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CANCELLATION OF EARLY ELECTIONS BY THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC: BEGINNING OF A NEW CONCEPT OF "PROTECTION OF CONSTITUTIONALITY"[1]

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> Interpretation of legal rules may not be used as authorization to eliminate or imperil the foundations of the democratic state.
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> (Art. 9 par. 3 of the Constitution of the Czech Republic)

> If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.
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> (L. L. Fuller, The Morality of Law)

Abstract. *The ruling of the Constitutional Court of 10 September 2009 which repealed the proclaimed early elections to the Chamber of Deputies because of their alleged unconstitutionality fully manifests unjustifiability of the interference by the Constitutional Court of the Czech Republic. The decision directly interfered with the process of democratic re-establishment of the Chamber of Deputies. At the same time, the Court"s intervention was only made*

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possible by violating a number of constitutionally prescribed rules. Finally, the respective ruling could not be issued without a "creative approach" on the part of the Constitutional Court towards the rules governing procedures before the Court. The approach eventually resulted in the violation of principles of fair trial – before a body that should guarantee them.

The paper analyses in detail various individual aspects of the case, from general issues of the division of power and contents of the mandate of deputies to individual procedural stages before the Constitutional Court.

Keywords: *constitutional law, material core of the constitution, sovereignty of the people, repealed elections, early elections, constitutional system, Czech Republic.*

1. Towards Defining the Concept of "Constitutionality" and its Protection

The concept of "constitutionality" is an evaluative category coming out of a legal-theoretical construct according to which there exists one or more standards determining the fundamental rules of the functioning state and at the same time defining the legal position of the individual both in relation to public power and also with respect to other individuals. It is proposed that the mentioned single standard, or possibly its body of law, creates a framework order into which the remainder of the legal system must fit, just as the further activity dependent on the application of the law of public power. The constitutionality of a specific legal act thus marks its agreement with those rules defining the fundamental relationships within the state. This direction of legal thinking has also been called "constitutionalism".

Constitutionalism appears in a time period comparable to the modern period with its theory of the sovereignty of the people. In the case of constitutionalism the emphasis is predominantly placed on its democratic form.[2] Most often in this instance one talks about constitutionalism as a result of the expression of the will of the people, when the people themselves in their sovereignty choose the manner of arranging public power as well as the fundamental principles according to which the law will be created and applied.

From the beginning itself of the formation of the concept of constitutionalism questions began to appear about the manner in which to ensure agreement of the constitutional legal rules and those lower legal rules under the constitution.

2 This however does not mean that we are not able to talk about other similarities of constitutionalism with other than democratic sources. The historical experience with European constitutional monarchies of the 19th century offers itself, where the source of the legal system was the constitution given from the will and the sovereignty of a ruler. Incumbent on its function in limiting the basic framework for the rest of the legal system the fact that it was a matter of an octroi constitution did not change anything. The manner of establishing the basic law of the land has its own influence on the perception of its legitimacy, but this in itself does not have to predestine the quality of this document, nor respectively the quality of life of the residents of the given state.

Concurrent with the problem of how to ensure protection of constitutionality there appears the question of who will be charged with being the "supervisor of the guard". On the one hand, it is necessary to protect the will of the people concentrated in the constitution against interference of the legislature and other powers; but, on the other hand, it is necessary that specifically interference from the side of its guardian not occur.

In the course of the time when it came to the gradual forming of the constitutional court system, some fundamental principles were also created which limit its activity, and this in the interest of the protection of the will itself of the creator of the constitution.

First among the highest rules which limit the organs of the constitutional court system is their being bound by the constitutional regulations themselves as the expression of the will of the creator of the constitution.[3] The constitutional courts are not in separate standing from the other highest state organs, whose place is not more legitimate and are not authorized to act *praeter,* nor even *contra constitutione.* Their role, just as of all remaining subjects, is to live in the given constitutional frame and not exceed it, nor even make an attempt at a new defining or breach of it.

The rule, which the above-mentioned points develop further, is that proceedings before the constitutional courts run almost exclusively on petition. The Constitutional Court is not supposed to show initiative; it is supposed to serve the protection of the interests of the other subjects.

As a further rule limiting the activity of the Constitutional Courts in the interest of protection of the Constitution is the principle of proportionality. Even in the case that the Constitutional Courts come to the conclusion that it is in a position to make a decision, because the constitutionality has been disturbed, they are to act in such a way as to do so only to a minimally necessary extent and also so that the interference into the existing legal relationships should not be more favorable than not acting.

A similar limiting rule is the principle of so-called judicial self-restraint, that is, knowingly limiting oneself. Limiting oneself, which leads only to useless interference into the current legal and power relationships in the existing constitutional system. Its sense is not limitation or submission to the legal power and competence of the Constitutional Court, but submission so that "it could engage in politics".[4]

As a conclusion to this problem it is possible to say that the Constitutional Court system is supposed to serve the protection of legal relationships through the application and protection of existing constitutional standards; but it is not its task to make corrections to or perfect the Constitution in its given condition. In the second case the Constitutional Court could easily slip towards a situation in which its will becomes the instrument of constitutionality rather than the will of the people. Thus the concept of democratic constitutionalism would be forsaken, of course never by the will of the people

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3 Dr. Eliška Wagnerová, the current vice-chair of the Constitutional Court of the Czech Republic, expresses herself in a very similar way when she states: …. it is for its judicature (meaning the Constitutional Court System – note by J.K.) determining the constitutionally given power of the people (revealed in the constitution)…" in: Wagnerová, E. *Ústavní soudnictví*. Praha: Linde, 1996, p. 25.

4 As the German Federal Constitutional Court stated, for example, in the year 1973 in its finding BverfGE 36,1,14f.

but outside of its possibility to address itself to this question. Such a step would in the end be in conflict with the fundamental principles of existing constitutionality.

2. Constitutional Model of the Czech Republic

2.1. The Constitution of the Czech Republic and the Procedure for Changes to it

The constitutional system of the Czech Republic (further only "CR") derives from two fundamental principles. The first of these is the principle of republicanism, and the second the principle of democratic governance. Key to this direction is the provision Art. 2 par. 1 of the Constitution of the Czech Republic (further only "Constitution").[5] In its first part it is stated that: "The people are the source of all power in the State". This formulation expresses the basic principle of the sovereignty of the people, but also the basic principle of democratic constitutionalism. These are the citizens of the Czech Republic, who themselves, by the process guaranteed by the Constitution, determine the rules by which they will govern themselves. They also delegate the authority to change the Constitution, should it cease to suit them.

In a case of a Constitution of the Czech Republic which departs from these basic principles, it is necessary to draw attention to two fundamental realities. Foremost it is necessary to pay attention to the mechanism of constitutional changes, and then it is necessary to devote attention to the formal shape of the Constitution.

The mechanism for constitutional changes is, in the Czech Republic, specifically in the sense that this is entirely in the hands of the Parliament of the Czech Republic. The Constitution can be changed only by a so-called constitutional law. That is to say a norm which differs from ordinary law in legal power, its manner of acceptance, and in certain small particulars also in the structure and structuring of its normative text.

With respect to legal strength, constitutional law stands above ordinary laws and by-laws. From the point of view of relation to the Constitution, and eventually further constitutional laws, the principle *lex posterior derogat priori* applies above all. For a constitutional law to be adopted, as stated in Art. 39 par. 4 of the Constitution, a vote of 3/5 of all representatives and 3/5 of the senators present (with at least 1/3 of all senators participating) is necessary. The constitutional law cannot be vetoed by the President of the Republic, just as it is not possible for the Chamber of Deputies to override a veto of the Senate.

From the above it is clear that the people of the Czech Republic are not directly linked to the approval of changes to the Constitution.[6] In this procedure the principle of

5 An English translation of the Constitution of the Czech Republic is accessible for instance at: <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html>.

6 As there is in some countries in the form of an obligatory referendum of acceptance – the constitutions of, for example, Spain, Denmark, Lichtenstein or Romania use such a procedure – or the election of a new par-

representative, indirect democracy strictly applies. The result then of the set procedure is a merger of the role of the creator of the Constitution and of the legislature.

