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REPORT

THE INFLUENCE OF THE ECHR ON NATIONAL CONSTITUTIONALJURISPRUDENCE: A CZECH CASE

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Czech Constitutional Court (here in after the "Court") has very broad jurisdiction which is enumerated in the article 87 of the Czech Constitution. The competences of the Court could be divided into three groups:

1. Abstract constitutional review, i.e. review of compliance of the legal regulations with the constitutional regulation.
2. Concrete constitutional review, i.e. protection of constitutionally guaranteed rights and freedoms against concrete infringement done by public authorities.
3. Other matters relating to the application of the Constitution, e.g. the certification of the election of a deputy or a senator, the loss of the seat of a senator or a deputy due to the loss of eligibility, a constitutional charge brought against the President, the constitutional review of a decision on dissolution of the political party or some other decisions relating to its activities, jurisdictional disputes between state bodies and self-governing regions and some other " exotic competencies".

The competencies under point l. a 2. mentioned above, are the most frequent.

The abstract constitutional review represents about 70 cases every year, they are within the jurisdiction of the plenum of the Court.

The concrete constitutional review, based on individual constitutional complains represents over 3.000 cases every year and is within the jurisdiction of the panel composed from three judges. This competence is given by the Article 87 par. 1 letter d) of the Constitution. According to this article, the Court decides on constitutional complaints against final decisions or other actions of public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.

The individual constitutional complaint may be submitted by a natural or legal person, if s/he alleges that his/her fundamental rights and basic freedoms guaranteed by a constitutional act have been infringed as a result of the final decision in a proceeding to which s/he was a party. A constitutional complaint may be submitted within a time-limit of 60 days, which starts to run on the day when the decision on the final available remedy was delivered to the party or, if there is no such remedy, on the day when the events which are the subject of the constitutional complaint took place. (article 72 of the Act on the Constitutional Court no:182/1993 of Collection of Czech laws, hereinafter "the Act").

The proceeding before the Court is based on the subsidiary principle, so it can only take effect after all procedural remedies which the complainant could claim in relevant proceedings (judicial, administration etc.) have been exhausted. If the complainant failed to exhaust all procedural remedies afforded him by law for the protection of his rights, the Court rejects his constitutional complaint as inadmissible.

A complainant may submit, together with his constitutional complaint, a proposal to annul a statute or some other enactment, or an individual provision thereof, the application of which resulted in the situation, which is the subject of the constitutional complaint, if the complainant alleges it to be inconsistent with a constitutional act, or with a statute, if the complaint concerns some other enactment. In such case, it is the Plenum of the Court that decides on such complaint.

In practice every final decision of public authorities and courts (including the Supreme Court and Supreme administrative Court) can be contested by individual constitutional

complaint lodged by the participant of the relevant procedure. Here are the grounds why individual constitutional complains in my country are so popular and so numerous. To face such a great quantity of individual constitutional complains the Court strictly applies the above mentioned " subsidiary principle". In the past the application of this principle was too strict and not very friendly, especially in civil cases.

The Czech judicial system is based on system of two instances. The decision of the court of a first instance can be generally contested by an appeal. Then the case is reviewed by the court of appeal (the second instance). Decisions of courts of appeal are final. But the Code of the Civil procedure allows to contest final decisions of the courts of appeal by an extraordinary legal remedy, which is within the jurisdiction of the Supreme Court. The nature of this extraordinary legal remedy can be defined as "*the appeal on a point of law*" as the Supreme Court can review the case only from the point of view of law.

As relevant articles 72 section 2 and 75, section 1 of the Act, before its last amendment, did not distinguished between ordinary appeals and extraordinary "*appeals on a point of law*", the problem was, how to apply the subsidiary principle in such civil cases. The requirement to use "all remedies", set out in Articles 72-2 and 75-1 of the Act, covered, in jurisprudence of the Court, also those "*appeals on a point of law*". The problem was that an "*appeal on a point of law*" as an extraordinary legal remedy is not automatically available to the party of the civil procedure. According to relevant articles of the Code of Civil Procedure this "*appeal on a point of law*" is generally admissible in cases in which the court of appeal has varied (changed) the decision of the court of first instance and in some other cases, but those details are not important.

