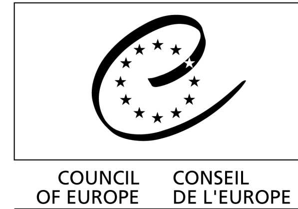

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THE EFFECTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT IN RELATION TO OTHER JURISDICTIONS

Report by

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I. General introduction

When referring to the effect of the decisions of the Constitutional Court (hereunder the "CC"), it is necessary to distinguish between :

1. effects of decisions concerning legal rules review proceedings (abstract and concrete) and
2. effects of decisions on constitutional complaints (in the Czech Republic, the constitutional complaints may be directed against final decisions made by public authorities as well as judicial decisions or any other interventions of public authorities. In both these cases, this concerns the acts of application of the objective law. The subject of the complaints is the fundamental right violated via an mistaken or improper application of a legal rule, i.e. the objective law. In cases where the problem consists in the unconstitutionality of the applied legal rule itself, the claimant may lodge the constitutional complaint together with a proposal for its annulment. In the case the conclusion on the unconstitutionality of the applied legal rule is drawn by the panel of the CC adjudicating such constitutional complaint, the panel itself may propose annulment of such legal rule. The annulment of a legal rule on the grounds of unconstitutionality is always decided by the Plenum of the CC). This paper does not deal with the effects of other types of decision.

In respect of the binding force of such decisions, there are in theory 3 types of effects to be considered:

a) res iudicata
b) erga omnes
c) effects having the force of law

Section 89 par. 2 of the Constitution states that the enforceable decisions of the CC are binding on all public authorities and persons. This provision evidently constitutes the effects *erga omnes*, for all decisions on the merits made by the CC and referred to as findings. The effects of decisions made on the merits referred to as resolutions are not covered by the Constitution. The Act on the CC (§ 43 par. 3) determining that a resolution by the CC given in writing shall contain, *inter alia*, advice of not being subject to appeal implies that the resolution has only the effects of a formal legal power, i.e. it does not even constitute an obstruction *res iudicata*.

But let us return to decisions made on the merits. The above-quoted constitutional provision is rather unsuitable as it is structured neither in relation to the types of proceedings (legal rule review, constitutional complaint), nor in relation to the type of decision (the claim is dismissed or a situation when the claim is admitted). In cases where this provision is only interpreted in grammatical terms, it may induce the conclusion, that all enforceable decisions of the CC have the *erga omnes* effect. This opinion is held by some of my Czech colleagues (A. Procházka, in *Právní rozhledy* 4/95, page 129, C. H. Beck Prague); however, this is apparently a very broad interpretation that is not shared by the majority. Rather rarely is this provision of the Constitution interpreted as a constitutional determination of another source of law besides the acts and by-laws, than a procedural provision stating the effects of the decisions made by the CC. However, neither this interpretation is accepted by the majority.

However, the nature of the matter clearly implies that it is necessary to distinguish between the effects of findings related to the review of legal rules (of all types) and the effects of findings related to constitutional complaints. This differentiation is supported by the requirement contained in § 57 par. 1 letter a) of the Act on the CC laying down the obligatory nature of the publication of a finding related to the review of legal rules in the Collection of Laws. This requirement indicates that findings that should be binding on all public authorities and persons must also be generally

available. In the Collection of Laws is promulgated both the sentence of the finding as well as those parts of the reasoning of the decision (§ 57 par. 2 of the Act on the CC) that manifest the legal opinion of the CC and reasons leading to it. Both the findings annulling a certain legal rule and findings dismissing a proposal for annulment of a certain legal rule are published.

The Czech jurisprudential doctrine holds the general opinion, that only the sentence of the finding, and not its reasoning, is binding. This apparently mechanically adopts the stating contained in the Civil Procedure Code (§ 159a par. 4). Personally speaking, I find this doctrine mistaken, since it omits the function fulfilled by the reasoning of a finding of the CC. The importance of this function is mainly manifested in the case of such findings that dismiss a proposal for annulment of a legal rule, but where the reasoning of the CC states, what interpretation of the contested legal rule is constitutionally conformable (so called interpretative findings).

To the extent that substantial parts of the reasoning are not to be binding, the value of such finding is null. The reason is that the Czech CC uses a simple sentence whose binding character is not contested by anyone, being "the proposal for the annulment of (a certain legal rule) is dismissed".