Structurally the Constitution, as has been already indicated above, is specifically a matter of a typical *polylegal constitution*. The fundamental principles according to which the state functions are, in the Czech Republic, embodied in more norms. The Constitution talks about constitutional laws, which together form the so-called constitutional order. From the point of view of content the constitutional laws can be either amendments to the Constitution (in so far as it changes the existing provisions) or supplements (in so far as it newly adjusts a matter so far unregulated.)

Basically it is possible to perform any kind of change to the Constitution through constitutional law.[7] The one limit is the provision Art. 9 par. 2 of the Constitution, stating that changes of fundamental essentials of the democratic legal state are forbidden.[8]

2.2. The Constitutional Court of the Czech Republic as an Organ of Protection of the Constitution

The Constitution of the Czech Republic anchors the Constitutional Court of the Czech Republic (further only "Constitutional Court") as the organ of the protection of constitutionality.[9] Among its most well known legal powers[10] is found in first place deciding on the annulling of laws and legal rules and regulations, if they are in conflict with the constitutional order.[11] A further well-known legal power is deciding on a constitutional complaint against a legitimate decision and other interference of organs of public power with constitutionally guaranteed rights and freedoms.

Assessing constitutionality, and eventually legality, of commonly mandatory legal statutes can be initiated only by a limited number of subjects. In the case of review of a law it is a matter of a group of at least 41 representatives or at least 17 senators,[12] and the President of the Republic is empowered to propose. An individual is able to invoke

liament, which must confirm the approved change to the constitution – for example, the Netherlands.

7 In the past the constitutional order was supplemented by a complex arrangement of special laws, which until that time the Constitution basically did not recognize and did not regulate, just as by way of a constitutional law there was a one time referendum on the entrance of the Czech Republic into the European Union. Changes in the constitutional order at the time had both a general and long-term character as well as a character that was narrowly specific and one time.

8 At this point it is necessary to draw attention to the fact that this clause of unchangeability is very general, because the Constitution itself does not specify more precisely what belongs among these "fundamental requirements". The judicature of the Constitutional Court of CR in this matter before September 2009 basically did not exist, and after the decision of 10 September 2009, which is the subject of this article, from then on it is not specific.

9 This is about the court organ for the protection of constitutionality. Details relating to its composition, authority and rules of functioning are contained in Art. 83-89 of the Constitution, and further expanded in law no. 182/1993 Coll. on the Constitutional Court, in its current version. The English version is accessible, for example, at: <http://www.concourt.cz/view/1458>.

10 A listing of all the powers of the Constitutional Court is contained in Art. 87 of the Constitution.

11 In the case of legal rules and regulations the reason for their possible annulment is also conflict with the law.

12 The number in both cases is formed by more than 1/5 of all members of a given Chamber.

this procedure only exceptionally, and this when he joins his constitutional complaint with a proposal for annulling a law (or by-law) on the justification that interference with his constitutionally guaranteed rights has occurred as the result of the application of a relevant norm.

The Constitutional Court is bound during its deciding only by constitutional order and the law on the Constitutional Court.[13]

It follows from the above that the Constitution establishes the Constitutional Court as the organ of the protection of constitutionality which is empowered to assess agreement of all standards and decisions with the Constitutional order; but at the same time it itself is not bound by the constitutional order but is subsidiary to it. The Constitution then does not establish any empowerment of the Constitutional Court to be a maker of the Constitution, and this not even as a negative maker of the Constitution. The Constitution does not establish the authority for any organ to assess and even annul a constitutional law.[14] The one exception is the people through the means of their representatives in Parliament, who moreover must hold to the qualified procedure.

2.3. The Voting Period of the Chamber of Deputies, its Dissolution and Calling for Elections

The length of the election period for the Chamber of Deputies and its duration is in the Czech Republic derived from the duration of the mandates of the representatives. They are voted in for four years and their mandate originates from election, that is until the moment of the closing of the polling place, by which the voting is ended.

The President of the Republic announces the elections for the Chamber of Deputies at least 90 days before their taking place. The votes must take place in the last thirty days of the election period of the preceding Chamber of Deputies.

Setting the period of time for the election is in the hands of the President of the Republic. However, it is necessary to draw attention to the fact that this is a matter of a *countersigned* decision, requesting for its validity the co-signature of the head of government or of a member of the government authorized by him. The independence of the deciding of the President of the Republic is here markedly limited by the will of the premier, together with the fact that the determination of the election period is supposed to be only of an administrative-organizational character. The Constitution does not give the President of the Republic any possibility to shorten, by his own will, the election period of the existing Chamber of Deputies and to initiate early elections in this way.

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13 See: Art. 88 par. 2 of the Constitution.

14 As shown in Vl. Mikule and Vl. Sládeček: „Obsah ústavních zákonů ani postup jejich přijetí a vydání nemůže Ústavní soud přezkoumávat.“ Mikule, Vl.; Sládeček, Vl. *Zákon o Ústavním soudu – komentář a judikatura k Ústavě ČR a Listině základních práva a svobod*. Praha: Eurolex Bohemia, 2001, p. 164.
Otherwise it is concerned with the view of the Constitutional Court alone expressed in the judgment record no. P1.ÚS 21/01. For this see also: Filip, J.; Holländer, P.; Šimíček, V. *Zákon o Ústavním soudu. Komentář. Komentář. 2., přepracované a rozšířené vydání*. Praha: C. H. Beck, 2007, p. 358.
From authors abroad who came to the same conclusion there is, for example, M. Borski. See: Borski, M. *Sąd Konstytucyjny Republiki Czeskiej*. Sosnowiec: Oficyna Wydawnicza „Humanitas“, 2009, p. 80.

Shortening of the election period of the Chamber of Deputies by way of its dissolution was, according to the constitutional condition valid at the time, when the Constitutional Court reached the decision described in this article, is possible only from strictly defined reasons, which pointed to non-activity of the Chamber of Deputies or to their inability to perform their function.

This was a matter of the following reasons[15]– non-expression of trust in the government, whose chairman was named by the President of the Republic at the proposal of the Chairman of the Chamber of Deputies; failure to form a quorum[16] on a government bill with which the government linked the issues of trust; disruption of a session of the Chamber of Deputies for a longer time that is permitted; [17] inability of the Chamber of Deputies to achieve a quorum[18] for a period of more than three months, although its session was not interrupted and although it was in the mentioned time repeatedly called to session.

As is clear from the list given, the Chamber of Deputies could not be dissolved against its own will, that is, even if it was the cause of this by its own inaction or inability to perform constructively. Until September 2009 the Czech constitutional version recognized the institution of the dissolution of the Chamber of Deputies only as an instrument for renewing its activity in a case that was objectively given, that the Chamber of Deputies is not able or does not want to act. This version did not make dissolution on the basis of political reasons possible, if the Chamber of Deputies functioned properly, or a decision, for example of the President of the Republic or the Premier.

The existing solution ensured (and ensures even into the future) a very strongly established Chamber of Deputies. It is a matter of one of the components of the entire solution, which the central constitutional organ in the Czech Republic makes from the Chamber of Deputies.[19]

Although the chosen concept serves the stabilization well of the Chamber of Deputies as an organ representing the will of the people, it brings its own difficulties. Among them first belongs the difficulty of realizing dissolution in the event of a political crisis. The Constitution until the end of September 2009 did not consider a mechanism for easy dissolution of the Chamber of Deputies at a time when there existed for it a suitable will across this chamber, and even the whole of society.

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15 Art. 35 of the Constitution.

16 The reason for dissolution in this case is not rejection of the appropriate bill, but *not deliberating* it within the specified time period, which would have been concluded with the issuance of *any kind of resolution of a material character*.

17 From § 21 par. 2 of Law no. 90/1995 Coll. on the rules of procedure of the Chamber of Deputies, in its current version, it is indicated that this can be a matter of 120 days overall in a year.

18 Both chambers of Parliament are able, according to no. 39 par. 1 of the Constitution to form a quorum with the presence of at least 1/3 of their members

19 More specific information on the form and genesis of the constitutional institution of dissolving the Chamber of Deputies in the Constitution of the Czech Republic is found, for example, in: Kudrna, J. Dissolution of the Chamber of Deputies in the Czech Republic – the origin and essence of applicable constitutional legislation. *Jurisprudence*. 2009, 3(117): 69–110. The text of the article is accessible in electronic form at: <http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226123>.

