disparagement" makes no provision either for the intent of the perpetrator, the degree of threat to the exercise of powers, or the role of the constitutional institutions in the democratic system in the least, and in its present form it is most comparable to the classical lèse-majesté.

Consequently, an interpretation is directly inspired which is not in conformity, first of all, with Article 17(4) of the Charter4) and Article 10 of the Convention since it does not concern measures which, on one of the grounds stated in those articles, are necessary in a democratic society, and further is not in conformity with Article 4(4) of the Charter,7) which provides that the essence and significance of the fundamental rights and basic freedoms must be preserved when employing provisions which place restrictions upon them and that such restrictions must not be misused for purposes other than those for which they were enacted. It also is not in conformity with Article 1 of the Constitution,9) according to which the foundations of the law-based state are respect for the rights and freedoms of man and of citizens and which, together with Article 1 of the Charter,8) gives expression to the primacy of the fundamental rights and basic freedoms.

The joining together, in the same section, of the criminal law protection of the Parliament, the government, and the Constitutional Court with the protection of the "Republic" results in the mixing of two disparate and incomparable categories of objects of protection. While the more general term „disparagement" is typical for the protection of abstract concepts, such as the „Republic" or the state symbols, with regard to the above-mentioned institutions, the protection should be bound to the role which these institutions perform in a democratic society, and thus to the manner in which they fulfill this role. That is to say, if the first case concerns the protection of abstract ideas and values, the second concerns the protection of functional values of the society, and by these means the protection of democratic principles.

According to the statement of views signed on 10 January 1994 by the Chairman of the Assembly of Deputies, § 102 of the Criminal Code3) was amended only in reaction to the changes in the constitutional situation resulting from the division of the state, but at the same time the proposal of the Constitutional-Legal Committee of the Assembly of Deputies that § 1023) be repealed was not at that time accepted.

The Constitutional Court concludes that due to the fact that § 102 of the Criminal Code3) was merely adapted to the division of the state, a conflict arose between the conception of the protection of constitutional institutions, which remained as a legacy of the „old regime", and the new constitutional order, as well as between that conception and the international obligations of the Czech Republic, which arise from quite divergent constitutional principles.

After the close scrutiny of all circumstances and contexts, the Constitutional Court finds that § 102 of the Criminal Code3) in the breadth defined in Act No. 290/1993 Coll., by the words: „its Parliament, government, or Constitutional Court“ conflicts with Article 17(4)4) and Article 4(4)7) of the Charter, Article 10(2) of the Convention, as well as the principal of the law-based state and the primacy of the fundamental rights and basic freedoms enshrined in Articles 19) and 310) of the Constitution of the Czech Republic and Article 1 of the Charter.8)

In view of the provisions of § 58 para. 1 of Act No. 182/1993 Coll. this judgment is enforceable on the day of its publication in the Collection of Laws. A decision of the Constitutional Court may not be appealed.

Pl. US 43/93

Overview of the most important legal regulations

1. § 154 par. 2 of Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, governs the definitions of the crime of Attack on a State Body, which is classified among Crimes Against Exercise of Powers by State Bodies and Public Officials and reads: Anyone who grossly insults or slanders a state body when it exercises its powers, or because of the exercise of its powers, shall be sentenced to a term of imprisonment of up to one year or to a fine.

2. § 156 par. 3 of Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, which governs one of the definitions of the crime of Attack on a State Body, reads: Anyone who grossly insults or slanders a public official when he exercises his powers, or because of the exercise of his powers, shall be sentenced to a term of imprisonment of up to one year or to a fine.

Note: This provision was repealed by Act no. 253/1997 Coll., which amended the Criminal Code.

3. § 102 of Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, Act no. 557/1991 Coll. and Act no. 290/1993 Coll., which provides the definition of the crime of Defamation of the Republic and its Representatives reads: Anyone who publicly defames the Czech Republic, its Parliament, Government or Constitutional Court shall be punished by a term of imprisonment of up to two years.

Note: This provision was repealed by Act no. 253/1997 Coll., which amended the Criminal Code.

4. Art. 17 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides in paragraph 1, that the freedom of expression and the right to information are guaranteed. Par. 4 provides that the freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public security, public health, or morals.

5. § 3 par. 4 of Act no. 140/1961 Coll., the Criminal Code, as amended by later regulations, provides that the degree of danger to society of an act is determined particularly by the significance of the protected interest affected by the act, the manner in which the act is committed and its consequences, the circumstances under which the act is committed, the person of the offender, the degree of his culpability and his motives.

6. Art. 10 of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that international treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.

7. Art. 4 par. 4 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down.

8. Art. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that all people are free, have equal dignity, and enjoy equality of rights.

9. Art. 1 of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.

10. Art. 3 of Act no. 1/1993 Coll., the Constitution of the Czech Republic, provides that the Charter of Fundamental Rights and Basic Freedoms forms a part of the constitutional order of the Czech Republic.