I am personally of the opinion that the sentence should contain specific fundamental rights and constitutional principles applied to review the contested legal rule. The reason is that this would facilitate the identification of those parts of the reasoning which represent the substantial reasons of the reasoning, in other words those, that are relevant for further interpretation of the contested legal rule.

This method would also make it possible to determine the scope of the decided matter that is the obstacle (*res iudicata*) in relation to the contested legal rule. In this scope, the proposal could not be generally repeated. In my view, the Czech jurisprudence holds a little bit mistaken opinion that a proposal for the annulment of a legal rule once reviewed by the CC cannot be ever repeated (similarly to the decision of the CC Ref. No. Pl. ÚS 32/2000). The reason why I find this solution mistaken is that a new proposal may present new reasons for the unconstitutionality of the contested legal rule, that were not manifestly reviewed in the first decision and which therefore cannot be covered by the obstruction *res iudicata*. This approach is common in Western European countries, such as Spain and Germany.

The Constitutional Court has in its decision from 28. 1. 2004 (Pl. ÚS 41/02) proceeded to the new practice in the event of the so-called interpretative findings. It has inserted an additional statement into the sentence of a decision, next to the original „petition for annulment of (certain legal rule) is dismissed“ one, which embraces that particular general constitutional principle, within which the impugned rule of law has to be interpreted. The Constitutional Court has explicitly specified in the reasoning of this finding, that it furthermore generally insists on binding force not only of the sentence of the finding, but also of substantial reasons included in particular segments of the reasoning. However, owing the specific nature of the interpretative findings, it has approached to the specific solution as mentioned above.

What is much more complex is the matter of effects of findings related to constitutional complaints. As a rule, these findings are not published in the Collection of Laws; they are only published in the Collection of Judgements, Findings and Resolutions of the CC. Pursuant to § 57 par. 3 of the Act on the CC, a finding concerning a constitutional complaint is only published in the Collection of Laws provided that the CC decides that the legal opinion expressed in the finding is of general relevance. This provision interpreted via an argument *a contrario* implies that findings concerning constitutional complaints are not usually of general relevance in terms of their general binding character. This implies that findings concerning constitutional complaints should only be binding on the litigants and authorities (like courts, administrative bodies) like enforceable decisions made by general courts. It appears necessary and logical to exclude private persons, who are not participants

in concrete proceedings, from the binding effects of the decision, because if it be to the contrary, the rights of such persons might be significantly affected. If we formally identify the binding character with the obstruction *res iudicata*, it might lead to absolute injustice. If we keep to the material binding effect in the sense which I shall elucidate later, the decision on the constitutional complaints would become a source of law. However, this is also prevented by the lack of their publishing in the Collection of Laws.

However, given this situation it is not possible that only the sentence of the finding would be binding for the scope of authorities I have mentioned. If the verdict reads "the constitutional complaint is dismissed", in material terms this means that a decision made by a general court becomes binding on all authorities. A worse situation occurs when the sentence of the finding abolishes e.g. a judicial decision, and therefore, what should be binding on all authorities is the fact that the matter has not been decided. A reasonable solution seems to be a construction that also substantial reasons of reasoning are binding for authorities. This on the one hand individualises the application of the legal rule, and on the other hand strengthens the legal certainty. This is due to the fact that the solution contained in the finding of the CC is binding on authorities, instructing them to proceed in the manner outlined in the findings of the CC in similar cases. On the other hand, private persons for whom such decisions are not binding may make their claim without being threatened by obstacle res iudicata.

II. Specific cases

Following the general introduction implying certain difficulties of the Czech legal environment, we can proceed to concrete cases of interaction of findings of the CC with decisions taken by general courts. This subchapter is divided into 2 parts for the purpose of clarity. The first part concerns the relation of the general courts to the findings of the CC concerning constitutional complaints, the second parts deals with the relation of the general courts to the findings of the CC concerning legal rule review.

1. General courts and decisions of the CC concerning constitutional complaints

Findings of the CC mediate value relations, they aspire to have an integrating effect as they represent a constitutionally certified formation of opinions. It is assumed that they will have a factual prejudicial effect.

