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"Politics and law in constitutional justice; from the political questions' doctrine to judicial politics"
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Political questions in the case-law of the Czech Constitutional Court

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The topic of this conference, "Politics and law in constitutional justice; from the political questions' doctrine to judicial politics", has certainly not been chosen at random; it is both attractive and interesting, for almost a century it has been considerably controversial in the judicature of American federal courts, and, in particular, it has been undoubtedly very topical in the current practice of the constitutional courts of the Central and Eastern European countries for the last twenty years, from the iron curtain's fall. The very title of this topic places next to each other, and possibly also opposite each other, the American doctrine – historically rooted in the efforts of federal courts of the United States to avoid entering the territory designated by the Constitution to the Congress and the President and to avoid interfering with the controversies between lawmaking and executive powers – and the less clearly defined "judicial politics" of the European supreme and in particular, constitutional courts, which especially in the post-communist part of Europe naturally cannot avoid their legitimate role in resolving highly political conflicts when the principles of plural democracy, legal state and fundamental rights and freedoms protected by the new democratic constitutions are at stake, even though they may then be sometimes criticised for judicial activism and suspected of tendencies for establishing the so-called "courtocracy". Also in the traditionally developed Western democracies, one can observe a certain tendency to reglementation and judicialization of political processes, which had been the exclusive domain of the political parties' free competition in the past.

The involuntary role to sometimes take the position of an actor in some highly controversial, widely publicized and closely followed political conflicts could not have been avoided by the Constitutional Court of the Czech Republic either, during its sixteen years of existence; especially the last two years were notably rich in this respect. During the past several weeks, the Czech Constitutional Court was dealing with the second motion of a group of senators, members of the upper chamber of the Parliament, to review preliminarily the consistency of the so-called reform Lisbon Treaty with the Czech constitutional order; the judgement was promulgated in the morning of November 3 and the President's signature in the same afternoon ended an internal political dispute of many months concerning the ratification of this treaty, by which the Czech Republic – as the last of 27 European Union's member countries – removed the last obstacle for the Lisbon Treaty coming into force.

When considering what would be the best way to use this opportunity to talk at this conference – with a topic so wide that it could be elaborated into a theoretical lecture of several hours – I finally opted for a paper by which I will try to describe in detail a recent judgement by the Czech Constitutional Court; in the particular proceedings, our Court was at first presented with a task to review the constitutional conformity not of a common, but constitutional act, and was confronted with the motion to dismiss this constitutional act because of its conflict with the constitutional order. This Constitutional Court's judgement is, however, at the same time an example of a decision which immediately and substantially influenced the current political crisis in the country; it concerns shortening of the term of office of the Chamber of Deputies, the lower chamber of the Czech Parliament, intended by a constitutional act adopted by the lower chamber itself, and the validity of the President's calling an early parliamentary election.

First, a few words on the political and legislative development, preceding the Constitutional Court's proceedings. This spring, the Chamber of Deputies voted no confidence in the coalition government which emerged from the last parliamentary election of 2006. This government handed in its resignation to the President; meetings of political parties represented in the Parliament followed, leading into an agreement on the formation and appointment of a new temporary, so-called caretaker government and subsequently into an agreement to shorten the regular term of office of the Chamber of Deputies and to call an early election to the Chamber of Deputies to be held in autumn this year. The procedure, by which the political representation chose to carry the agreement on early election into effect, was not new to the Czech Republic; it had already been used once, in 1998, and already

at that time strong doubts were raised about its constitutional conformity and its consistence with the constitutionally anticipated procedure for dissolution of the Chamber of Deputies. However, at that time the Constitutional Court had no opportunity to assess the constitutionality of such a procedure, because it understandably could not have done so of its own initiative and received no qualified motion at that time. The same method of arriving at early election, which was challenged at the Constitutional Court this time, had two steps: the Chamber of Deputies adopted by a qualified constitutional majority a draft of a constitutional act on the shortening of the fifth term of office of the Chamber of Deputies, which was supposed to terminate as of the day of the election to take place on October 15 this year, the same act was afterwards also adopted by the Senate, the upper chamber of the Czech Parliament, and the President subsequently pronounced a decision – based on the adopted constitutional act – to call an election to the Chamber of Deputies of the Parliament of the Czech Republic, which was countersigned by the Prime Minister.

