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CONFERENCE

ON

**"EXECUTION OF THE DECISIONS OF
CONSTITUTIONAL COURTS: A CORNERSTONE OF
THE PROCESS OF IMPLEMENTATION OF
CONSTITUTIONAL JUSTICE"**

**ON THE OCCASION OF
THE 10th ANNIVERSARY
OF THE CONSTITUTIONAL COURT OF AZERBAIJAN**

REPORT

**"TYPES OF JUDGEMENTS
AS A CONTRIBUTION TO THE EFFICIENCY OF DECISION-MAKING
AT THE CONSTITUTIONAL COURT"**

by
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The provision of the Article 87 section 1 para. a) of the Constitution of the Czech Republic sets out that the Constitutional Court may rule on the annulment of statutes or individual provisions thereof, should they be in conflict with the constitutional order. This constitutional jurisdictional provision is effected under Art. 70 of the Act on the Constitutional Court.

The Constitutional Court of the Czech Republic has thus joined the ranks of those Constitutional Courts that derogate, i.e. not only declare (find) the non-constitutional nature of a statute with consequence of nullity of such a statute, i.e. with *ex tunc* implications (typically and originally this was the only option available to the Federal Constitutional Court of the Federal Republic of Germany). The Constitutional Court of the Czech Republic has, for a long time, strictly adhered to the above quoted provision of the Constitution. In the sentence of judgement, therefore, it was either stated that the contested statute (or provision of a statute) would be repealed, or that the case would be dismissed. We shall set aside the fact that in its sentences of judgement, the Czech Constitutional Court neither specifies the provisions of the constitutional order with which the contested legislation collides (in the case of derogation judgements), nor those with which it does not collide but with which the contested legislation was actually confronted in the review process. In my opinion, the aforementioned provisions of Art. 70 sections 1 and 2 of the Act on the Constitutional Court calls for such an approach (the Constitutional Court must first arrive at the conclusion that the contested statute or provision thereof is or is not in breach of a constitutional act, which must be expressed in the first judgement, and only then may the contested statute or provision thereof be repealed or the case dismissed with the second judgement). It is beyond doubt that the outlined technique, which is habitual in some other countries, is of importance in order to determine the extent of the obstacle in the form of a *rei iudicatae*. Of course, and this is very important, it has an impact on the findability of the so-called supporting reasons in the reasoning of the judgement, which should relate to the interpretation of the constitutional provisions given in the sentence of judgement. But let us return to the main theme.

The Constitutional Court of the Czech Republic has rapidly adopted the Europe-wide known and applied doctrine of giving preference to a constitutionally conforming interpretation of a contested statutory norm over its annulment, which is clear from a wide range of the Court's decisions (e.g. findings in the cases Pl.ÚS 10/99, Pl. ÚS 33/03, Pl. ÚS 45/04 and many others). In this context, the Constitutional Court argues that the adherence to such a doctrine minimises the interference on the activities of other bodies, in our case the activities of parliament. Until as late as 2004, the constitutionally conforming interpretation of contested statutory norms used to be provided in the reasoning of a judgement.

Because, however, there is an ongoing conflict in place as to whether, in addition to the sentence of judgement, also determined (and which) parts of the reasoning are binding (an overview of opinions and their proponent is given in the Commentary on the Constitution of the Czech Republic, Sládeček, Mikule, Syllová, to article 89 section 2, p. 734 and subsequent), it used to happen that the constitutionally conforming interpretation of a statutory provision by the Constitutional Court, contained within the reasoning, was not always respected by all the bodies that applied the contentious statutory norm, including common courts (see for example the finding no. Pl. ÚS 4/06). This naturally leads to a higher number of constitutional complaints and the technique used therefore turns against the Constitutional Court itself.

The above problem also provided an impetus to the fact that in January 2004, in the case Pl. ÚS 41/02, the Czech Constitutional Court adopted its first interpretative judgement, inserted after the sentence that the petition for the repeal of a certain amended provision of the Act on the protection of classified information is dismissed. The provision in question was one that listed the group of persons on whom security clearance was not to be carried out. Originally the list included attorneys, but the amendment to the act excluded them from the exemption. The issue to be interpreted therefore lay in the question as to whether, following the amendment, it would be necessary to require security clearance for an attorney acting for the defence in

criminal proceedings involving work with classified information. It ought to be remarked that the proceedings for the review of the amended statutory provision was initiated by a common court, which in fact conducted criminal proceedings during which classified information appeared.

