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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**in co-operation with the**  
**CONSTITUTIONAL COURT OF AZERBAIJAN**

**Seminar on**

**“The Value of Precedents (national, foreign,  
international) for Constitutional Courts”**

**A FEW NOTES ON THE CASE LAW  
OF THE CZECH CONSTITUTIONAL COURT,  
THE EUROPEAN COURT OF HUMAN RIGHTS  
AND THE EUROPEAN COURT OF JUSTICE  
AND ITS ROLE  
IN THE CZECH REPUBLIC**

**Report**

**prepared by**  
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The theme of this conference – the role of the established practice of the chief European and national legal institutions in the milieu of the Czech Republic – is still for me that of a dream fulfilled. I say this even though fifteen years will have already elapsed in November this year from what we call the Velvet Revolution. No wonder, therefore, that I will use the this brief outline, from time to time, to share with you my personal experiences and impressions, and that theoretical approaches will not prevail in what I have to tell: rather than that, perhaps, I will take the role of an observer concerning how the Czech legal community's approach to these issues has changed and developed.

I completed my legal studies in socialist Czechoslovakia in a situation under which it was required by the 1968 Act on the Czechoslovak Federation that the Constitutional Court be established, but in reality – as later referred to in the later editions of university textbooks as an absolute fact – it was never established before the fall of communism. Nor did administrative courts exist, and indeed the judiciary for civil and criminal matters was de facto a two-instance system: a decision on an extraordinary remedy could only be made by the General Prosecutor, and the only role left for the Supreme Court was, in essence, to unify the practice of lower-instance courts and to influence it through the opinions of the Supreme Court panels, which – though formally non-binding – were in fact meticulously respected by all judges. Students at law faculties were inculcated with the idea that that precedent was not a source of law in the socialist legal system, while it was suggested to students of journalism that making court proceedings public in contradiction with the interests of the ruling Communist Party was not to be tolerated. Issuance of independently commented court decisions was out of question at that time. The constitutional law of the so-called capitalist countries was a very marginal subject. Legal history, comparative law studies and legal philosophy led a meagre existence beyond the horizon of official interest.

Why do I begin with this reminiscence?

It cannot be overlooked that most Czech judges currently serving in higher-instance courts, as well as the justices of the Constitutional Court, are people of my generation, or older colleagues, all with a similar academic background of legal education. It is evident that the only way to learn new ways of working with the incoming concepts of the rule of law and to acquire new ways of thinking is by post-graduate education and lifelong learning, including both self-study and the various educational modules now on offer.

Let me now ask a rhetorical question: have all had, or do all have, the motivation and the drive needed for intensive self-study? The answer, of course, primarily involves an important ethical issue; nevertheless, the impact of circumstances is also far from negligible.

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I was appointed Justice of the Constitutional Court of the Czech Republic in late May this year. I have not yet finished my first 100 days in office, and I am still a newcomer among you. From 1989 to 2004 I was a practicing lawyer, and in 2002–2003 I was Chairman of the Czech Bar Association. In my role as legal counsel I had plenty of opportunities to see the approaches of certain less flexible lawyers and judges and, on the other hand, opportunities to contribute to the work that was being done in the Czech Republic in the area we are now talking about.

I may perhaps start with some cautionary examples from the first years of the existence of a constitutional judiciary in this country.

In 1994, at a Prague appeals court, as a legal counsel I quoted a passage from the Convention for the Protection of Human Rights and Fundamental Freedoms, whose Czech text had already been known for two years, as it was contained in the Czech Collection of Laws. The chairing judge interrupted me and instructed me that “this court decides according to Czech law...”

Even four years later, at a Czech/Austrian seminar held in Linz for lawyers and judges about – among other things – the powers and structure of the European Court of Justice, one elderly first-instance judge said with relief during a break that she would have been truly fortunate to have retired before the Czech Republic joined the EU.

By giving these two examples, I would like to show that, relatively speaking, judges of general courts of lower instances had a most indifferent attitude to the practices of the European Court of Human Rights, the European Court of Justice and even the Constitutional Court of the Czech Republic: they began feeling the need to study these things much later than did lawyers and Constitutional Court justices.