In situation, where the "*appeal on a point of law"* is admissible on the basis of the law, the Constitutional Court rejected an individual constitutional complaint against the decision of the court of appeal as inadmissible, when the complainant did not submitted the *"appeal on a point of law"* to the Supreme Court, because s/he did not exhausted all legal remedies (see the subsidiary principle). This situation was clear, without any problems.

But in cases, where the "*appeal on a point of law"* was not admissible on the basis of the Code of Civil procedure, the decision about the admissibility of an *"appeal on a point of law"* depended (and still depends) entirely on the opinion of the Supreme Court.

According to Article 239-2 of the Code of Civil Procedure, effective till up the 31st Dec. 2000 an "*appeal on a point of law*" was admissible in cases where the Supreme Court (it is the court of cassation) considered that the contested decision of the court of appeal is of crucial legal importance. It has happened, many times, that a party of the civil procedure submitted "*an appeal on a point of law*" (against the decision of the court of appeal), trying to convince the Supreme Court that his/her case is of the crucial legal importance. But when the Supreme Court did not shared the opinion of the party, rejected this extraordinary legal remedy as inadmissible.

In such cases the constitutional complaint was admissible only against the decision of the Supreme Court within the time-limit of 60 days since its delivery to the party. As such decision of the Supreme Court was not in merit, potential constitutional complaint could not help, as the party needed the constitutional review of the decision of the court of appeal (that was in merit) and not the formal decision of the Supreme Court that was not in merit at all. This way the party has lost "the key" to the constitution review of the decision of the court of appeal, as the time limit of 60 days since the service of the decision of the court of appeal has elapsed during the procedure before the Supreme Court. When the complainant brought such complaint

(against the decision of the court of appeal) it was rejected as inadmissible, being lodged more than sixty days after service of the judgment of the court of appeal.

Therefore the practice of simultaneous lodging of "*an appeal on a point of law*" (to the Supreme Court) and the individual constitutional complaints (to the Constitutional Court), both against the same decision of the court of appeal has developed. The simultaneous lodging of "*an appeal on a point of law*" and of the individual constitutional complaints, was the only way how to reach the access to the Constitutional Court, how to reach the constitutional review of contested decision of the court of appeal in the situation when the Supreme Court rejected the *" appeal on a point of law*" as inadmissible i.e. only from formal reasons. It was the burden for the people as the reasoning of *"the appeal on a point of law*" is especially on the level of general (universal) law while the reasoning of the constitutional complaint must contain especially the constitutional aspects. Therefore they had to pay their lawyers two times or two lawyers as both procedures – before the Supreme Court and before the Constitutional Court require the obligatory legal representation by professional lawyer-advocate.

To prevent the discrepancy between the decision of the Supreme Court and the Constitutional Court, in the same case, the Constitutional Court was waiting to the final decision of the Supreme Court and after its decision continued the procedure concerning the contested decision of the court of appeal. Unfortunately the jurisprudence of the Court was not unified. One panel preferred to wait, while more panels were less patient, were not waiting, and the situation was rather schizophrenic. Just see:

1. The constitutional complaint against the decision of the court of appeal was rejected (when the simultaneous " *appeal on a point of law*" was submitted to the Supreme Court) as lodged too soon, because complainant did not exhausted all legal remedies.

2. After negative decision of the Supreme Court, the constitutional complaint against this decision was rejected as manifestly unfounded, because to decide whether the contested decision of the court of appeal is of crucial legal importance or not, is entirely within the competence of the Supreme Court as it is the interpretation of the general and not constitutional law. The result was practical denial of the access to the Constitutional Court.

Above mentioned practice was criticized especially in two decisions of ECHR, **BĚLEŠ and others - Czech Republic** (No 47273/99) and **ZVOLSKÝ and ZVOLSKÁ - Czech Republic** (No 46129/99), both from 12.11.2002, section II.

