

LEGAL STATUS OF ARMED FORCES: WHO IS WHO (AND WHY?)

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Abstract in original language

Skromný příspěvek autorův čerpá z pojmové a funkční identifikace ozbrojených sil, jakožto složky strukturovaného vnímání veřejné moci, to vše s důrazem na institucionální aspekty jejich postavení, řízení a normativně vytýčené působnosti. Klíčovým aspektem jsou pak introspekce zkoumání subjektivity ozbrojených sil samotných, ale i jejich funkčních součástí a reprezentantů, což ve svém souhrnu naplňuje esenci správního a ústavněprávního pojmu "zajišťování obrany".

Key words in original language

Armed forces; Legal identity; Structure of administration.

Abstract

The author's contribution draws from the conceptual and functional identification of the armed forces as a component of a structured perception of public power, all that with an emphasis on institutional aspects of their status, management and normatively defined scope. A key aspect are the introspections of examining of subjectivity of the armed forces themselves, however even of its functional components and representatives, which altogether fulfills the essence of the administrative and constitutional concept of "safeguarding security".

Key words

Armed forces; Legal identity; Administrative structure.

Before I will proceed to define the issues implementing the mutual relations taken within the armed forces, as well as relations projected to extern, allow me please to present brief a theoretical consideration.

We would have lost too much time if we pay a sole attention to the theory of state itself. The concept of personality of State can be both proceed from a position of national law as well as from a position of international law, while a key factor will be the direction of legal relations realized at that time. For our present purposes I, therefore, leave aside the international consequences and will focus only on the inner action.

The State has been perceived in many forms within the legal theories, even though it is outwardly apparent through its primarily characters and

expressions. These characters can then be expressed in two concepts. The first is the concept of facticity (organic), through which we perceive the State as something determining and originar, in a kind of a social form of "etatising" primal mover. In the second theory is the State referred to a body of determinate or derivative character, which was created as a product of a metaphysical action or social force, and therefore the position of product or institution appertains to him.

Whether the case of a state represents an institution constituting or constituted, it is not specifically defined by the law what State is or what it means. That does not stipulate that this term is unknown to legal order of the Czech Republic. Since the State is more a subject of public than private law, the term occurs more frequently in the terminological system of public law norms¹. But the State enters even into private relations and it is therefore astonishing that the fundamentals Act on private law – the Civil Code – does not fold the state between the parties, impacted directly by civil law².

When I am talking about personality, then the key to understanding thereof is the concept of subject, of which Jan Hurdík states that it comes from the ancient Latin phrase "subiectum" which was used as a grammatical or logical concept representing a particular category, which is founding the other categories³. The word of subject itself does not have a legally-value colouration, this gets after being assigned to a group of determinants, whose projection is the institute legal relationship, when the subject becomes in which the body becomes the subject of a legal relations⁴ and thus takes its personality.

In legal practice, the terms of a subject and a person in a legal sense difuse, though - cum grano salis - the subject is probably a broader concept. Specific phenomenon is then the existence of legal persons, which – and it is necessary to stress - the idea is widely accepted just from the time of writing major legal codes, because by this time were as persons considered and known only natural persons. Even though there were established special legal rules for the communities of persons or corporations of property, those rules had been always particular⁵ and have been legally crossing each other.

¹ The rubriques of many laws often compart of words like „of state“, of Czech Republic“, „domestic“

² he provisions of § 1 sec. 2 of Act no. 40/1964 Coll is given a list of such persons, and the only other relevant point in the Act § 18 sec 2 point. d), which refers to other legal persons, entities in which it lays down the law.

³ Hurdík J. a kol.: Úvod do soukromého práva, 2. vydání, Masarykova univerzita, Brno, 2002, p. 110 /introduction to private law/

⁴ Victor Knapp stated that it is a "social relationship of more players, who share individual rights and obligations of subjective nature“ in Knapp, V.: Teorie práva, , 1. vydání, Praha, C.H. BECK, 1995, p. 202

⁵ Eg. guilds, the King's court, monasteries, Church as a institution, etc..

Within the area of our country was the first nation-wide acceptance of legal persons performed by the Austrian General Civil Code (ABGB) in 1811⁶.

