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**REVIEW BY THE CONSTITUTIONAL  
COURTS OF PROCEEDINGS BEFORE  
ORDINARY COURTS APPLYING  
COMMUNITY LAW**

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**REPORT**

**The Czech Constitutional Court Doctrines on Community and  
Union Law**

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# The Czech Constitutional Court Doctrines on Community and Union Law

## A) The Euro-Amendment to the Constitution of the Czech Republic

Since the Czech Constitution was a markedly national constitution (just as corresponds to the norm in the region), in the period when the Czech Republic was preparing for accession to the EU, it was necessary to amend the Constitution so as to make possible the transfer of certain powers and competences to European entity. In the end Constitutional Act No. 395/2001 Sb. (hereinafter “Euro-Amendment to the Constitution”) was adopted and came into effect on 1 June 2002.

In order to be gain better oriented on this issue, let us have a look at the text of the relevant provisions.

### *Article 1*

*(1) 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.*

*(2) The Czech Republic shall observe its obligations resulting from international law.*

The Euro-Amendment introduced a second paragraph into Article 1.

### *Article 10*

*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*

The Euro-Amendment entirely reformulated Article 10. The original version of this Article provided that only international treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated take precedence over statutes.

### *Article 10a*

*(1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.*

*(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.*

This Article was, in its entirety, newly incorporated into the Constitution.

### *Article 49*

*The assent of both chambers of Parliament is required for the ratification of treaties:*

*a) affecting the rights or duties of persons;*

*b) of alliance, peace, or other political nature;*

*c) by which the Czech Republic becomes a member of an international organization;*

*d) of a general economic nature;*

*e) concerning additional matters, the regulation of which is reserved to statute.*

This Article of the Constitution, in terms of its content, expanded the exhaustive enumeration of international treaties by those stated in the new letters a) – c).

*Article 87*

*(1) The Constitutional Court has jurisdiction:*

*a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order;*

*b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute;*

*c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state;*

*d) over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;*

*e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator;*

*f) to resolve doubts concerning a Deputy or Senator's loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator;*

*g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2;*

*h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66;*

*i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented;*

*j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws;*

*k) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body.*

*l) over remedial actions from a decision of the President of the Republic declining to call a referendum on the Czech Republic's accession to the European Union,*

*m) to determine whether the manner in which a referendum on the Czech Republic's accession to the European Union was held is in harmony with the Constitutional Act on the Referendum on the Czech Republic's Accession to the European Union and with the statute issued in implementation thereof.*

*(2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.*

The Euro-Amendment added a new paragraph 2 to Article 89 which introduces a new procedure to the Constitutional Court's jurisdiction. As far as concerns para. 1, lit. m), that is the review of the referendum on the Czech Republic's accession to the EU, this jurisdiction was not bestowed upon the Constitutional Court until the adoption of Constitutional Act No. 515/2002 Sb.

*Article 89*

*(1) Decisions of the Constitutional Court are enforceable as soon as they are announced in the manner provided for by statute, unless the Constitutional Court decides otherwise concerning enforcement.*

*(2) Enforceable decisions of the Constitutional Court are binding on all authorities and persons.*

*(3) Decisions of the Constitutional Court which declare, pursuant to Article 87 para. 2, that a treaty is not in conformity with the constitutional order, are an obstacle to the ratification of the treaty until such time as they are brought into conformity with each other.*

The Euro-Amendment added a new paragraph 3 to Article 89, which expands the jurisdiction of the Constitutional Court to the *a priori* or preventive control of the constitutionality of treaties.

It is evident from the cited provisions, that the Euro-Amendment did not modify the normative directive, contained in Article 1 para. 1 of the Constitution, to maintain the sovereignty of the Czech Republic. Nonetheless, Article 10a para. 1 generally made possible the transfer of certain powers of Czech state bodies to international organization or institution. The Czech Republic thus joined the group of states whose constitution does not expressly refer to the EU or EC. This approach was adopted because of the expected development of the European entity's legal personality which up to now is solely the EC, and not the EU, possesses. This transfer of powers was realized on the basis of the referendum on accession, held on 13-14 June 2003. A total of 4,446,758 persons cast their vote in favor of accession.

