

Constitutional Prohibition of Censorship in Theory and Practice

Abstract

The thesis focuses on the constitutional prohibition of censorship enshrined in Art 17(3) of the Charter of Fundamental Rights and Freedoms and presents an analysis of the content and applicability of this institute of Czech constitutional law. Firstly, the thesis addresses the confusion of terms which results from identifying censorship in an extra-legal sense with the constitutionally prohibited censorship within the meaning of the Charter or from mistaking this concept for the prior restraint doctrine known from the Supreme Court of the United States and European Court of Human Rights case law.

The thesis is subsequently structured according to the three fundamental characteristics of the examined concept identified in the Czech doctrinal literature. These are critically analysed from the perspective of coherence in the context of the related guarantees of freedom of expression, the sub-constitutional regulation of media law and the intermediary services in the digital space. The fundamental premises of the Czech doctrine are confronted with the existing case law and the starkly contrasting position of the Slovak literature and case law. The analysis drives from the historical evolution of the concept on the Czech territory and from the historically functioning censorial practices, to which the individual equivalents of the provision reacted. Argumentation is also supported by the comparison with the judicial and doctrinal interpretation of German and Polish constitutional prohibitions and from a distinct constitutional solution from the United States.

Firstly, attention is paid to the absolute nature of the constitutional prohibition of censorship and to the potential admissibility of exceptions to the rule. Thus, it is examined whether the prohibition of censorship can stand as a categorically formulated rule also in a possible collision with other constitutional values or under extraordinary external circumstances.

Subsequently, the prior nature of restrictions as one of the characteristics of constitutionally prohibited censorship is analysed. The possibility of applying Article 17(3) to ex post interference in the dissemination of expression is firstly assessed from a historical and comparative point of view. Then, this option is considered from a systematic perspective in relation to the limitation clause enshrined in Article 17(4) of the Charter and the absolute nature of the constitutional prohibition of censorship. The thesis identifies the key elements of the

restrictions that can be qualified as prohibited censorship and distinguishes them from other prior restraints that do not fall within the scope of Art 17(3) of the Charter.

The final part of the thesis focuses on identifying the addressees of the constitutional prohibition of censorship. The initial assumption that the constitutional norm limits solely public authorities is presented. The thesis then critically analyses alternative considerations proposing that the institute should also be applicable to restrictions imposed by private actors. Thus, it is assessed whether the constitutional prohibition may apply to self-censorship inside editorial offices and to content interventions carried out by influential actors from outside. Due to their specific position, special attention is paid to the applicability of the prohibition of censorship to the moderation of user-generated content conducted by intermediary service providers. Additionally, the possibility of interpreting Article 17(3) of the Charter as a provision establishing a positive obligation of the State is addressed separately. Subsequently, an analysis is conducted of situations where the applicability of the constitutional prohibition of censorship is discussed in the context of non-vertical interventions due to their particular connection to public authorities. Thus, the specifics of public broadcasters and media operated by local governments are examined.

Keywords: censorship, freedom of speech, prior restraint