There is no doubt that even the state is a specific legal person, public corporation, bordered by the existence of relations inside which it occupies a position of power on one side and relationships, where its power is not applicable (private law relations and the application of the principle of equality⁷) on the other. Entering into the legal relations with the State means that the State may unilaterally set rights for the other party (or even third party) or impose obligations on them and decide on them consequently. However, the State is limited (self-restraint) by the prohibition of arbitrariness. Power of State and can be applied only in cases within the limits and manners provided for by a law⁸.

Exquisite Czech scientist in the field of administrative law, Dusan Hendrych, stated the concept of state as legal persons following "The structure of the state as a legal entity, which is attributed the executive power, enabled the development of administrative law, because only then were not conceivable legal relationship between the citizen and the State as well as relations between State and other holders of public power.⁹" How are borne the persons of public law? Unlike private law, when the will of parties is sufficient, the public law persons have been developed from above by a formal act of public authority¹⁰. This is not referring only to central administrative offices, but also to local government entities or corporations of public property.

The very concept of personality represents the cornerstone for the relationship of the State and its institutions (and other bearers of public authority). Already Georg Jellinek questioned the personality of partial State authorities: "The body of state has no such authority as state itself. There are not two personalities: the personality of state and personality of the body, which would have been bound in a legal contract. Heads of State, Parliament, administrative authorities have never been a legal personality, which for sure belongs purely to the State; all the disputes between them are

⁶ See also its provision § 26

⁷ A rich Case-law exists towards this theme, see e.g. the decision of the Constitutional Court sp.zn. Pl. ÚS 33/2000, from January 10, 2001

⁸ See also Art. 2 sec. 3 of the Constitution

⁹ Hendrych D.: *Právnícké osoby veřejného práva*, *Správní právo*, 1/1996, str. 3 /Legal Persons of public Law/

¹⁰ Such act understood not only a Statute or Constitutional Act, but also an act of individual nature

disputes about the competence within one and the same legal entity. These are always disputes about objective, not a subjective right.“¹¹

In relation to the mutual position of State and enforcers of public authority I have to emphasize that clear criterion of personality allocation would be seen much easier at the relation of State vs. Self-Government than in State vs. State Authorities. Personality – measured by Knapp¹² - can be viewed as a competence to enter the rights and obligations. In the area of public law such personality belongs to the state-itself, whereas it can delegate to authorities the exercise of these powers. Bodies of the State, however – and that is the crucial point – are acting on behalf of the State and under its responsibility. Such theory is followed by the Constitutional Court's case law, which wrote on this theme: “ If a state is acting in legal relations the role of subject to public law, or as a bearer of public authority, it can not be from the very nature of fact a holder (subject) to fundamental rights or freedoms. Opposite approach would be a denial of the meaning of fundamental rights and freedoms as they were formed centuries of evolution of European and Anglo-Saxon culture. From theoretical point of view such an approach implies a fundamental difference between denial of the license terms (subjective right) and powers (competence), which is accepted as a paradigm of legal reasoning in a range of continental European and Anglo-Saxon legal culture.¹³

It has been demonstrated until now, what are the bases of personality in the perception of the Czech legal environment. According to Art. 79 sec. 1 of Constitution the ministries and other administrative offices may be established, and their powers provided for, only by statute, which regulation became true due the platform of Act no. 2/1969 Coll., on creation of ministries and other Office (hereinafter Act on competence). As the theme of this paper is the subjectivity of armed forces, let's take a look at their definition.

The Constitution itself does not constitute a sufficient basis for safeguarding national security. There is primarily missing an institutional definition of specific bodies; whereas the very issue of national defense is reduced to the provisions of Article 43, which, however, applies only to the individual actions of the government and Parliament. The President is designated as Commander in chief of the Armed forces. Preamble to the Constitution even lays down the commitment of the citizens of the Czech Republic to protect their homeland when those are aware of their responsibilities towards the

¹¹ Jellinek, G.: *Všeobecná státověda*, Praha, 1906, str. 594-595 (General Science of State; Allgemeine Staatslehre)

¹² Knapp, V.: *Teorie práva*, 1. vydání, Praha, C.H. BECK, 1995, str. 203 /Theory of Law/ ; Knapp itself, however, did not consider the State to be a legal person a kept thinking in following equation: natural persons – legal persons – State.

¹³ Plenum of the constitutional Courts opinion reg. mark. Pl. ÚS-st.-9/99

others and their responsibility to the community. The Charter of Fundamental Rights and Freedoms finally allows a person to refuse military service on the grounds of conscience or religion. Military service and a service taken instead are not considered to be a forced labour. Such ad hoc legislative wows might hardly create a reference framework for evaluating the personality of the Armed forces.