Since the adoption of the Euro-Amendment, there has been an ongoing discussion in Czech legal scholarship on the legal basis of the operation of Community law in Czech law starting from the day of the Czech Republic's accession to the EU, including the basis for its precedence over national law. Nonetheless, it appears that a consensus exists that there is sufficient constitutional basis for the operation of Community law, including its manifestations arising in the course of the interaction of Community law with national law in the application of procedural law.

It can be said that in legal scholarship there is one school of thought which considers Article 10 of the Constitution as the constitutional basis for the operation of Community law, and another school which finds Article 10a to be the basis. The first school proceeds from the opinion that the purpose of Article 10a is a provision that is . In the view of this school, Article 10a provides the authorization for Czech bodies (the Government, the Parliament, the President of the Republic), to participate in international transactions connected with the transfer of certain powers of the Czech Republic, in the given case to the EU (the author is using the term, "EU", in the sense of the EC, that is the First Pillar of the EU). This school is of the view that, without such constitutional empowerment, the conclusion of the Treaty of Accession to the EU would have been in conflict with the Constitution. Therefore, they adhere to the position that Article 10a is an indispensable constitutional prerequisite for joining an integrational grouping, and no other provision would enable it to do so. This school espouses the view that Article 10 of the Constitution has another purpose, consisting in the incorporation into Czech law of already validly concluded international agreements. It is in this way that international agreements yield a set of legal rules which public authorities are obliged to apply, moreover with precedence over statutes. These authors, thus, conceive of Article 10a and 10 of the Constitution as having divergent and non-interchangeable purposes.

The second school of thought proceeds from the opinion that Article 10 of the Constitution relates to “ordinary treaties”. Article 10a is incompatible with Article 10 since it regulates treaties of a different type, that is delegating treaties. The authors in this school cite that Article 87 para. 2 of the Constitution in support of their opinion, as it empowers the Constitutional Court to carry out *a priori* review of norms in relation to international agreements concluded pursuant to Article 10a and Article 49. The authors infer that, if the Constitution draws an explicit distinction between these two groups of treaties, then that must be taken into account. They further argue that international agreements under Article 10 merely take precedence over statutes, whereas treaties under Article 10a have, in the view of these authors, no less than actual applicational precedence over the constitutional order. That is, to the extent defined by these treaties, or to the extent which these treaties delegated authority to the EU, the constitutional order does not apply. At the same time, these authors accept that the Constitution cannot itself bestow greater legal force than it itself has as, in that case, it would cease to be the font and origin of the legal order and the state constituted by the Constitution would cease to be sovereign. Thus Community law, whether it be primary or secondary, is not applied in the national setting due to the fact that the national constitution so provides, rather because Community law itself so provides. In other words, these authors tend toward the dogmatic argumentation which perceives the particular character of Community law, as receiving (regardless of whether it is primary or secondary law) different treatment than that received by ordinary international agreements. Whereas Article 10 of the Czech Constitution itself declares that ordinary international treaties form a part of national law, the Founding Treaties or the Treaty of Accession of the Czech Republic to the EU, forms a part of Czech law on the basis of its own legal force and operates in national law regardless of whether national law is otherwise closer to the monistic or dualistic model.

## **B) The Czech Constitutional Court and Community Law**

On 8 March 2006 the Constitutional Court issued its judgment in the matter of Sugar Quotas (Pl. ÚS 50/04), in which it showed continuity with the doctrine mentioned above in the second place. However, it expressed a certain in relation to the ECJ’s doctrine and in relation to the applicational precedence of Community law over national constitutional law. Still if left open the issue (or rather suggested scepticism) whether it was prepared, in a norm control proceeding to consider itself as a court or tribunal which is called upon, pursuant to Article 234 EC Treaty, to refer preliminary questions to the ECJ.

The Constitutional Court went on to the review of the legal regulation of the key to the allocation of sugar quotas. It reviewed the key with reference to national constitutional law, however it interpreted that law in light of the ECJ case-law on general principles of law, which form a part of Community law. The Constitutional Court let these principles radiate into the interpretation of constitutional law. It concluded: “Although the Constitutional Court’s referential framework has remained, even after 1 May 2004, the norms of the Czech Republic’s constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law”.