Leaving aside the brief existence of the Czechoslovak Federal Constitutional Court (February to December 1992), the Constitutional Court of the Czech Republic began working on 15 July 1993. The first plenary judgement was issued so late as 21 December 1993. There were much fewer cases before Supreme Court panels, compared with today, because the conditions for filing individual constitutional applications – which in the first period often concerned the decisions of general courts in restitution cases – were not met: those conditions consisted in exhausting all procedural remedies available from the general courts. Thus the judgements of the Constitutional Court began growing in number later, in the latter half of the 1990s.

I was far from being the only lawyer to focus on the judgements of the European Court of Human Rights. The Czech Bar Association established a study committee for its many members who were interested in these issues; the Chamber’s International Department had the relevant judgements at its disposal; and workshops were held, which were attended by experts – judges or assistants from that Court. The law journal “Bulletin advokacie” regularly published articles with analyses of the new case law. Although there was a certain gap due to the fact that cases against the Czech Republic were still pending, I could see from the articles authored by the justices of the Constitutional Court that they were thoroughly studying and monitoring the judgements of the European Court of Human Rights. Common interest in making use of these judgements urged Czech lawyers and many of the justices of the Constitutional Court to co-operate, so that many of the justices acted as lecturers at training courses for lawyers and trainees, examiners for bar exams and contributors to Bulletin advokacie.

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I have not yet mentioned our young generation of lawyers. They enjoy several advantages, such as a better knowledge of languages, the current focus of study programmes at the faculties of law and various study abroad opportunities (including those with special focus).

As to the judgements of the European Court of Human Rights, the handicap of those who are not able to read in English or French has been removed, because the judgements of that Court are now translated into Czech and published in the journal “Judikatura Evropského soudu pro lidská práva” (Judgements of the European Court of Human Rights). In addition, 15,000-20,000 printed pages of the judgements of the European Court of Justice are now being officially translated. The plenary judgements of the Czech Constitutional Court are published in the

Collection of Laws. All judgements passed by the Constitutional Court in a given calendar year are contained in the Collection of Judgements of the Constitutional Court, which is published for public use on an annual basis. In addition, the journal “Judikatura Ústavního soudu ČR” (Judgements of the Czech Constitutional Court) has already been in publication for five years. Hence, the availability of the case law for Czech readers is improving, and the reader can choose between its printed or electronic form. Commentaries on the judgements, including the critical ones, are no longer taboo.

Awareness of the case law has also been improving in recent years in the general judiciary. The case law of the Czech Constitutional Court, the European Court of Human Rights and the European Court of Justice is being analysed and commented on under the judges’ training programme in the Law Academy. The results are already evident. There is an increasing number of cases where the judges of general courts use the opportunities offered by procedural rules: they stay the proceedings and propose that certain regulations be revoked because of a contravention of the constitution of the Czech Republic. The period of real contention between the Supreme Court and the Constitutional Court, referred to as the Courts’ War in the media (which perhaps was primarily due to the then unusual situation where the Supreme Court was party to the proceedings before the Constitutional Court and where the Supreme Court’s decisions could be overruled) is already over. The prospects for the further work of the Constitutional Court seem optimistic at last.

Now let me address the current situation.

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The Constitutional Court’s first ten-year term expired in 2003. At present the Constitutional Court does not have a full quorum of members: two of the required fifteen constitutional justices have not yet been appointed. The appointment of new constitutional justices for the next period has brought about a significant change: only three of the justices from the previous arrangement were re-appointed.

The continuity of the Constitutional Court’s deliberations in the future is guaranteed by Section 23 of Act No. 182/1993, on the Constitutional Court: “if in connection with its deliberations a panel decides upon a proposition of law differing from the proposition of law pronounced by the Court in a previous judgement, it shall submit the issue to the Plenum for consideration. The Plenum’s determination is binding on the Panel in further proceedings”.

Discussions are under way as to the binding nature of the judgements of the Constitutional Court of the Czech Republic. The opposite poles in this discussion are given, on the one hand, by the view that all decisions are generally binding, including the “supporting reasons” stated in the justification, and on the other hand by the view that decisions made by the Constitutional Court (except the award of the judgements through which the Constitutional Court fulfils its role as a negative legislator, i.e. as an authority that abolishes legal regulations) are not generally binding.