One of the essential prerequisites for ensuring the defense of State is – out of quality in trained troops and beauffedord armours - even a good legislation, especially a system of laws and other regulations that provides for basic rights and obligations of the State as a whole, its institutions, other public authorities, and finally, it provides for rights and obligations of legal and natural persons within the system of national defense. Czech Republic did not begin well, even because the first five years of its existence passed without any constitutional act responding to needs of defense. When the Constitutional Act No. 110/1998 Coll. On the safety of the Czech Republic, was approved in 1998, it has been followed by a number of laws in both for defense and homeland security¹⁴. Even those legislative activities, however, failed to develop the necessary legislative framework for securing the national defense. Constitutional Act on the Safety is an astonishingly unsystematic legal document which provides - within its thirteen articles - ambitiously for two extra-ordinary states, the emergency legislative process, the State Security Council and the change of war-time election period.

The State distributes its powers among its institutions according to the catalogue of object indexes of state activities. According to the Competence Act is Ministry of Defence a central state administrative body for the securing the defense of the Czech Republic; while the Ministry is in charge of the Army and administrates Military Regions. The additional duties are then stemming from this range of tasks.

I am sure that the vigilant audience have noticed the fact that the Ministry of Defense controls the Army, but not the Armed forces as such. It is for sure a conceptual lack of current regulation. The basic legal act, which provides for regulation of the armed forces, is the Act No. 219/1999 Coll. On the Armed Forces (hereinafter "AFA"). Provisions of its § 3 then reads... "Czech Republic creates armed forces to her security." Those Armed forces are (by the same Act) – divided into Army, Military Office of the President of the Republic and the Castle Guard.

¹⁴ In particular Act no. No. 222/1999 Coll. on the provision of Defence Act, Act No. 240/2000 Coll., Crisis Management Act, Act No. 239/2000 Coll., on Integrated Rescue System, and Act No. 241/2000 Coll. on economic measures for crisis situations, the Act No. 219/1999 Coll. Armed Forces of the Czech Republic, Act No. 220/1999 Coll. conscription and its security, and many others.

By use of such a structure - mentioning that I do not consider it lucky - there universal scheme of the Armed forces was shattered. In most NATO member countries are Armed forces divided according to their competence, but at some point their command structure converges into personal and administrative unity¹⁵. Czech Republic is not that case. Commander in Chief of the Armed Forces is the President, whose constitutional status refines the AFA. President then :

- approves the basic orders of military¹⁶,
- appoints and dismiss the Chief of the Military Office of the President,
- confers honorary or historical titles to military units, military equipment and military emergency units,
- loans combat flags to military units, military equipment and military emergency units.

None of these activities has, however, direct connection with the employment of the Armed forces, whether in combat or in peace. Two of the Armed forces are also linked with the President of the Republic, which have only – though - a minimal military force. These are the Military Office of the President of the Republic and the Castle Guard.

Military Office of the President of the Republic is an armed force consisting - and I beg your attention now - of eleven military officers. The Office mission is mainly to coordinate the execution of the powers of the President in relation to the management of the Armed forces, and governing the Castle Guard.

Castle Guard is then composed of 655 soldiers, whose mission can be summed up into two points:

- surveillance of the Prague Castle, and
- ceremonial escort of the President (including the Castle Music).

¹⁵ In the USA the Armed forces (called military forces therein) consist of the Army, Navy, Marine Corps, Air Force, and Coast Guard. While the President of USA is the overall head of the military, the US Department of Defense is the principal organ by which military policy is carried out., the President has an advisory National Security Council to coordinate military action with diplomacy. Both the President and Secretary of Defense are advised by a six-member Joint Chiefs of Staff, which includes the head of each of the branches, led by the Chairman of the Joint Chiefs of Staff (currently Admiral Michael Mullen).

¹⁶ There are two in fact – Basic order of Armed forces (Order I.) and Basic executive order of Armed forces (Order II.)

Officers and members of the Castle Guard are subordinated to the Chief of the Military Office of the President, but not the Chief of Staff. Their uniforms and material equipment is covered through the Office of the President, not the General Staff nor Ministry of Defence. The only fighting-fit and traditional groupage remains - within the Armed forces - the Army.