For this reason in 1998[20], and likewise in 2009,[21] a one time passing of a constitutional law came about by which the current electoral term of the Chamber of Deputies was shortened.

3. Attempt at Putting in Order the Early Elections in the Fall of 2009

In Spring 2009 the political crisis in the Czech Republic reached a peak with the expression of a lack of trust in the government. Already at the moment of voting on 24 March 2009 it was clear given the distribution of political forces that an exit from the crisis would not be looked for in putting together a new government. In the given moment the possibility in essence did not exist for the rise of a new government which might have a clear political mandate and could obtain trust. The variant of a so-called "care-taker" government came into consideration only for the bridging period of time until the moment of the conducting of the early elections. These were considered as the most appropriate solutions which made possible the building of a new government with a clear mandate necessary for the period of economic crisis calling for a series of social reforms.

With regard to the fact that the Constitution of the Czech Republic did not offer for a similar situation a negotiable solution, the political representation came to the conclusion with a very emphatic majority that it would be necessary in the interest of acting speedily to pass a constitutional law which brings about a shortening of the election period of the Chamber of Deputies and thereby also its own dissolution until the day of the early elections.

There were two main arguments speaking for the mentioned solution. The first of them consisted in the fact that at the time the valid sense of Art. 35 of the Constitution[22] did not make it possible for dissolution of the Chamber of Deputies to be sufficiently flexible, and moreover it asked for not being in session although the Chamber of Deputies was prepared to do everything for its own dissolution in the fastest way.[23] The second

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20 Constitutional law no. 69/1988 Coll.; the course of its deliberation is recorded here: <http://www.psp.cz/sqw/historie.sqw?T=351&O=2>.

21 Constitutional law no. 195/2009 Coll.; the course of its deliberation is recorded here: <http://www.psp.cz/sqw/historie.sqw?o=5&T=796>.

22 Its wording was as follows: *Art. 35*
(1) Chamber of Deputies may be dissolved by the President of the Republic, if a) the Chamber of Deputies fails to vote confidence in a newly appointed Government the Prime Minister whereof was appointed by the President on the proposal of the Chairman of the Chamber of Deputies; b) the Chamber of Deputies has not decided on a Government Bill the consideration whereof the Government tied to the question of confidence; c) the session of the Chamber of Deputies has been recessed for a longer than admissible term; and d) the Chamber of Deputies has not had a quorum for a period longer than three months although its session was not recessed and although during the said period it had been repeatedly convened to meet.
(2) The Chamber of Deputies may not be dissolved three months prior to the end of its electoral term.

23 In the given situation rigorous adherence to the procedures given in Art. 35 of the Constitution would mean a requirement to conduct simulated legal acts. A simulation would be for example repeated building of govern-

argument consisted in that through a constitutional law, according to the currently valid procedure, any kind of change to the constitutional order was possible as far as it would not lead to setting aside of substantial matters of the democratic legal state. This danger was not found because with the shortening of the electoral term it was supposed to come to turning power over to the hands of the sovereign power, that is the people, and not to limiting of their rights. As a supporting argument the example was put forward from 1998, when in an almost identical situation, according to its characteristics, the same solution was used.

Under these circumstances the proposal of the appropriate constitutional law was put to the Chamber of Deputies on 7 April 2009. A week later the government delivered its position recommending this proposal. The bill was passed in the Chamber of Deputies on 13 May 2009 by a vote of 172 representatives out of 189 members present.[24] The Senate passed the bill on 28 May 2009, and the President of the Republic signed it on 15 June 2009. The constitutional law was announced on 29 July 2009 under no. 195/2009 Coll.

The content of this norm was very simple. It stated that V. the electoral period[25] of the Chamber of Deputies will end on the day of the elections, which will take place at the latest on 15 October 2009.

Contemporary with the discussion of this constitutional law arguments appeared which drew attention to its apparent conflict with fundamental requirements of the democratic legal state. Opponents of the constitutional law found a problem in the fact that the constitutional law should be in conflict with the principle of legal certainty. According to the thinking of the opponents the Chamber of Deputies and its representatives were voted in for a four-year election term, which can be shortened, but only by methods known on the day of the elections. Each change in the course of the election term means a change in the rules "in the middle of the game" and in this as such should essentially be retroactive.

With respect to objective constitutional law fault was also found with its one-time character. This was supposed to achieve a specific remedy from the selected solution. The arbitrariness of the Parliament's decision making, which was, in terms of its model, an identical situation, where one accepted a general solution and at other times, when a general solution did not suit it, sought a one-time solution, was according to the opponents in conflict with fundamental balance and legal certainty.

The last of the arguments presented drew attention to the fact that each representative has a claim on non-interrupted performance of his mandate, and this for the entire

ments with the knowledge that this was being done just so that non-confidence in them could be expressed and on the third attempt could lead to the dissolution of the Chamber of Deputies.

24 This was concerned, by the way, with the same number of votes by which, on 16 December 1992, the Constitution of the Czech Republic was passed. This argument was also used supportively, in order that the legitimacy of the chosen procedure was emphasized. For passage of a constitutional law at least 120 votes are necessary.

25 This electoral term was begun on 4 June 2006 and was supposed to end on 3 June 2010.

electoral term. Shortening can create an exception, but only by methods which were known to the representatives and voters at the time of elections.

If we summarize the arguments of the opponents of the constitutional law, then according to their idea an emerging government crisis should be resolved only by existing constitutional methods, and another solution could, it is true, be approved but with the possibility of its validity being when there is a new Chamber of Deputies.

In the course of May 2009 the Chairman of the Senate, Petr Pithart, made known[26] his idea to gain the support of at least 17 senators and propose a bill for reviewing the constitutionality of this constitutional law in the framework of a proceeding falling into a so-called abstract review of constitutionality. He justified his idea in the manner already described above, against which he did not otherwise address the basic procedural problem linked to the fact that the Constitutional Court is authorized to review the constitutionality only of ordinary laws (and rules under these). And moreover it is itself bound by constitutional laws. The idea of the Chairman of the Senate in the end was not realized, primarily because he was unable to obtain sufficient support.

On 1 June 2009 the President of the Republic, by a decision[27] countersigned by the Premier, announced that elections to the Chamber of Deputies would take place on 9 and 10 October 2009.

This decision, along with the constitutional law no. 195/2009 Coll., on the basis of which is was issued was contested in a constitutional complaint filed on 26 August 2009 by Deputy Miloš Melčák.

4. The First Constitutional Complaint against Constitution Law in the Czech Republic

The constitutional complaint filed by Deputy Miloš Melčák, represented by his lawyer, Jan Kalvoda[28], was delivered to the Constitutional Court on 26 August 2009. A competent judge-rapporteur did not find reasons for its dismissal on the basis of procedural reasons.[29] With this, proceeding was commenced before the Constitutional Court in the matter of the complaint.

In his constitutional complaint the complainant sought dismissal of the decision of the President of the Republic no. 207/2009 Coll. on announcing elections to the Chamber of Deputies of the Parliament of the Czech Republic, as well as dismissal of the constitutional law no. 195/2009 Coll. on shortening the electoral term of the Chamber of Deputies.

The structure of the constitutional complaint was key in this case. If we leave aside for the moment the ignoring of the fact that the Constitutional Court according to the

26 For example: <http://www.pithart.cz/presscentrum.pp>.

27 Published under no. 207/2009 Coll.

28 The text of the constitutional complaint in Czech is accessible, for example, here: <http://swww.usoud.cz/assets/_stavn__st__nost_poslance_Milo_e_Mel__ka.pdf>.

29 They are enumerated in § 43 par. 1 and 2 of the Law on the Constitutional Court.

Constitution of the Czech Republic, not according to the law on the Constitutional Court of the Czech Republic (further only ZÚS), is not authorized to review the constitutionality of the constitutional laws, procedure for dismissal of the law (See § 64 ZÚS and following) for this case did not come into consideration, because it could not by initiated by Deputy Melčák alone. The formal requirements (for their enumeration see: § 72 par. 1 ZÚS) based on the constitutional complaint were fulfilled such that the contested decision of the President of the Republic was characterized as "another encroachment of public power".[30]

As the constitutionally guaranteed right of the complainant, the interruption of which was at issue, the right to participate in the administration of public affairs, set in Article 21 par. 1 of the Charter of Fundamental Rights and Freedoms (further only Charter), was identified. It was further emphasized that this right pertains to all citizens under *equal* conditions.