When on August 26 the Constitutional Court received a constitutional complaint of Mr. Miloš Melčák, deputy of the lower chamber of the Parliament, the pre-election campaigns of all important political parties had already been well under way. The movant sought derogation of the President's decision to call an election, which was supposed to take place in the first half of October, and along with his constitutional claim, he also filed a proposal for derogation of the constitutional act on shortening of the term of office of the Chamber of Deputies, based on which the President made his decision. He felt affected by the President's decision, in particular, in his right for undisturbed exercise of his office. On September 1, the Constitutional Court deferred the President's decision, the proceedings in the matter of constitutional claim were suspended and the proposal to derogate the constitutional act on shortening of the term of office of the Chamber of Deputies was transferred to the plenary of the Constitutional Court for judgement within the so-called proceedings for control of regulations. After a hearing of September 10, the Constitutional Court promulgated its judgement, cancelling thereby the constitutional act on shortening of the fifth term of office of the Chamber of Deputies and promulgated that concurrently with that also the President's decision to call an early election becomes void. The judgement was adopted by a majority of thirteen judges, only two judges of the Constitutional Court had a different opinion on the judgement. While the public, which was able to follow the hearings in direct television broadcast, could not have been too surprised by the verdict of the Constitutional Court, the political parties which had invested time, energy and money into their pr-election campaigns, were generally quite critical of the Constitutional Court's judgement; the legal community was divided in their evaluation. At the first sight, it could seem difficult to understand that the Constitutional Court proceeded to cancel a constitutional act which formally – in the hierarchy of the primary sources of law – is along with the Constitution a part of the constitutional order; when listing the competencies of the Constitutional Court, the Constitution itself does not explicitly give the Constitutional Court the power to cancel, beside common acts, also the constitutional acts.

I will now attempt at a very brief summary of the principal underlying reasons based on which the Constitutional Court promulgated its judgement.

The Constitution of the Czech Republic, Article 9, par. 2, stipulates: "A change to substantial requisites of a democratic legal state shall be unacceptable". This is the so-called imperative of unchangeability of the material core of the Constitution, that is excluding the "material core of the Constitution" from disposition of the lawmakers, similarly to the so-called "Ewigkeitsklausel", included in Article 79, par. 3, of the Basic Law of the FRG. Already in its first judgement on control of regulations in the matter of constitutionality of the act on the illegitimacy of the Communist regime and protest against it, the Constitutional Court formulated a thesis that the new Czech Constitution is not based on value neutrality, it does not merely define institutions and processes, but it also incorporates certain regulatory ideas into its text, expressing the fundamental inviolable values of a democratic society. According to the concept of a material constitutional state, on which the Constitution of the Czech Republic is based, the law and justice are not at free disposition of the lawmaker and acts, because the lawmaker is bound by certain fundamental values, which the Constitution claims to be inviolable. Within the framework of the Constitution, the constitutive principles of a democratic society are placed above the legislative competence and thus also "ultra vires" of the Parliament. In the existing case law, the Constitutional Court included into the material core of the body of laws also the principles of the right to vote. Protection of the material core of the Constitution, i.e. the imperative of impossibility to alter substantial requisites of a democratic legal state according to Article 9, par. 2, of the Constitution, is not a mere appeal or proclamation, but a provision of the Constitution with normative consequences. Therefore, the Constitutional Court in its judgement articulates the necessity to include the categories of constitutional acts to the concept of "acts" subject to review of their consistency with Article 9, par. 2, of the Constitution, with eventual derogatory consequences. Otherwise, the

inadmissibility of amendment to the substantial requisites of a democratic legal state, anchored in said Article, would be deprived of its normative nature and it would only remain a political or moral appeal.