In a hierarchic structured courts or judiciary system, such as the Czech one, the practical reasons generally lead to accepting of decisions made by the supreme instances. Although the CC stands outside the system of general courts and although its decisions are, or should be, reasoned only by constitutional rules and principles, its decisions have a similar effect in relation to the decisions of general courts.

Experience shows that findings of the CC are being accepted more rapidly quicker by lower courts and the more higher the court is, the more problems occur in acknowledging the findings of the CC. It is difficult to resist the temptation to link this empirically supported finding with the fact that the lowest instance courts have experienced the most massive changing of judges following 1989. These newly appointed judges are not usually burdened by the old decisions of the courts and they are more open to the new interpretation of the law. In simple terms, these judges do not have to deny themselves, their former interpretation of legal rules or to overcome rooted methods of interpreting the law connected with the political system in place before 1989.

These old stereotypes often appeared in the decisions taken by regional courts that act as courts of appeal, *inter alia*, in restitution suits. The restitution agenda is at the same time an example of post-revolutionary law. This law strived to mitigate and remedy at least a part of damage caused by the

communist regime. The following example of a decision made by the CC (Ref. No. II. ÚS 23/97) is a testifying challenge made by the CC vis-à-vis the dismissive practice of regional courts in relation to the decisions of the CC.

The judgments of general courts, with their refusals to deal with the restitution claim of the complainant from the aspect of judicature of the Constitutional Court, represent therefore predominantly a proof of their absolute failure, based on their inability to perceive the monstrous substance of the previous regime, and subsequently, also to understand the role, which fell to the Constitutional Court in relation to the justice in a post-totalitarian country. After all it is the reluctance of the courts to implement and to construe the restitution regulations in conformance with the judicature of the Constitutional Court, which is one of the most significant proofs of the necessity for the existence of the Constitutional Court and its powers towards general courts. Last but not least the refusal of the regional court represents also a clear contempt of the citizen, since pursuant to § 6 of the Code of Civil Procedure the courts are called for the prompt and effective protection of the rights of the citizen, since the regional court ruled with the awareness of the existence of the Constitutional Court, the constitutional petition as an utmost means for the protection of rights and the already preceding judicature, therefore with the awareness of further delays in the matter.

Many more cases could be presented to illustrate the rejection of decisions made by the CC in the prejudicial form and we shall return to them later.

A highly dangerous signal was given out at the end of 1996 by the High Court in Prague (court of appeal), when it refused to accept a finding of the CC cancelling its specific decision.

It caused much reaction in articles and discussions among the professional community. The Constitutional Court cancelled at the end of September 1996 the judgements of the High court by which the defendant was condemned to unsuspended imprisonment for serious violent crimes (Ref. No. III. ÚS 83/96). In the given case the Constitutional Court was considering the right for defence against the interest of the state on the due execution of justice, which should be carried out without undue delay and within ordinary general court, and instructed the court not to take into account certain time limits for the custody because of the obstructions from the side of the petitioner. According to the High Court the Constitutional Court exceeded its powers, and therefore the judgment was not respected and the defendant was released.

However, several months later in another criminal matter the Supreme Court did not approve the petition by the Minister of Justice for the violation of law to the disadvantage of the defendant and the challenged resolution was cancelled with the reasoning that period between 15 April 1997 and 26 May 1997 will not be included in the time limit due to the circumstances exclusively on the side of the petitioner and his lawyer. This interpretation of the time period is based on the same principles as the judgment of the Constitutional Court (published under No.239/96 in the Collection of Laws).

The aforementioned decision made by the High Court in Prague, unfortunately justified and supported by the former administration of the Supreme Court, encouraged the judges of the Supreme Court themselves to reject the decision of the CC in concrete case. The Supreme Court played a game of table tennis with the CC; however, with the „ball“ being a particular person. Media started reporting about a war of courts.