In this finding, the Constitutional Court stated that it insisted upon the fact that as long as the Constitution of the Czech Republic (article 89, section 2) sets out that enforceable decisions passed by the Constitutional Court are binding on any and all authorities and persons, the Constitutional Court shall also interpret this provision in such a manner that not only the sentence of judgement is binding, but also those sections of its reasoning that contain so-called supporting reasons (clearly inspired by the German concept of "tragende Gründe"). Despite this, however, the Constitutional Court has proceeded to the introduction of a constitutionally conforming interpretation of the amended provision in the sentence of judgement. It clearly did not want to run the risk whereby in the criminal case, where a direct threat to the fundamental rights of the defendant is impending, the supporting reasons contained in the reasoning of the finding would not be respected by the general court, only because there is an ongoing polemic as to the extent of the binding force of the findings of the Constitutional Court. The fact that it was a long-running criminal case, which was the subject of many polemics with a highly political subtext, contributed to the thorough quest for an efficient solution.

From the above it is obvious that the Czech Constitutional Court was motivated to pronounce an interpretative judgement by its endeavour to impose its actual constitutional function – i.e. the protection of constitutionality (as per article 83 of the Constitution). Ensuring the functionality of the constitutional judiciary therefore outweighed the strict use of the techniques outlined by the Constitution and expanded upon by the Act on the Constitutional Court in the form of the repeal of a contested provision. Otherwise, similar motives for an innovative pronouncement of a decision may be seen at other European constitutional courts as well. The Italian Constitutional Court can probably be said to be a „geyser of ideas“, as it seems to be the most creative (using interpretative, additive and substitutive judgements, whereas the latter two can subsequently be used to support claims in a lawsuit, as stated by justices from the Italian Constitutional Court during their recent visit, who additionally confirmed that they proceeded to the creation of these sentences by themselves, i.e. without the support of Italian rules of procedure, however, apparently fulfilling the function of the constitutional judiciary.). Let us add that the first interpretative finding of the Constitutional Court of the Czech Republic was accepted in general without any problems by the expert and lay public alike. This is probably related to the fact that this finding did not mean any extra demands on the state budget and additionally because its aim was to increase the protection of the fundamental rights of individual persons.

Probably more complicated will be the evaluation of the finding adopted in the case Pl. ÚS 20/05 of February 2006, whereby the Constitutional Court of the Czech Republic made a further step in the enrichment of the range of its sentences of judgement. In this case, a judgement difficult to classify or designate (according to criteria used abroad) was adopted, because it is unclear thus far as to what purpose the adopted judgement follows. Some people say that it is an “additive judgement“, while others dispute this, saying that it cannot be additive, for it does not enrich the legal system or any statutory norm contained within with any other “indication” missing therein that is worthy of protecting, unless it had been an unpronounced aim of this judgement to formulate an additional reason for damage compensation claims against the State, not formulated thus far under the Act no. 82 of 1998.

The contentious judgement reads: The long-term inactivity of the Parliament of the Czech Republic consisting in the non-acceptance of a special statutory regulation determining cases in which a lessor is permitted to unilaterally increase rent and service charges, and to change other terms of a tenancy agreement, is unconstitutional and is in breach of Article 4 para 3, Article 4 para 4 and Article 11 of the Charter of Fundamental Rights and Freedoms and Article

1 para 1 of the Additional Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

As to whether and which legally relevant or even technically normative purpose this judgement followed, will have to be decided soon by the Constitutional Court of the Czech Republic in cases of constitutional petitions, whereby property owners and lessors are demanding a statement that their fundamental rights have been breached by judgements passed by common courts, and therefore an annulment of these judgements, through which their claims for damage compensations against the state were rejected, i.e. damages incurred when the central government and parliament ignored three findings of the Constitutional Court derogating the statutory norms on regulated rent. As to how the Constitutional Court will interpret this judgement awaits to be seen. It is certain, however, that in the interpretation the Court should follow the discharging of its function entrusted to it by the Czech Constitution, i.e. the protection of constitutionality. In my opinion, however, the political appeal addressed to the legislator (the judgement is also interpreted thus by sections of the expert public) misses the constitutionally delimited function of the Constitutional Court.

Besides, there is lively discussion going on in Europe on the theme of the responsibility of the State for legislative acts or the non-existence thereof, and the very development of this institute in time is very interesting (see for example Wróblewski B.P., *Die Staatshaftung für legislatives Unrecht in Deutschland – Eine rechtshistorische, rechtsdogmatische und rechtsvergleichende Untersuchung*, Nomos Verlagsgesellschaft, Baden-Baden 2005) – but that is a different theme .