In the matter of infringement of the constitutionally guaranteed right of the complainant in the form a decision of the President of the Republic on setting elections on 9 and 10 October 2009 the main argument presented was the reality that the complainant would be limited in his rights by the fact that, in comparison with the electoral term of other representatives, he could not carry out his mandate over a comparable period.[31]

At this point it is necessary to draw attention to the reality that a complaint formulated in such a way ignores the basic requirement of the ZÚS, according to which a proposal for annulment of the legal enactment is substantiated only should the claimed encroachment on constitutionally guaranteed rights occur as a result of its direct application. In this case however the shortening of the electoral term was not initiated by the contested decision of the President of the Republic but by constitutional law no. 195/2009 Coll.

The complainant at that time did not at all put forward what kind of concrete injuries resulted to him from the application of the decision of the President of the Republic no. 207/2009 Coll., which was contested by his complaint. With regard to the content of the decision he would obviously have to present reasons why he considered the fact that the elections are supposed to take place specifically in the period of time 9 and 10 October as an injury to his rights. Nothing else is contained in the decision of the President of the Republic.

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30 "Another interference of an organ of public power is a specific act which was issued in the frame of competence of an authorized organ or, on the contrary, completely outside of it or also non-activity of an organ in a situation in which it is supposed to taking action." In Filip, J.; Holländer, P.; Šimíček, V., *supra* note 13, p. 497.
As the Constitutional Court, however, says in its judgment doc. ref. no. I. ÚS 92/94, "It is not possible to consider legislative activity, as well as the issuance of generally binding statutes of the central organ of a state government, as the interference of an organ of public power." Here the question offers itself of whether a decision of the President of the Republic having a generally binding character is not just this kind of "generally binding statute of a central organ of state government".
The Constitutional Court further in its own judgment doc. ref. no. IV. ÚS 233/02 states that if a decision is "another interference", then it must be legitimate and the complainant would be a participant in a relevant proceeding. This condition in the given case was not fulfilled.

31 Part II., par. 5 and 8 of the constitutional complaint.

In the case of constitutional law no. 195/2009 Coll. the complainant first tackled the question of the reviewability of the constitutionality of constitutional law by the Constitutional Court.

In the first place the complainant claims that such a legal power is not appropriate to the Constitutional Court, and this even in spite of the formulation of Art. 87 of the Constitution, because the contested constitutional law "both contravenes and deviates from the constitutional order according to Art. 112 par. 1 of the Constitution, that materially it is not a part of it". The complainant further presents that adherence to the formalistic interpretation of the Constitution would lead to an absurd conclusion, where it would be possible to codify anything at all with a constitutional law, and this outside of any constitutional control. In support of his argument the complainant further cites Art. 13 of the protocol Art. 1 to the European Covenant on the Protection of Human Rights and Fundamental Freedoms, establishing the right for effective discretionary remedies.

Consideration of various "types" of constitutional laws is further developed with reference to Art. 9 par. 1 of the Constitution, according to which it is possible for the Constitution to be only supplemented or amended, but never "suspended", as in this instance.

The complainant also mentions that the contested constitutional law is in itself essentially retroactive, which is in conflict with the principles of the legal state.

Based on all the above mentioned reasons the complainant puts forward the opinion that constitutional law no. 195/2009 Coll. is not a constitutional law, due to its fundamental inadequacies, and could not have become one; its substance is different. For this reason it is reviewable and, if appropriate, annullable by the Constitutional Court.

In conclusion it is necessary to state about the filing of the constitutional complaint that the complainant *did not propose* deferring the enforceability of the decision of the President of the Republic.

5. Course of the Proceeding before the Constitutional Court and its Judgment

5.1. Procedural Resolution

The first decision in the described case was a resolution on deferring the enforceability of the decision of the President of the Republic on establishing the day of elections.[32] In it the Constitutional Court addressed itself preliminarily to some binding legal questions.

Firstly the Constitutional Court gave an interpretation according to which the contested decision of the President of the Republic has a mixed character, because though it has elements of a statute, it is at the same time an act of the application of law no. 195/2009 Coll. From this reality the Constitutional Court concluded that it is a matter of

32 It was published under no. 312/2009 Coll.

an encroachment of an organ of public power into the constitutionally guaranteed right *of all citizens to have under equal conditions access to a public function*.[33]

Secondly the Constitutional Court expressed its opinion also on the binding procedural issue. Deferring the enforceability of the contested decision is according to the provision § 79 par. 2. ZÚS is possible *only at the proposal of the complainant*. Such a proposal was not made. In order for it to be possible for enforcement to be postponed in spite of this, it would have been necessary to declare a unique interpretation of the law on the Constitutional Court.

The Constitutional Court did take such a step. It did not implement the interpretation of § 79 ZÚS but made a general appeal to the judicature of the European Court for Human Rights (further only ECHR), specifically on the judgment in the matter of *Kadlec and Others against the Czech Republic*. In this direction the Constitutional Court achieved a general conclusion, according to which it is required to review the submittals that had been made on the basis of their content. In the given case it judged the complaint of Deputy Melčák "*with regard to the concept of his petition*". On the basis of the conceived but explicitly not explained purpose of the complainant the Constitutional Court actively bypassed the missing part of the motion,[34] without which it would not have been possible to achieve deferment of enforceability.[35]

Further decision in the matter of the constitutional complaint of Deputy Melčák followed on 2 September 2009. This time a decision was made according to § 78 par. 2 ZÚS on dismissal of a proceeding on a constitutional complaint and on conveyance of a proposal for annulment of constitutional law no. 195/2209 Coll. to a proceeding according to Art. 87 par. 1 letter a) of the Constitution.

The question whether the Constitutional Court is appropriate to review the constitutionality of the Constitutional Laws was not solved at all. On the contrary it was submitted that no reasons were found for denying the complaint.[36]

Against the described finding of the Constitutional Court only Judge Vladimír Kůrka stepped forward with his own separate point of view. He stressed that according to his idea it should not come to dismissal of the proceeding on the constitutional complaint but to its denial, since it is not a proposal proper for real discussion.

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33 Art. 21 par. 4 of the Charter of Fundamental Rights and Freedoms

34 The question remains whether this proactive interpretation was necessary, or rather suspending enforcement was, and, with regard to further development, required. Preferential deliberation of the matter, which § 39 ZÚS allows even without a petition, came into consideration. The condition for such a step is only a quorum of the Constitutional Court on whether the point in question is urgent.

35 It is necessary to remark here that a position against the manner of argumentation which the Constitutional Court chose was taken by Judge Vladimír Kůrka and Judge Jan Musil. Both these dismissed the material basis for submitting a constitutional complaint and the chosen formal approach. Their arguments will be recalled in later sections of this paper.

36 At the same time already in this phase of the proceeding justification should have been given as to why provision § 43 par. 1 letter d) ZÚS, talking about dismissal of a motion in the event that the Constitutional Court is not competent to deliberate it, does not have an impact on the given case.

5.2. Finding in the Matter Itself

The key decision in the matter of the constitutional complaint of Deputy Melčák is the finding of the Constitutional Court in the matter itself, which was pronounced on 10 September 2009 and published under no. 318/2009 Coll.[37] On the day it was pronounced this finding annulled both constitutional law no. 195/2009 Coll. and the decision of the President of the Republic No. 207/2009 Coll.

The Constitutional Court in deciding in the matter itself held to the following line of argumentation. First it drew attention to the unchanged ability of the so-called material core[38] of the Constitution of the Czech Republic. The Constitutional Court repeatedly inferred its existence from provision Art. 9 par. 2 of the Constitution.