In my view, the Constitutional Court’s propositions of law, expressed in the substantiation of its judgements, are binding on the Constitutional Court and may only be departed from in a manner defined by law. They are not legally binding on other public authorities and on natural persons; nevertheless, they should be respectfully taken into account within the activities of such authorities, and should as such be observed. In spite of this, it has happened recently that after the abolishment by the Constitutional Court of the

government's rent regulation measures as being in contradiction to the Constitution, the government adopted other measures to regulate rent under conditions analogical to those for which the previous regulation was abolished. I hope this will remain an exception, as it is far from supporting the feeling of legal certainty and encouraging respect of law. ...

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As I have said, the case law of the European Court of Human Rights is available and known in our country. It is used on a daily basis in preparing the Constitutional Court's judgements. It is regularly referred to in the substantiation of those judgements. This further contributes to its publicity.

It is worthwhile at this point to mention a phenomenon that affects many countries, including the Czech Republic.

For many applicants, constitutional application offers further hope and represents another chance to try to reverse judgements unfavourable to them. Although clear decisions are already available in respect of many issues, the backlog of other similar applications is not diminishing. Unsuccessful applicants continue to pursue their cases, bringing them before the European Court of Human Rights. And there are many who think – and have good reasons to do so – that the Constitutional Court is becoming a “judgement-making factory”.

The obvious reasons are, unfortunately, as follows: the reputations of the courts being affected by their poor performance in the past, the lack of confidence in the general judiciary, the lack of uniformity in the decisions of general courts, delays in proceedings before the general courts, and the parties' feeling that, if there is any justice at all, it is not being fairly administered in their cases. The establishment of the Supreme Administrative Court and the existence of a complete administrative judiciary system have not reduced the backlog of complaints. In spite of the fact that representation by a lawyer before the Constitutional Court is mandatory, the majority of constitutional applications are manifestly ill-founded, although it is repeatedly stressed that the Constitutional Court is not part of the general courts system, nor is it another instance in that system. The clients' desire to file a complaint is obviously stronger than the lawyer's factual analysis of the chances for success.

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Experience from our country's first four months of membership in the European Union may certainly be another point contributing to this. Just briefly: the Czech Constitutional Court's relation to the European Court of Justice had been only a matter of theoretical discussion before 30 April 2004. Not even today do we have before us any specific case to be submitted to the European Court of Justice. It remains an open question as to whether practice will follow the active Austrian model or the more restrained German approach.

This brings us to the recapitulation of what I am submitting to the debate.

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As to the role and importance of the case law of the Czech Constitutional Court and the European Court of Human Rights, the Czech Republic has progressed along its path – perhaps a bit thorny at the beginning – from the zero starting point early in the 1990s to a standard situation of democratic rule of law with a continental legal system.

Lawyers working in the Czech Republic and the lay public have no problems (technical, linguistic or any other) concerning the accessibility of the case law of the Czech Constitutional Court and the European Court of Human Rights. The activities of the Constitutional court still enhance the publicity of that case law in our country.

The knowledge and application of that case law in specific cases are directly proportional to the professional skills of each lawyer. The education system, capable of involving to a greater extent the middle- and older-generation lawyers, is continuously improving.

The case law of the Czech Constitutional Court generally reflects that of the European Court of Human Rights. There are no great differences between them, nor is there any non-critical application. Throughout the period of existence of the Czech Constitutional Court, its case law has been developing in a continuous manner, remaining understandable to the ordinary parties to legal relations. Its content now represents part of the general legal knowledge base *de lege lata*.

Constitutional case law is widely used by the legal profession in its publishing activities and is commented on both in books and journals. The daily newspapers report about the judgements of both the Czech Constitutional Court and the European Court of Human Rights on a regular basis.

Time will bear witness to the further development of relations to the European Communities Court of Justice and the specific forms thereof.

What is there to say in conclusion? I wish those who still can only dream of the positive role of the case law mentioned above that their dreams come true. Among post-communist countries, the Czech Republic model – though not totally painless – may in my view be a source of optimism and inspiration.

Thank you for your attention.

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