While assessing the proposal for cancellation of a constitutional act, the Constitutional Court had to ask and to answer the following basic questions: What delimiting, conceptual signs define the category of constitutional acts according to the Constitution? Is constitutional act an act which is thus labelled by the Parliament and adopted by a qualified procedure? Or does it also have to meet other conditions: the condition of competence (authorisation) according to explicit provisions of the Constitution and a material condition, specified in the already mentioned Article 9, par. 2, of the Constitution?

In a number of its judgements, the Constitutional Court has already expressed the requirement for a legal regulation's universality. Arguments in favour of universality of an act, as compared to an ad hoc act for a single case or single use, are the division of powers, equality, right for an independent judge and exclusion of arbitrariness in the execution of public authority. The Constitutional Court considers the universality of an act, and naturally of a constitutional act, a significant requisite of a legal state. According to its Article 9, par. 1, the Constitution may only be amended by constitutional acts. The reviewed constitutional act on shortening of the term of office is an ad hoc act, for a unique event, but it is not complementing or amending the Constitution. It is a constitutional act only by its form, not by its contents. By its contents, it is an individual legal act. The answer of the Constitutional Court to the question whether the mentioned Article 9, par. 1, of the Constitution also authorises the Parliament to adopt individual legal acts in the form of constitutional acts is 'no'. With the absence of constitutional authorisation to adopt ad hoc constitutional acts, the constitutional conformity of such a constitutional act could only be based on an acute need to protect the material core pursuant to Article 9, par. 2, of the Constitution and could only be accepted under absolutely exceptional circumstances, such as a state of war or natural disasters, while such a procedure would have to comply with the terms following from the proportionality principle. Therefore, the Constitutional Court closed this part of its justification by the following: Even a lawmaker may not claim a norm to be a constitutional act if it lacks the nature of an act, let alone a constitutional act. A contrary procedure is an unconstitutional arbitrariness. Excluding review of such acts by the Constitutional Court would totally eliminate its role of the constitutionality protector.

In its justification of the judgement, the Constitutional Court further states that the very early termination of the term of office of the Chamber of Deputies is by itself an institute anticipated and approbated by the Constitution, the procedure for dissolution of the Chamber of Deputies and calling an early election is explicitly anchored in Article 35 of the Constitution. However, for its application, the Constitution specifies cumulatively both material conditions and a respective procedure, without any option of diverting from them. The challenged constitutional act in given case totally ignores both, suspending Article 35 ad hoc temporarily (this is the so-called breakthrough – in German doctrine the Durchbrechung – of the Constitution by the Parliament), specifying – outside the framework of procedures prescribed by the Constitution – a procedure for this single case, different from the one assumed and required by the Constitution, without being approvable due to such exceptional purposes among which the Constitutional Court included for example the circumstances of war or natural disasters. For the sake of comparison, it is worth pointing out that the German Federal Constitutional Court promulgated similar judgements.

So much for the basic underlying reasons for derogation of the constitutional act on the shortening of the fifth term of office of the Chamber of Deputies. The Constitutional Court reached a conclusion on the constitutionally inadmissible individual and retroactive nature of this constitutional act, for adoption of which the Chamber of Deputies has not the constitutional authority and which is contrary to the substantial requisites of a democratic legal state. By cancelling this constitutional act, however, the Constitutional Court, as it notes at the end of justification of its judgement, has not limited the citizens' right to exercise their right to vote, because the only consequence of this step is that the current democratically established Chamber of Deputies of the Parliament of the Czech Republic will be executing its functions until the end of its regular term of office.

In conclusion, there is a question for the commentators of our decision: did the Czech Constitutional Court in its judgement act as a too activist court when it did not refuse – using a formulated "political question" doctrine – to deal meritoriously with the issue, influencing significantly the political controversy as well as the legislative and electoral processes? In the United States, the "political question" doctrine is traditionally one of the limits of jurisdiction of the federal courts, having its origin in the theory of the division of powers. However, let us remember the surprise, caused to many observers, when in 2000 the American Federal Supreme Court did not

consider this doctrine to be an obstacle for its review of the electoral procedure in the state of Florida, deciding by its judgment in the last instance about the next President of the United States.