The Army is the foundation of the armed forces (as is stated explicitly in AFA) and is divided into military units, military equipment and military rescue services. The primary mission of Army is to ensure the military defense of the country against aggression and to meet commitments that come from international treaty obligations of the Czech Republic on collective defense. It is also set to fulfill tasks within peacekeeping operations in regions of instability or conflicts, and to implement rescue and humanitarian missions both on the national territory and abroad. Army, however, can be used internally, for predetermined reasons, such as disaster relief, the carriage, the guarding and other tasks¹⁷.

A State authority responsible for managing the Army is the Ministry of Defence. Its powers derive partly from AFA, but also from the Act on competency, where in its § 16 is being indicated that the Ministry of Defence is a central state authority of administration in particular for the defense of the Czech Republic, for the Czech Army control and management of military regions¹⁸. The Ministry is headed by the member of Government. But the government itself has no direct relationship to military control; the Government has only a certain power delegated in connection with the approval of operational plans, projected scope of military population and structure of the Armed forces.

Armed forces form part of the administrative structure of the State, the State administration being dependent on the executive branch. The role of armed forces in safeguarding national security¹⁹ and in implementing the defence

¹⁷ More is provided for by the provision of § 14 sec. 1 of the act no. č. 219/1999 Coll.

¹⁸ The military region is an outlined part of the Czech Republic territory formed to be used for defense of the state and military training. The region is a territorial administrative unit within Czech Republic, but it does not belong to cadastre of any municipality. The state's administration of such a military region is executed by the Military Regional Office. Citizens, living in these regions, are not allowed to own property. The regulation is laid by the Act No. 222/1999 Coll., on defense of the Czech Republic

¹⁹ In 2005, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1713/2005 which called upon Council of Europe member States to adhere to the principles of democratic oversight of the security sector, including intelligence services, police, border guards and the armed forces. With regard to the armed forces, the Recommendation stipulates that national security is the armed forces' main duty. This essential function must not be diluted by assigning the armed forces auxiliary tasks, save in exceptional circumstances.' (Art. IV-a). Moreover, the Recommendation States that the deployment of troops abroad should be in accordance with the United Nations Charter, international law and international humanitarian law, while the conduct of the armed forces should be subject to the jurisdiction of the International Criminal Court (Art. IV-e)

policy decided by the executive should be understood taking into account their position within the distribution of powers of the State and the checks and balances between them.

One of the most contentious part of the statutory definition is a question of command and control. The AFA provides²⁰ that the Minister issues commands to secure the tasks of the Army, while these commands that are binding for soldiers in active service. Just in the next paragraph, however, it is stated that the General Staff of the Army of the Czech Republic is a part of the Ministry, which Staff provides the military command. From such legal construction a question appears: Which line of the chain the command follows? The situation is further complicated by the fact that the Chief of Staff is appointed by the President on Government's proposal and after consulting the relevant parliamentary committee on defense. The President might also dismiss the government's proposal. Chief of General Staff is, however, in the performance of his powers subordinated to the Minister of defense. Do you consider this area complicated? Well, it really is!

Conclusion

Well, what is going on with the legal personality? Despite all the complexity of command and control, we must bear in mind that the Armed forces have no legal personality. Therefore they do not enter into legal relationships on their own behalf; they can not commit to any binding engagements, own no property of immovable assets and can not even acquire any. They are therefore just one component of the State and assets, which are in their use, remain state property.

The uniqueness of the Ministry of Defence is that a special organization - Military Office for legal representation – acts instead in legal relations is. This office acts on behalf of government unit - the Ministry of Defence in the judicial proceedings in the civil, labor (service), and administrative field of law and at legally complex cases, at the request of Commander of military unit or facility, as well as in administrative proceedings. Legal basis for such representations are given in § 3 Act No. sec. 6 of an Act no. 219/1999 Coll. on Armed Forces, and in § 7 sec. 2 of Act No. 219/2000 Coll. On property of the Czech Republic and its representation in legal relations.

I want to emphasize two facts at the very end of this paper. Diversity management of the Armed forces and the quantity of command levels affect in any way the question of subjectivity, since there exists the only one,

²⁰ § 7 sec. 2 and 3 of the Act no. 219/1999 Coll.

outlined to the state. Out of the State exist and commit its branches only²¹, but on behalf of the State and onto its account.

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²¹ § 3 sec. 1 of the Act no. 219/2000 Coll., On property of the Czech Republic and its representation in legal relations