In the framework of the pronounced finding however the Constitutional Court places emphasis not on individual values supposedly creating the so-called material core of the Constitution but on their procedural meaning. Since it is especially a requirement for the protection of these values which is able to serve as *key*, as it were, whereby in case of need or urgency the Constitutional Court can overcome the formalistic limitation, for example, of Art. 87 par. 1 letter a), which discusses annulment *of laws only.*

Decisive here is not whether some concrete and before known value is threatened, but that the situation might come to a threat. In the case of a fundamental doubt it is necessary according to the procedure of the Constitutional Court to follow through so that it is possible to come to such a determination. On the other hand, why it is necessary to carry out that the precise composition of this so-called material core of the Constitution is not known and is defined from case to case, and this with regards to the circumstance of the matter being discussed.[39]

The legal authority of the Constitutional Court to review the agreement of constitutional laws with constitutional order is supported by a further argument, according to which it is necessary to interpret the concept of "law" in the Constitution such that it includes also constitutional laws, provided the Constitution does not stipulate otherwise.

From the point of view of the formal course of the process of creating norms, the Constitutional Court did not find any inadequacies. From the material point of view, however, the Constitutional Court considers as a fundamental mark of constitutional law its generality. This is according to the Constitutional Court also a substantive requirement of a democratic legal state.

The Constitutional Court further presented as one of the reasons for prohibiting ad hoc promulgation of constitutional laws the absence of such express empowerment directly in the Constitution. Under other circumstances, without such empowerment, it

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37 An English version of the judgment is available, for example, at: <http://www.concourt.cz/file/2510>.

38 From the explicitly specified valuations in past decisions of the Constitutional Court there is concern here for the principle of the sovereignty of the people, the principles contained in Art. 5 and 6 of the Constitution, and further the right to protest and the fundamental principles of the right to vote.

39 Both Chairman of the Constitutional Court Judge Pavel Rychetský and his Deputy Chairperson Pavel Holländе, spoke in this spirit, and did so already on 13 February 2009 at a conference held at the School of Law of Charles University in Prague on judgment P1. ÚS 19/08 in the matter of the Lisbon Treaty.

might be possible to occur purely exceptionally, and this in the interest of protecting the so-called material core of the Constitution.

Another of the arguments which the Constitutional Court found to be substantial during review of the contested constitutional law was its *retroactivity*. The Constitutional Court saw this in that the constitutional law under review in the period of the duration of the complainant's mandate as a representative introduced new circumstances under which the finishing of this mandate should come about. According to the idea of the Constitutional Court an early ending of the electoral term by itself is not against the Constitution, but what is in conflict with the Constitution is the manner in which new circumstances were introduced. As problematic the Constitutional Court also pointed out that the existing possibilities for shortening the electoral term were not used, nor was an attempt to do this made, but what occurred went directly to the introduction of a new method unknown to Constitutional rules up to that time.

As conclusion to its argumentation the Constitutional Court summarized the reasons brought for the derogation of constitutional law no. 195/2009 Coll. The validity of the constitutional law is according to it given by the cumulative fulfilling of procedural, competency and material conditions. In the case of the constitutional law reviewed, according to the idea of the Constitutional Court the last condition above all was not fulfilled, and this from the reason of the "individual and retroactive form of this norm". Therefore the Constitutional Court annulled this constitutional law on the day of the announcement of its findings.

Together with this on the basis of provision § 70 par. 3 ZÚS it simultaneously also annulled the decision of the President of the Republic no. 207/2009 Coll., and this as an "implementing rule" for the annulment of the law. The Constitutional Court found justifiability for this approach in its own statement made already on 1 September 2009 in connection with the announcement of its resolution on deferring the enforceability of the decision of the President of the Republic, that this act has a mixed character. The elements of a normative act established the justifiability of the approach according to the above-mentioned provision of the Law on the Constitutional Court.

At the close of its justification the Constitutional Court explained that its deliberation did not touch on the rights of citizens to exercise their right to vote, because the single result of the pronounced finding is the reality that the Chamber of Deputies will perform its function until the end of its regular electoral term, unless some other constitutionally conforming procedure for its shortening is used.

A differing point of view to this finding was worked out by Judges Vladimír Kůrka and Jan Musil. Both stances are very extensive and their arguments echo in other parts of this article. At this point it is appropriate to say that both judges criticized both the application of procedural rules by the Constitutional Court and its argumentation in the matter itself, including misinterpretation of historical circumstances, and all this with reference to the activism of the Constitutional Court and its entry into the process of creating politics and influencing the political situation in the country. Their viewpoints are inspirational above all because they draw reasonably from the text of the Constitution and the Laws on the Constitutional Court.

6. Problematic and Disputable Places in the Argumentation of the Constitutional Court

In this section arguments will be incrementally introduced which the constitutional judges presented in their majority opinion and which raise misgivings about its basis in the Constitution and in law.

6.1. Question of Authority to Review the Constitutionality of Constitutional Laws

The first and fundamental inadequacy of the finding in the matter of the unconstitutionality of the constitutional law no. 195/2009 Coll. is the lacking authority of the Constitutional Court to conduct such a process. Conducting such a process conflicts not only with the text of the Constitution and Laws on the Constitutional Court but also with the fundamental logic and concept of constitutional judicature overall.

The task of organs for the protection of constitutionality is to ensure that laws and norms of lesser legal power are in agreement with the constitutional rules.[40]

Giving respect to the usual meaning of words it is possible to explain only with difficulty that holding to a specific rule and the situation of being bound by this rule can lead to its *annulment*. If someone is bound by a rule, he cannot break it, because by this he would himself decide on what he wanted to be bound by and what on the other hand did not suit him.

The Constitution alone does not even recognize a process in which a constitutional law can be reviewed. The provision Art. 87 par. 1 letter a) is unusable for this case, because a grammatical explication leads to the conclusion that it is concerned only with general, not constitutional, law.

In this given case the Constitutional Court should have refused the submittal of Deputy Melčák on the basis of its own inappropriateness to conduct such a proceeding.[41]

6.2. Inadequacies in the Form of Submission

Deputy Melčák turned to the Constitutional Court with a constitutional complaint. He chose this form of submittal because it was the only one that opened the possibility for him to turn to the Constitutional Court in his matter.[42] In spite of this however it contained a whole range of unsealable holes.

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40 In the case of the Constitutional Court of the CR this task comes not only from Art. 83 of the Constitution, but also from its Art. 88 par. 2 The Constitutional Court judges are *bound* by the constitutional order in their deliberative activity. It is possible to also use provision Art. 85 par. 2 of the Constitution for support, which stipulates in the oath of the constitutional judge, that "…I will be governed by the constitutional laws".

41 Provision § 43 par. 1 letter d) ZÚS. The argument of the complainant that according to the Convention for the Protection of Fundamental Rights and Freedoms he must be ensured an effective legal remedy, does not count, because the Constitutional Court would express itself on the matter. The Convention however does not establish a right that a petition submitted to an inappropriate organ would be deliberated.

42 If we can talk about "suitable" form in a case when the Constitutional Court lacks legal power to conduct a specific proceeding, then that would be rather the occasion for initiating a proceeding according to § 64 ZÚS in the framework of abstract control of constitutionality.

It is not possible to submit a constitutional complaint in the Czech Republic except against a normative act. Its subject matter must be an individual legal act. In the given case however two normative legal acts of general character were immediately contested, but no individual legal act.

Moreover the decision of the President of the Republic only determines the election period. It does not proceed to encroachment on fortified, constitutionally guaranteed rights, because constitutional law no. 195/2009 Coll. decides on the ending of the mandate.

It is shown from the above that in the matter of the submitted constitutional complaint there were justifications for their denial based on reasons of making of a submittal to someone who is clearly competent.[43]

6.3. Material Irresponsibility of the Person Making the Submission

The Law on the Constitutional Court in its § 72 presents as a fundamental condition in submitting a constitutional complaint: "encroachment on the constitutionally guaranteed right or freedom". The complainant in his submittal however does not present any such right of his own which could have been breached by the contested decision of the President of the Republic. If he did not do so himself, this question should have been addressed by the Constitutional Court. This however did not happen.

Materially there does not exist any right of the representative in the sense of claim to a mandate for the entire electoral term. This would be in conflict with a fundamentally representative democracy, when a sovereign power would be a subject only at the moment of elections and for the whole electoral term he would be condemned to the role of an object in the hands of the elected representatives. The two dissenting judges emphasize these arguments.