Decision in the given case was rather complicated by the circumstance that the Constitutional Court had already previously (in its Judgment Pl. ÚS 39/01) found that the key, in effect at that time, for the allocation of quotas had been laid down under discriminatory (that is, unequal)

circumstances (the key set down the referential time period for the assessment of capacity for sugar production). It was necessary to overrule this opinion, a step which the Constitutional Court took by applying the doctrine contained in its judgment Pl. ÚS 11/02. In this judgment the Constitutional Court formulated the doctrine of the continuity of its own case-law, which it deduced from the attributes of the democratic law-based state. There is no doubt that, as a result of the Czech Republic's accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. Without doubt, then, just such a shift occurred in the legal environment formed by sub-constitutional legal norms, which necessarily must influence the examination of the entire existing legal order, constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with Article 9 para. 2, or Article 9 para. 3 of the Constitution of the Czech Republic. At the same time, in the Constitutional Court's view, the current standard within the Community for the protection of fundamental rights cannot give rise to the assumption that this standard for the protection of fundamental rights through the assertion of principles arising therefrom is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court. The Constitutional Court therefore came to the conclusion that in this case there are grounds for departing from its judgment in matter No. Pl. ÚS 39/01. This modification did not, however, relate to the substantive assessment itself of the key selected by the Government, rather to the fact that the Constitutional Court no longer deems itself to be called upon to subject such a key to abstract constitutional review in the manner in which it did in its judgment No. Pl. ÚS 39/01. Naturally, that does not rule out the possibility that the ordinary courts address, in specific cases of individual producers, the fairness of this key, assuming that specific facts will be established on the basis of which such inequality is alleged.

The Constitutional Court then concerned itself with the Government's entitlement to adopt such a legal provision, which merely paraphrases Community law contained in a regulation (Commission Regulation (EC) No. 1609/2005) and reached the conclusion that, by proceeding as it had, the Government acted *ultra vires*. The Government failed to respect the fact that, as a result of the Czech Republic's accession to the EU, a transfer of powers of national organs to supra-national organs has taken place on the basis of Article 10a of the Constitution of the Czech Republic. In the moment when the Treaty Establishing the European Community, as amended by all revisions to it and by the Treaty of Accession, became binding on the Czech Republic, a transfer was effected of those powers of national state organs which, according to EC primary law, are exercised by organs of the EC, upon those organs.

The Czech Republic conferred these powers upon EC organs. In the Constitutional Court's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Article 1 para. 1 of the Constitution of the Czech Republic. In the Constitutional Court's view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive

law-based state. In such determination, it is the Constitutional Court which is called upon to protect constitutionalism (Article 83 of the Constitution of the Czech Republic). The essential attributes of a democratic state governed by the rule of law, according to Article 9 para. 2 of the Constitution of the Czech Republic, these remain beyond the reach of the Constituent Assembly itself.

To conclude, the Constitutional Court spoke regarding the the operation of Article 10a of the Constitution as well as the basis upon which Community law operates in the domestic legal order. In this regard, it stated the following: Direct applicability in national law and applicational precedence of a regulation follows from Community law doctrine itself, as it has emerged from the case-law of the ECJ. If membership in the EC brings with it a certain limitation on the powers of the national organs in favor of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to determine the effect of Community law in their national legal orders. Article 10a of the Constitution of the Czech Republic thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic. The Constitutional Court is of the view that – as concerns the operation of Community law in the national law – such approach must be adopted as would not permanently fix doctrine as to the effects of Community law in the national legal order. A different approach would, after all, not correspond to the fact that the very doctrine of the effects that Community acts call forth in national law has gone through and is still undergoing a dynamic development. This conception also best ensures that which was already mentioned, that is, the conditionality of the transfer of certain powers.

### **C) The Czech Constitutional Court and European Union Law**

The Constitutional Court's judgment of 3 May 2006 (Pl. ÚS 66/04) concerned the implementation of the Framework Decision of the Council (EU) No. 2002/584/JHA, known as the "European Arrest Warrant". As far as concerns doctrine on the relation of Union law to Czech constitutional law, the Constitutional Court took as its starting point the following thesis: Just as with other state organs, the Czech Republic's accession to the EU resulted, on the basis of Article 10a of the Constitution, to a certain extent to the limitation upon the Constitutional Court's jurisdiction. In view of the ECJ doctrine on the supremacy of Community law, the Constitutional Court can exercise its jurisdiction in relation to norms of EC law only under certain circumstances. According to the ECJ, where Community law applies within its proper sphere, it is supreme, so that it cannot be contested by means of national law referential criteria, even on the constitutional level. According to this doctrine the Constitutional Court would have no competence to decide on the constitutionality of European law norms, not even in the situation which they are contained in Czech act. Thus is its competence to adjudge the constitutionality of Czech norms restricted in the same sense.