In the case Běleš against Czech republic, the ECHR said :

Access to the Constitutional Court – The admissibility of the appeal on a point of law, within the meaning of Article 239-2 of the Code of Civil Procedure, depended entirely on the opinion of the Supreme Court as to whether the contested decision was of "crucial importance from the legal aspect". Thus, neither the applicants nor their lawyer were capable of evaluating the prospects of their appeal on a point of law being declared admissible by the Supreme Court, especially since it had been declared inadmissible by the Court of Appeal. If their appeal on a point of law had been declared inadmissible, the applicants' constitutional action might have been declared inadmissible as being out of time. The simultaneous introduction of the appeal on a point of law and the constitutional action, recommended by the Government, is to be analysed as an aleatory remedy which finds no support in the statutory provisions and does not provide an appropriate solution, in

accordance with the requirement of legal certainty. A requirement for the applicants, as well as appealing on a point of law, to bring an action before the Constitutional Court on the same basis would have been the source of legal uncertainty. Moreover, it is difficult in practice for individuals to be aware of that procedure for bringing actions simultaneously. In any event, the application described by the parties of the rules relating to the admissibility of the constitutional remedy does not contribute to ensuring the proper administration of justice, since it prevents the persons concerned from using an available remedy. The requirement to use "all remedies" set out in Articles 72-2 and 75-1 of the Law on the Constitutional Court, without any distinction being drawn – except as regards the action for a review of the procedure – between ordinary actions and extraordinary actions, on the one hand, and the lack of foreseeability of the admissibility of the appeal on a point of law arising under article 239-2 of the Code of Civil Procedure, on the other hand, infringes the very substance of the right of appeal by imposing on the applicants a disproportionate burden which upsets the fair balance between the legitimate desire to ensure compliance with the procedural rules on bringing an action before the Constitutional Court and the right of access to that court. Since in Czech law an appeal on a point of law is an extraordinary remedy which is not automatically available and the admissibility of which is left to the discretion of the Supreme Court, it cannot be regarded, in this case, as an effective remedy which the applicants can be criticised for having failed to exercise. That is of such a kind as to violate the right to effective protection by the courts and tribunals. In short, the Constitutional Court's decision deprived the applicants of the right of access to a court and, accordingly, of their right to a fair hearing within the meaning of Article 6(1) of the Convention.

The reaction of the Constitutional Court was prompt. On the plenary sessions held 14th and 21st January 2003 has declared that after the above mentioned decisions of the ECHS changes its jurisprudence as follows:

l. In the case, when extraordinary legal remedy was submitted, the decision on the admissibility of the constitutional complaint will be taken (by the Constitutional Court) only after the decision on the extraordinary legal remedy (by the Supreme Court).

2. The time limit of sixty days (for lodging of the individual constitutional complaint) will begin to run since the day of delivery of the decision on the extraordinary legal remedy to the complainant, without regard to the way how the Supreme Court has decided. It means that decision on merits as well as the decision on inadmissibility of extraordinary legal remedy, taken by the Supreme Court plays the same role as the time limit for lodging of the individual constitutional complaint is concerned).

This time limit will be considered as observed also in relation towards the previous decision of the court of appeal, contested by an extraordinary legal remedy. It means that there is no reason to lodge simultaneously the extraordinary legal remedy and the constitutional complaint any more.

This conclusion of the plenary session of the Constitutional Court was published in the collection of Czech laws as the notice number 32/2003, the 3rd February 2003.

The above mentioned decisions of ECHR gave rise not only to the reaction of the Constitutional Court but followed the reaction of the legislator as well. The Parliament had adopted, the 11th December 2003 the amendment of the Act on the Constitutional Court that was published under no.83/2004 of Collection of laws. This broad amendment of the Act has

altered, among others, the key article 72. Stipulates that if the extraordinary legal remedy was rejected by competent public authority from reasons depending entirely on the opinion of this authority, the constitutional complaint against the previous decision on the last legal remedy can be lodged within the time limit of 60 days since the day on which the decision on the extraordinary legal remedy was served to the complainant.

This amendment has improved the position of complainants and eliminated the former source of legal uncertainty. Made clear the recent disputable questions of admissibility of the constitutional complaint, because exactly clarifies what legal remedies is necessary to exhaust before lodging the constitutional complaint (see the subsidiary principle) and clearly fixes the beginning of the run of the time limit within which the constitutional complaint must be submitted.

Brno 7th October 2005 Frantisek Duchon