In that time it would be proper to make a procedural provision consisting of an invitation to complete the essentials of the submission so that the requirements of the ZÚS would be fulfilled.[44]

6.4. Formal Non-Fulfillment of the Conditions for Deferring Enforceability

As has already been mentioned above, the Constitutional Court deferred the enforceability of the contested decision of the President of the Republic.[45] This step was surprising because the complainant *did not make* such a request at all. From the point of view of the law it is nevertheless a matter of an *obligatory* condition.

The Constitutional Court bypassed this inadequacy of the constitutional complaint in its explanation. It helped itself with the decision of the ECHR in the matter of Kadlec

43 § 43 par. 1 letter c) ZÚS

44 § 43 par. 1 letter b) ZÚS.

45 § 79 par. 2 ZÚS.

and Others v. Czech Republic [46]and referred to the fact that excessive formalism can be a breach of just process.

This argument would certainly have its own weight, if of course it would be possible to liken the circumstances of the case described with at least remotely with the circumstance of the matter under review. Judge Musil in his divergent view judges that this is not so. His conclusion, without further elaboration of arguments in his dissent, is, according to everything, correct.

It is true that the ECHR in the matter described warned against the effects of excessive formalism. But it did so in a situation when the Constitutional Court of the Czech Republic previously denied a submission for the reason that information had been exchanged in the pages of the submittal that had been made, so that the date of legal validity appeared in the field for the document number of the contested decision and vice versa. Such action is clearly a manifestation of excessive formalism.

In the case of the complainant M. Melčák the situation is different. The Constitutional Court deduced a legal act which *had not been performed at all*. As it seems, on this approach falls directly the other part of the conclusion of the ECHR which presented that it is necessary to avoid *"...excessive flexibility, which might in contrast lead to setting aside the procedural conditions stipulated by law."*

The Constitutional Court in doing so committed nothing else than precisely "excessive flexibility" and aiding the complainant in fulfilling the conditions necessitated by law.

The fault of this approach of the Constitutional Court goes beyond more than the approach is able to choose according to § 39 ZÚS from the unquestionable reason of the urgency of the matter under consideration. Deferring enforceability – at any cost, even if without the clear will of the complainant – was not necessary.

6.5. Material Non-Fulfillment of Conditions for Deferring Enforcement

The chosen approach of the Constitutional Court also raises concerns with regards to sufficiently meeting further conditions of § 79 par. 2 ZÚS for deferring the enforceability of the decision. It is possible to act thus only if it will not be in conflict with the important public interest and if the performance of the decision of a recognized third party would for the complainant mean non-average greater harm than what can arise to the third party from the deferring of the enforceability.

The dissenting Judge Musil addressed himself to this condition and expressed marked doubts about its fulfillment. He draws attention above all to the fact that the complainant himself does not present any argumentation regarding any harm,[47] that threatens him.

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46 An overview of the judgments of the ECHR, no. 4, 2004. For an English version of the judgment, see: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/d0cd2c2c444d8d94c12567c2002de990/92bd4d9ef2fb04d2c1256e9f004ee00e?OpenDocument>.

47 At this point it is suitable to point out that the injury is supposed to be a result of the criticized decision of the President of the Republic, who the constitutional complaint pertains to; so it should be explicitly linked with the fact that the elections will take place on 9 and 10 October 2009.

Apart from this reality it is appropriate to point out that the Constitutional Court itself in its majority view deals with this matter only very vaguely. First it claims that no circumstances exist which would attest to public interest preventing deferring of enforceability, here deferring elections. Further it claims that by deferring enforceability harm does not arise to a third party. And in conclusion it mentions that no harm is caused to public means because there had been no expenses so far (that is, until 1 September 2009) on the elections.

It is necessary to assume a critical stance towards the first claim. Postponing parliamentary elections is without doubt an encroachment on the public interest and also on the rights of third parties. As far as in a democratic republic dissolution of elections within a given social situation[48] does not mean encroachment on the public interest, then it is necessary to reappraise the legal concept of "public interest" itself.

Similarly inadequate is dealing with the question of encroachment on the rights of third parties. Interfered with were the rights of those representatives who already wanted to leave their functions, also the rights of persons running as candidates, for whom it was restrained to seek a mandate (i.e. they wanted to try for office and a mandate and were not able to do so) and there was an encroachment also on the subjective public right of all authorized voters to take part in the elections, which to them arose on the basis of the decision of the President of the Republic.

Unsupported at the very least is the claim that until 1 September 2009 there had not been any public means expended on the elections. According to the point of view of the Ministry of the Interior for Communications[49] these expenses amounted during the first week of September to 122 million crowns. This reality was also supposed to be reasonably taken into account.

Inadequate justification is also by the weak place of all appropriate decisions of the Constitutional Court, which basically marginalizes the question of balancing the interests of the complainant and the interests of other parties, specifically the interest of the public. If the Constitutional Court works with the concept of the legitimate expectation of Deputy Melčák, that his mandate will last until 3 June 2010, or will end under circumstances set forth in the Constitution to the day of his election, it should thoroughly through its argumentation also balance with the legitimate expectation of all parties who prepared for participation in the elections in the stipulated October period.

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48 This practically means that the Chamber of Deputies is not able to form a government with a political mandate. And on the other hand there is an absence of any kind of opinions that the elections could be used for getting rid of democracy and a legally consistent state in the Czech Republic.

49 For example: <http://aktualne.centrum.cz/domaci/volby-2009/clanek.phtml?id=647255>. Nine months later this amount was specified at approx. 114 million crowns. That is approximately the equivalent of 5 million Euro. For a more specific idea it is possible to state that it is roughly 1/4 of the expenses connected with the organization of the elections; that is without the amount of the state support paid to the political parties who achieved an election result of at least 1.5%. For example: <http://ekonomika.idnes.cz/stat-vystavil-ucet-ze-zrusene-predcasne-volby-vysly-na-114-milionu-1cf-/ekonomika.asp?c=A100522_183904_domaci_vel>.

6.6. Non-Inclusion of the President of the Republic among the Participants of the Proceeding

The procedural approach of the Constitutional Court also raises doubts that lead to the fact that the President of the Republic, even though proceedings were taking place on the cancellation of the decision he issued, would not have standing as a participant in the proceeding.

Provision § 76 par. 1 ZÚS stipulates that the participant of the procedure is the state institution against whose interference the constitutional complaint is directed. There is no doubt that the President of the Republic is, in the sense of this provision, the state institution. There is also no doubt that the decision published as no. 207/2009 Coll. was issued by the President of the Republic. The constitutional complaint of Deputy Melčák was directed against this decision and asked for its annulment. Under these circumstances the conditions of § 76 par. 1 ZÚS were fulfilled and the President should have been invited as a participant to the procedure. However, this did not happen.

The reason is a very unusual overturning of the procedural meaning of both contested norms. While key for commencement of the proceedings was ‚the construction of the constitutional complaint', the proceedings following after paid hardly any attention to the subject of the constitutional complaint. Basically the whole procedure was devoted to constitutional law no. 195/2009 Coll. The decision of the President of the Republic, which formed the key enabling the process to be started, was in the end cancelled as a ‚mere' implementing regulation in accordance with § 70 par. 3 ZÚS.

In this way the room that belonged to the President of the Republic as a participant in the proceeding was eliminated. The appropriate procedure in essence did not take place. The unique outcome, the kind of impact it will have on making the decision on the constitutional complaint itself, will be described below.

The approach chosen is in conflict with the law on the Constitutional Court and on the very principles of the legal state. It establishes a precedent which is more dangerous in that it has happened within the organ that is the highest body supposed to care for, among other things, the protection of just process. The problem is specifically in the fact that the Constitutional Court did not give passage to the rights that the President of the Republic should have had as a participant in the proceedings.

6.7. The "One-Timeness" and Specificness of the Law

One of the main real arguments on which the Constitutional Court based its finding was criticism of unconstitutionality consisting in the fact that the contested constitutional law does not fulfill the requirement for generality of law. Generality of law is according to the Constitutional Court one of the essential requirements for a legal state.