In the same judgment it continued as follows: „In its 8 March 2006 judgment No. Pl. ÚS 50/2004, the Constitutional Court refused to recognize the ECJ doctrine to the extent that it required absolute precedence of Community law. It stated that the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understandably, unless this extraordinary circumstance and highly unlikely situation were to come about, the Constitutional Court, pursuant to the ECJ doctrine of supremacy, will not

review individual norms of Community law for their consistency with the Czech constitutional order. In this matter, however, the petitioner asserted that the adoption of the European Arrest Warrant resulted in just such a conflict with the essential attributes of a democratic law-based state. However, also in its judgment No. Pl ÚS 50/04 the Constitutional Court adumbrated a further limited exceptions to the position it had no competence to review the constitutionality of Czech legal enactments adopted to transpose or implement EC law. In situations where the Member States are implementing European law norms and the implementation leaves Member States a certain margin of discretion as to the choice of means to accomplish the aim laid down in the European law norm, then the Member State may review the resulting act in terms of conformity with its own constitution. Thus, the Member States are free in their choice of the means, made available to them under Community law, for accomplishing the given objective, such that they may select means which are consistent with their respective constitutions and exclude those which are in conflict therewith. As a corollary to this doctrine, announced in Pl ÚS 50/04, where the delegation of authority leaves the Member State no margin of discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm of European law, in principle the doctrine of supremacy of Community law does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic, naturally, with the exception as described above. Although the provisions contested in the present case are of a mandatory nature, the situation presented in this case is substantially different from the matter resolved in its judgment No. Pl ÚS 50/04, in that it involves not Community law in the classic sense, that is under the First Pillar, rather Union law under the Third Pillar, in the form of a framework agreement. The Constitutional Court concurs with the petitioner that the Framework Agreement, which formed the basis for the adoption of the contested norms, does not have direct effect. The purpose of a framework decision is to approximate the Member States' legal and administrative enactments. While framework decisions are binding on Member States as concerns the objective which should be accomplished, the choice of form and means is left to the national bodies. A framework decision cannot be invoked against natural or legal persons unless it has been implemented into national law. Thus, framework decisions must be implemented by means of a domestic law enactment, which is the present case is that act whose provisions it is proposed should be annulled. Despite the fact that the contested provisions were adopted for the purpose of transposing a framework agreement, and, the framework agreement left no room for discretion as to the choice of means, still it may be the case that the Constitutional Court may review this enactment for its consistency with the Czech constitutional order. Whether it may do so depends on the the actual nature and status of norms under the Third Pillar, such as Framework Decisions, in particular in relation to Member State legal orders.

The Constitutional Court acknowledged that the implementation of a framework agreement is not enforceable by the ECJ, however, for such a case it countenanced political and administrative pressure brought to bear on the Member States by the European Commission. It further drew attention to the fact that, in the case of Union law, the ECJ has not as yet clearly given its view of the status of such norms in relation to Member State legal orders. Nonetheless, it espoused the ECJ decision in the case of Maria Pupino, in other words the principle of loyal cooperation by the national courts towards the ECJ.

The Constitutional Court further observed that ECJ case-law is evolving. It stated that it even considered the possibility to submit a matter to the ECJ; in the end, however, it ruled out this step due to the fact that the Belgian Cour d'arbitrage had already taken the same step.

In my dissenting opinion, I expressed criticism of the doctrine the Court adopted on European Union law, as well as its standard of review for the contested statutory provisions. In my view