It was the case of a young man who was supposed to carry out alternative civil service. He started to carry out the service, but with regard to his conscience he decided not to continue in it and he left the service permanently without the consent of the respective authorities. For this act he was condemned, he did not carry out the service either, and therefore a conviction followed. Both

penalties were carried out to their fullest extent. Subsequently the Minister of Justice submitted a petition in favour of the claimant. The Supreme Court did not cancel the challenged decision, although an academic statement on the violation of law has been made. The Supreme Court made the decision several months after the foregoing judgment of the Constitutional Court. The Constitutional Court stated in its judgement No I. US 184/96 that in the case of the sentence, in which the academic statement on the violation of law was made and the original decision was not cancelled, it is not a constitutional petition which would be apparently unfounded, neither it is an intervention into the jurisdictive activity of the Supreme Court. The Constitutional Court as the body for the protection of constitutionality based its reasoning on Art. 40 of the Charter, which stipulates that nobody may be prosecuted for an act for which he was already condemned with legal force or was acquitted of the accusation. At the same time the Supreme Court did not respect the fact that the principle ne bis in idem *found its place also in Art. 4 of the Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms. On 20 March 1997 the Constitutional Court cancelled the sentence of the Supreme Court.*

In October 1997, regardless to the judgment of the Constitutional Court, the Supreme Court confirmed its preceding sentence. The President of the Supreme Court did not react.

On 2 April 1998 the Constitutional Court once again cancelled the sentence of the Supreme Court by the judgment No III. US 425/97, in which a statement is made on the significance of the judgments of the Constitutional Court. The Supreme Court deduced indefensibility of the interpretation resulting from the judgment of the Constitutional Court as far as the identity of the act is concerned, and this interpretation was designated as legally unsubstantiated. The Supreme Court proposed that the Panel in charge should distance itself from the legal opinion expressed by the Panel of the Constitutional Court on 20 March 1997. The Constitutional Court stated in its judgment among others that if the Supreme Court in this matter of the claimant, in which the decision of the Supreme Court had been cancelled by the cassation judgment of the Constitutional Court, did not take into account in the following proceedings and the resulting decision the deductions and the conclusions based on this judgment, without for instance supplementing the factual findings, based on which the Supreme Court could possibly get to a different evaluation of the said act, there is no other way but to cancel the sentence again as contradictory to Art. 89, par. 2 of the Constitution, without having any possibility to return anyhow to the merit of the matter.

In the conclusion the Constitutional Court added that it should be mentioned that the decision of the Supreme Court in this matter - as far as the obligatory character of the judgment is concerned - is not in conformity with the decisions of other Panels of the same Court, since the Supreme Court in other matter respected the legal opinion expressed by the judgment of the Constitutional Court and governed the new decision accordingly.

In September two judges of the Supreme Court refused to submit to the standpoint of the Constitutional Court and they let themselves be disqualified from the following proceedings. After an intervention of the new President of the Supreme Court the disqualification of both judges from the following deliberation of the matter was cancelled. A different legal opinion may not be a reason for disqualification of the judge from a pending matter.

In 1998, the author of this article became the new Chief Justice of the Supreme Court. In fall 1998, she issued a declaration released in media, stating that any further failure to abide respect the decision taken by the CC in a particular case would be considered a gross violation of the Constitution, violation of the rights of third parties and a lessening of the reputation of the whole judiciary meaning that such a judge would face disciplinary proceedings . Since that time no such excess has occurred. However, problems with acknowledging the findings of the CC in terms of their prejudicial quality have persisted. This may again be shown in an example of a conscientious objector.

It is an interesting case of a man who refused military service in 1959 due to his confession, and was condemned for it. In 1997 the Minister of Justice submitted a petition for the violation of law. The Supreme Court refused the petition, and the Constitutional Court approved in October 1998 the petition against this decision, since according to the Constitutional Court the petitioner had had the right to refuse military service already at that time, namely based on the Art. 18 of the General Declaration of Human Rights of 1948 (Ref. No. II. ÚS. 285/97). The core of the dispute was not the question of repeated punishment, but the question as to whether a citizen had the right to refuse military service as early as the 1950s. In March 1990 the Supreme Court changed its original decision and cancelled the sentence. One of the judges in charge mentioned: "Our Panel felt bound by the judgment of the Constitutional Court."