It cannot be denied that it is legislatively and legally more appropriate when the law is really a general norm. It is doubtful however whether the lack of generality of a norm is in and of itself a justification for its characterization as a norm that is unconstitutional.

A very poignant position on this question was assumed by Judge Musil in his differing point of view on the finding. He states that the Constitutional Court above all in the past judicature voided an insufficiently general law not only for this inadequacy but always at that time also because it came to interference into the activity of another organ.[50]

Judge Musil further indicates that the requirement of generality is not in and of itself a component of the fundamental essentials of a democratic legal state. Moreover according to him, not only that the Czech legal system recognizes a whole series of "concrete" laws but they are also used by legal systems abroad. As an example he mentions, for instance, Art. 143b and 143c of the Fundamental Law of the Federal Republic of Germany.

In the reviewed matter however there occurred a marked shift in interpretation, so that "non-generality" of a law in and of itself was proclaimed to be a characteristic violating constitutionality, and this without even the necessary justification for why the judicature of the Constitutional Court was stricter.

6.8. Restriction of the Powers of the Maker of the Constitution

The Constitutional Court in the justification of its finding raises doubts about the very power of a framer of the Constitution to carry out certain changes to the Constitution. In the case of the contested constitutional law the Constitutional Court does not talk about change or amending the Constitution in the sense of its Art. 9 par. 1, but uses the term "breach". It is not a matter explicitly of terminology, because in the eyes of the Constitutional Court the contested constitutional law has a completely different quality because it suspends the Constitution.

One can agree with this explanation only with difficulty because it does not have support in the Constitution. It is not even possible to use the reference to Art. 9 par. 2 of the Constitution for support.

The argument used by the Constitutional Court leads to restriction of the authority of the framer of the Constitution. In the case of the Constitution of the Czech Republic he represents the people, and therefore in the end this is a matter of restricting the sovereignty of the people. In this way then this explanation comes into conflict with provision Art. 9 par. 3 of the Constitution.

Such taking away of power of the people in some cases during the normal functioning of the state, and without concern for 'extreme' situations, would mean that under certain circumstance the people are not sovereign. Whereas this statement was made by an organ belonging to "established power" (*pouvoir constitué*) that has no right to stand above the sovereign.

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50 It was like this, for example, in the judgment P1. ÚS 24/04 in the matter of the so called dams on the river Elbe, which were declared by law, for the purpose of speeding up the foreclosure process, as a matter of public interest. A decision regarding the existence of a public interest prevailing above the private interest belongs, however, to the organ of executive power.

However, the fact alone that another subject is able to decide on the extent of "sovereign" power calls up serious doubts as to the position of such a power or the meaning of the concept "sovereignity".

6.9. Necessity of Constitutional Authorization for Publishing "Non-General" Laws

The previous argument of the Constitutional court is very closely connected with its statement that a writer of the constitution under a normal situation would be able to publish "specific, non-general" constitutional laws only if it had explicit authorization of the Constitution.[51] In this case one is also concerned with the definition of concepts needed for a given, specific matter, while the given interpretation does not have any broad support in the text of the Constitution.

The Constitution above all does not in any way divide constitutional laws into different types. It is further necessary to emphasize that the Parliament of the Czech Republic, when holding to the relevant procedures defined in other provisions of the Constitution, is authorized to issue constitutional laws directly on the basis of Art. 2 of the Constitution. It does not need any further empowerment for this activity; besides it would be quite superfluous.

On this point one can, without reserve, agree with the opinion of Judge Musil, who states that in this matter the Constitutional court abandoned its role as a "negative law maker" and appropriates for itself the competency to create positive norms in that it is creating new constitutional rules.

Beyond the framework of the argument of Judge Musil it is necessary to add that through the argument mentioned the Constitutional Court itself violates the principles of the separation of power anchored in the constitutional order of the Czech Republic and tries to appropriate the role of a maker of the Constitution.

If the framers of the Constitution had desired such a solution, no doubt they would have included it expressly in the text of the Constitution[52] and would not have left such an important matter in an unclear state.

6.10. Retroactivity of the Contested Constitutional Law

The next of the fundamental material reasons that the Constitutional Court presented in connection with the annulment of constitutional law no. 195/2009 Coll. is its alleged retroactivity.

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51 As an extreme possibility the Constitutional Court allows an exception in a situation when an *ad hoc* constitutional law was issued in a state of emergency in order to protect the so-called material core of the Constitution.

52 On this point it is possible to refer to the example of the Constitution of the Slovak Republic, in which the Constitutional Court of SR has the authority to give a binding explanation of the Constitutional provision and thus to a certain extent also form a system of the division of powers. However, there is a question of whether such a incidental interpretative decision is able to lead to the restriction of power of the maker of the constitution, and eventually instrumentally towards restriction of the sovereignty of the people.

It is true that retroactivity, that is mainly true retroactivity, is an extremely undesirable phenomenon that is apparently in collision with the principles of a legal state. In particular it is only with difficulty that it could be compatible with the principle of recognizability of a law and its predictability. On the other hand, however, it is not possible to say the same about non-genuine retroactivity using some precise meaning of the word.

The Constitutional Court in its justification of the discussed finding only mentions genuine retroactivity. It seems that the appraisal also follows from this of the criticized constitutional law as a norm, which in this way is an example of genuine retroactivity. However, such an appraisal is difficult to accept.[53]

The criticized constitutional law corresponds rather with non-genuine retroactivity, which is not even considered by some lawyers as retroactivity at all.[54] Rather than establishing or breaking a legal relationship or reality with an effect back to the past, one is concerned here with modification of an existing relationship or reality for the present moment or for the future.

Besides, it is possible to encounter this problem in every change of a legal enactment. Lon L. Fuller remarked on this reality as follows: "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."[55]

Surely it is possible to agree with the statement that the problem of retroactivity is exceptionally complex. It is further necessary to recognize the divergent point of view of Judge Musil as true when he states that the concept of retroactivity first of all is not monolithic.

There are different types of retroactivity and exercise of the principle of prohibition of retroactivity varies, depending on the branch of law it concerns. Furthermore there are a great number of exceptions allowed to the principle of the prohibition of retroactivity.

For example, in the sphere of criminal law this is from the reason *in mitius*, that is, for the benefit of the perpetrator. In this connection Judge Musil pointedly remarks whether early elections cannot be understood as something advantageous for citizens of the Czech Republic and, therefore, to allow retroactivity. I add that insofar as it cannot be declared that early elections would be advantageous for citizens, then definitely under the given social conditions they would be advantageous for the principles of democracy in the Czech Republic.

If the justification of the Constitutional Court in this section were to be upheld consistently, then a complete fulfillment of the above cited words of L. L. Fuller would occur. A legitimate expectation would become a perfect brake on any modification of law to the current needs of society.[56]

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53 Likewise: Syllová, J. Teorie „ústavně limitované jednorázovosti" (on the finding annulling a constitutional law on shortening the electoral term of the Chamber of Deputies). *AUC-Iuridica*. 2010, 2: 146.

54 For example: Boguszak, J.; Čapek, J.; Gerloch, A. *Teorie práva*. Praha: Eurolex Bohemia, 2001, p. 86.

55 Fuller, L. L. *The Morality of Law*. Yale : Yale University Press, 1964, p. 60.

56 The countless amendments to the business code of law, according to which, for example, a joint-stock com-

At the same time the Constitutional Court alone does not always proceed so consistently. In the matter of the so-called 'squeeze-out' procedure, decided by the judgment ref. no. P1. US 56/05 it did not pay attention to the fact that the minority shareholders bought their shares as a long-time investment in order to increase the value of their money and expected that their right of ownership would be respected. In their case actual expropriation by a private subject was made possible without the existence of any public interest; and this practice did not have any constitutional barrier in the fact that the legitimate expectations of the minority shareholders were just the opposite.

It would be surely possible to find further examples documenting the fact that in this case retroactivity should have been allowed, if it was retroactivity at all, and this for reasons *in mitius*, as Judge Musil also suggested. At the very least for the reason that the relationship between the people and their representatives and the content of their mandate should be preserved.