the Constitutional Court did not properly or thoroughly deal with the objection that, in the Third Pillar of the EU, a transfer, pursuant to Article 10a of the Czech Constitution, of a part of the Czech organs' powers to organs of the EU did not occur, nor could it have. Whereas the First Pillar of the EU is constructed on an enumeration of the substantively defined powers of the EC organs, if Article 10a of the Constitution is applied in the case of the Third Pillar, that would represent a "blank check" given to the EU organs in vaguely defined areas, or an entirely "framework" definition – that is, in the criminal agenda connected with justice and police. Since criminal law, by its very nature, is that field which most intrudes upon the fundamental rights, and above all into their very foundation, that is, into the liberty of the individual, such a "blanket" transfer of powers to the EU organs, pursuant to Article 10a of the Constitution, did not comport with the essential attributes of a democratic law-based state (Article 9 para. 2 of the Constitution of the Czech Republic). After all, according to the Czech Constitutional Court's jurisprudence (III ÚS 31/97), both respect for the individual endowed with fundamental rights and the state's obligation to protect the fundamental rights of individual persons constitute an immanent component the essential attributes of a democratic law-based state. It is a question, which in my view must be answered in the negative, whether the Czech Republic is even permitted to transfer to EU organs, pursuant to Article 10a of the Constitution, some part of its powers in the field of criminal law, with the consequence that the Czech Republic would be giving up constitutional control over this field, even assuming the reservation that the Czech organs would reassume these powers, should they be carried out by the EU in conflict, above all with Article 9 para. 2 of the Czech Constitution. My doubts about the possibility to transfer even precisely defined powers in the field of criminal law stems from the fact that, as of yet, the EU does not have its own constitution containing a catalogue of fundamental rights springing from commonly shared conceptions of the liberty of persons and of the possibilities to restrict them. In my conception the constitution is the unique legitimizing instrument which restricts the powers of the authorities of organized society, in the given case the EU authorities, exercise in this sensitive area, that is, in criminal law, even if merely on the plane of norm creation. The web of international agreements on which today's European Union is constructed does not, in my view, provide a sufficient guarantee of the protection of individual freedom in the literal sense. I am thus convinced that, in the context of the Third Pillar, the adopted framework agreements are, by their nature, "intergovernmental agreements", with all the consequences flowing therefrom. "By including into the Treaty on the EU the provision that direct effect is excluded, the Member States wished, in particular, to prevent the ECJ's doctrine on the direct effect of directive from being extended to framework decisions as well" (decision of the German Federal Constitutional Court of 18 July 2005, no. 2 BVR 2236/04).

The nature of framework decisions excludes their classification as international treaties under Article 10 of the Czech Constitution, alone due to the fact that they lack a constitutionally foreseen process of internal ratification (the assent of Parliament); thus, the preventive control of their constitutionality by the Constitutional Court is ruled out. In my view, the implementation of framework decisions is subject solely to the strictures of Article 1 para. 2 of the Czech Constitution, and is subject to full constitutional review only in the case of implementation of the framework decision by act of the national legislature. I concur with the judgment to the extent that the national implementation cannot be enforced through ECJ proceedings, however, in my view, the view expressed in the judgment to the effect that implementation can be enforced by the European Commission bringing political and administrative pressure to bear on the Member States is unacceptable, as I consider it in conflict with the attributes of a democratic law-based state, in which politics must confine itself within the bounds prescribed in constitutional principles.

All this led me to the conviction that the doctrine formulated by the Constitutional Court in relation to Community law cannot be applied in relation to acts in the Third Pillar, or to national enactments implementing framework decisions. In such cases, the threshold for review cannot be lowered all the way to the level of the essential attributes of the democratic law-based state, or the fundamental attributes of national sovereignty. On the contrary, in such cases the entire constitutional order must be applied as a referential criteria for the adjudication of constitutionality of the implemented framework decision. Accordingly, I think it necessary to observe that, when voting in the Council, the representative of the Government should always be mindful of the fact that their vote for the proposed act, which will need to be transposed into the Czech legal order, must pass muster from the perspective of the entire Czech constitutional order.

In contrast to the field of civil law, however, criminal law is that field of law in which are manifested the values particular to each individual Member State of the EU and which is also very sensitive since, after all, it is tied to the intrusion of public power into the personal liberty of individuals. The values which a society has gained through its experience and which its members share are prominently projected into the definition and interpretation of particular criminal offenses, as well as into the area of criminal procedural. Therefore, I cannot accept even the premise, contained in the judgment, that a sufficient level of value convergence exists among EU Member States. Evidence to the contrary can be found, for example, in the Spanish procedural institute of incommunicado detention. Without any attempt to judge it, it simply cannot be seen as in harmony with the conceptions of the just resolution of issues arising from the institute of habeas corpus, such as they are resolved in the Czech Charter of Fundamental Rights and Basic Freedoms. Moreover, in its judgment Pl. ÚS 36/01, the Constitutional Court held that it is not permissible to decrease the standard for the protection of human rights that has been attained.