What happened then was that identical cases were reviewed by various panels of the Supreme Court according to the pattern adopted by the Constitutional Court. Only one panel of the Supreme Court refused the solution of the CC and its decision was contested by a constitutional complaint (Ref. No. I. ÚS 671/01), which was naturally admitted and the judgement of the Supreme Court was cancelled. In the meantime, the so-called „grand panel" of the Supreme Court was established (consisting of nine members) authorised to decide on the merit of the case in case when the legal opinions adopted by small, i.e. 3-member panel, differ. The case of a conscientious objector from the 1950s was thus referred to the grand panel of the Supreme Court. Paradoxically, the grand panel adopted the apparently minority opinion and the case appeared again at the CC (Pl. ÚS 42/02). The CC decided this matter in Plenum. It kept factually to the aforementioned decision made by the panel of the CC. However, the reasoning changed. The Plenum of the CC concluded to review this case in terms of the liberty of conscience, and not religious liberty as it had been done so far. The liberty of conscience was considered in its present quality, i.e. the liberty guaranteed by the present Charter of Human Rights, as the so-called „absolute fundamental right".

This finding is also significant in so far as the CC permitted, that if procedural means allow for the application of the old (pre-revolutionary) law, this law shall be interpreted in light of the present constitutional democratic values. In other words: even given the formal continuity of the law, its value discontinuity is evident. In doing so, the Constitutional Court referred to a decision taken by the European Court of Human Rights of 22 March 2001 in case Streletz, Kessler, Krenz vs. Germany. The CC also called general courts, and in particular the Supreme Court, not to ignore today's democratic constitutional standards and principles, when interpreting the old law because otherwise their decisions would be incomprehensible for society and would undermine the constitutional awareness of the society. Such decisions contribute also to the existing mistrust in the general judiciary meaning that the Czech courts cannot protect the rights of citizens against excessively manifested state power.

2. General courts and findings of the CC concerning review of legal rules

In respect of findings of the CC annulling a certain legal rule, there are no problems occurring, provided that the rule is enforceable annulled by publishing of the finding in the Collection of Laws. The problem might occur and does occur in cases where the enforcement of the finding is postponed for several months or even a year or longer (the longest postponed enforcement of a finding concerned the annulment of certain provisions of administrative judiciary in the Civil Procedure Code; (Ref. No. Pl. ÚS 16/99 published under No. 276/2001 Coll.). The enforcement of the finding was postponed for 18 months. The maximum time-limit for postponing of the enforcement of a decision made by the CC is not foreseen in the Czech law, unlike in Austria, for example). Therefore, the question is how to deal with cases occurring in the temporary period between the passing of a finding and the postponed date of its enforcement. The CC has not yet commented on this problem, in other words, it respected the practice of general courts. In this temporary period, the general courts interpreted the annulled law in the same manner as before the

finding had been passed. The author of this contribution is of the opinion that it would be more appropriate when the CC reasoning of its finding would be supplemented with some temporary interpretation of the annulled legal rule. This interpretation should at least minimise the interference with individual fundamental rights by further application of the annulled legal rule. It may be foreseen that this solution would bring another controversies with general courts, because of their refusing of the binding character of reasoning of findings made by the CC.

The issue of the binding character of reasoning is naturally most pressing in the case of interpretative findings, i.e. in cases the legal rule is not annulled, but the reasoning presents a constitutionally conforming interpretation of the contested legal rule.

To set an example, I can mention the finding of the CC concerning the act on the illegality of the communist regime and resistance against it (Ref. No Pl. ÚS 1/1993). This finding of the CC also states that it is constitutionally conform that the periods of limitation concerning crimes committed by prominent persons of the communist regime do not run between 25 February 1948 and 1 January 1990 as anticipated by the contested act. However, the general courts failed to acknowledge this decision of the CC in many cases. They considered the periods of limitation at their own discretion. This is one of the reasons why communist crimes have not been exhaustively punished in the Czech Republic.

I hope that above-mentioned new practice of the CC will contribute to more effective solution of the question connected with real binding character of interpretative findings of CC.

III. Conclusion

The constitutional judiciary in the Czech Republic is a new, post-totalitarian institution. It is a well developed constitutional judiciary. The Czech Constitutional Court has much authorities and the constitutional complaints against judicial decisions in particular represent a significant instrument by which the CC affects the interpretation of the law. Undoubtedly, the Czech legislator intended to correct judicial decisions by means of constitutional complaints in the spirit of new constitutional values being aware of the fact that the way of thinking of more than 2 500 judges at general courts cannot be changed from day to day.

The example of the Czech Republic shows that the relation to the general judiciary develops in a positive manner, although slower than desirable. For existence of democratic state ruled by rule of law is essential that the decisions of the CC are accepted and respected voluntarily.