6.11. Suspension of the Proceedings on the Constitutional Complaint

Exceptionally interesting is the final decision of the Constitutional Court on Deputy Melčák's constitutional complaint,[57] which started the whole proceeding.

In the matter of the constitutional complaint the Constitutional Court by its own ruling decided to halt the proceedings. It did not do this based on the reason that the Court itself alone knows the law on the Constitutional Court. This is, according to § 77, *exclusively* by withdrawal of the complaint by the complainant alone. Even though such a possibility existed after the issuance of the judgment in a matter of constitutional law and at the same time on the decision of the President of the Republic, the complainant did not use it. Insofar as this did not happen, the reason could also be that he took the hearing as his own essential matter. In such case the Constitutional Court should have discussed the complaint from the material point of view in order to not restrict the rights of the complainant.

The Constitutional Court instead used a different procedural route. It stopped the proceeding with a reference to § 104 of the Civil Procedure Act, which it applied on the basis of § 63 ZÚS. The Civil Procedure Act in the cited provision speaks about the so-called insufficient conditions for proceedings, among which belongs, along with other things, obstruction of *rei iudicatae*.

The Constitutional Court in its majority view saw an obstacle in the fact that the subject of the constitutional complaint already had been decided by the main judgment in the matter. The support for this statement is however questionable. It is however necessary to agree with the dissenting opinion of Judge Musil, who points out that the subject matter of the individual constitutional complaint is the objected to violation of the individual basic rights of a specific person, here Deputy Melčák. Judge Musil further

pany was founded in 1992 with its own structure and rules of operating, today bears only a distant resemblance to its original form, can be very doubtful from a constitutional point of view, regarded with an evaluative rationalization. At the same time even here it is possible to talk about changes of rules "in the middle of the game" which at the beginning could not have been expected.

57 Judgment doc. ref. no. P1. ÚS 24/09 from 15 September 2009.

draws attention to the fact that nobody paid any attention to this individual aspect, no proof was given, nor did other participants express their opinion on this.

If the uniqueness of the approach of the Constitutional Court in the case described was not obvious from the finding in the matter, to which main attention was devoted, it is paradoxically obvious in almost a pure form just from the resolution by which the constitutional complaint was decided and by which the whole case was closed.

From this resolution it is evident that the constitutional complaint served only as a formal reason to initiate the proceeding. The Constitutional Court itself stated that everything substantial in the proceeding was connected with Constitutional law no. 195/2009 Coll. By this, of course, it put doubts on the whole construction of the constitutional complaint.

It is a pity that the Constitutional Court in such a serious case did not find more consistent argumentation that would enable the proceeding to be conducted from beginning to end by well-established methods. Rather paradoxically one can find it in the exceptionally complex and, from the viewpoint of its arguments supporting, divergent view of Judge Musil.

7. Consequences of the Decision of the Constitutional Court in the Matter of M. Melčák

All the more important insufficiencies of the approach and the argumentation of the Constitutional Court in the matter of the constitutional complaint of Deputy Melčák have been presented above. From the given analysis what, above all, Judge Kůrka suggested in his different point of view on the issued judgment is obvious. Namely that the whole argument of the Constitutional Court was led rather by the effort to justify the right to annul constitutional laws, rather than to examine whether the complainant suffered damage to his constitutionally guaranteed rights.

The Constitutional Court introduced many reasons in the justification of its judgment, especially in the form of references to the history of Germany, in order to justify its active interference and stepping over the bounds of constitutionality. It does not present any argument, however, that the contested constitutional law, and then the announced elections as its result, should lead to setting aside the basis of the democratic and legal state in the Czech Republic. Considering the present social and political situation in the Czech Republic, the comparisons with the Republic of Weimar at the beginning of the 1930's are exaggerated. And as such they are also largely unbelievable.

Altogether in the judgment alone one cannot find any appearance of an effort "not to do politics", and to follow the principles of proportionality and the principle of *judicial self-restraint*.

For the future the described decision of the Constitutional Court can have several consequences. First of all it can be assumed that the Constitutional Court is prepared in the future to even decide beyond the framework of the valid rules and accomplished submittals, and this everywhere where it will be able on its own to provide justification.

For the constitutional order of the Czech Republic the judgment especially in the matter itself and its justification has the significance that it forms two categories of constitutional legal norms with separate status. The legal norms that were accepted before constitutional law no. 195/2009 Coll. are a solid part of the constitutional order and for the future are evidently untouchable by the Constitutional Court. The second group is formed by all constitutional laws that will be (or were) passed after the above mentioned constitutional law and that are not otherwise protected against annulment.

In the final result a self re-evaluation of the role which the Constitutional Court is supposed to play in the constitutional system of the Czech Republic occurred. Its role was moved towards the control not of the Parliament but directly of the maker of the Constitution. This also means that even in a time of relatively stable relationships democracy and its exercise should be under the control of the Constitutional Court.

In the face of such a development there would be little to object to if it came about through a standard constitutional and legal way. However, this did not happen. There was ample use of possibilities of Art. 9 par. 2 of the Constitution, but to the detriment of Art. 9 par. 3 of the Constitution.

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ČEKIJOS RESPUBLIKOS KONSTITUCINIO TEISMO ATŠAUKTI PIRMALAIKIAI RINKIMAI: NAUJOS SĄVOKOS „KONSTITUCINGUMO APSAUGA“ ATSIRADIMAS

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Santrauka. *Čekijos Respublikos konstitucinė sistema yra grindžiama tautos suvereniteto principu. Principas atskleidžia daugelį viešosios valdžios organizavimo aspektų, taip pat privačių asmenų ir valdžios institucijų santykius. Tačiau tautos suvereniteto idėja yra patikrinama teisinės valstybės principais.*

Visų pirma yra siekiama apsaugoti asmens padėtį ir užkirsti kelią žmogaus teisių ir demokratijos neigimui daugumos valia. Pastaruoju metu imta dažnai minėti naują elementą, vadinamąjį konstitucijos materialų pagrindą, kaip pagrindinių konstitucinių principų demokratinėse valstybėse santykių dalį. Pagrindą sudaro vertybės, kurios turėtų būti visiškai nesugriaunamos, net vis-ą-vis sprendimais, kylančiais iš tautos valios. Ši teorija taip pat daro ir procesinį poveikį. Galiausiai tai reiškia, kad konstitucijos kūrėjų valia bus pavaldi konstitucinio teismo valiai. Nors konstitucijos materialaus pagrindo teorijai gali būti teikiama tam tikro masto svarba, tačiau jos kaip korekcinio elemento svarba yra susijusi ne su konstitucinio teismo sprendimų priėmimu, bet su konstitucijos kūrėjų sprendimų priėmimo procesu. Čekijos Respublikos atveju tai reiškia Parlamento vaidmens suvaržymus konstitucinės tvarkos keitimo procese.

Čekijos Respublikos Konstitucinio Teismo 2009 m. rugsėjo 10 d. nutarimas, kuris panaikino paskelbtus pirmalaikius rinkimus į Atstovų Rūmus dėl jų tariamo prieštaravimo Konstitucijai, aiškiai parodo Čekijos Respublikos Konstitucinio Teismo nepagrįstą kišimąsi. Sprendimas tiesiogiai įsiterpia į demokratinį Atstovų Rūmų perrinkimo procesą. Tiesmo įsikišimas buvo įmanomas tik pažeidžiant konstituciškai nustatytas taisykles. Galiausiai atitinkamas nutarimas negalėjo būti priimtas be Konstitucinio Teismo „kūrybiško požiūrio“ į taisykles, reglamentuojančias Teismo procedūras. Toks požiūris galiausiai atvedė prie teisingo bylos nagrinėjimo principų pažeidimo institucijoje, kuri turėtų užtikrinti šių principų įgyvendinimą.

Straipsnis išsamiai analizuoja įvairius bylos aspektus, nuo bendro pobūdžio klausimų apie valdžių padalijimo principą ir parlamentarų įgaliojimų turinį iki atskirų proceso etapų Konstituciniame Teisme.

Reikšminiai žodžiai: *konstitucinė teisė, materialus konstitucijos pagrindas, tautos suverenitetas, atšaukti rinkimai, pirmalaikiai rinkimai, konstitucinė sistema, Čekijos Respublika.*

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