Press Release: The Constitutional Court Annulled the Constitutional Act and Decision of the President to Call Early Elections

Brno, Constitutional Court, 10 September 2009

On 10 September 2009 the Constitutional Court adopted and immediately thereafter publicly announced a judgment annulling constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, and Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic.

The Constitutional Court thus granted the constitutional complaint of Deputy Miloš Melčák, which it received on 26 August 2009.

The verdict of today's Constitutional Court judgment reads:

I. Constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, is annulled as of 10 September 2009.

II. Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic, countersigned by the Prime Minister, ceases to have effect simultaneously with constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies.

Decisions of the Constitutional Court cannot be appealed.

The judgment goes into effect immediately, not upon promulgation in the Collection of Laws. Under verdict II of the judgment, by the annulment of the constitutional Act on Shortening the Fifth Term of Office of the Chamber of Deputies, **the Decision of the President of the Republic on Calling Elections to the Chamber of Deputies** for 9 and 10 October 2009, also ceased to have legal effect, which also affects all actions taken under the relevant election act on the basis of the now invalid decision of the president. That means that **the elections to the Chamber of Deputies called for 9 and 10 October 2009 will not take place**.

In the reasoning of the judgment, the Constitutional Court considered, in particular, **Art. 9 par. 1 of the Constitution**, which provides that "this Constitution may be supplemented or amended only by constitutional acts," and **Art. 9 par. 2 of the Constitution**, under which "any changes in the essential requirements for a democratic state governed by the rule of law are impermissible."

The Constitutional Court pointed out the roots of these provisions, which include the tragic experience of 20th century history, specifically Germany during the Weimar Constitution, which led to the Nazi regime usurping power and to World War II, as well as our experience with the totalitarian communist regime. It was for this reason that, when the Constitution of the Czech Republic was adopted in 1993, the original constitutional framers prevented changes to the material focus, the core of the Constitution (the essential requirements for a democratic state governed by the rule of law) by subsequent, derivative constitutional framers, i.e. parliaments established on the basis of the Constitution of 1993.

The Constitutional Court first answered the question of whether, as a body for the protection of constitutionality, it is competent to review an act designated as a constitutional act. It stated that protection of the Constitution's material core, i.e. the essential requirements for a democratic state governed by the rule of law under Art. 9 par. 2 of the Constitution is not a mere slogan or proclamation, but an actually enforceable constitutional provision. In other words, **the Constitutional Court is also competent to review acts designated as constitutional acts in terms of their conformity with the essential requirements of a democratic state governed by the rule of law**; otherwise the protection of constitutionality would be illusory, because a constitutional act could be used to do anything, with no opportunity to defend oneself against it before the Constitutional Court.

Therefore, the Constitutional Court posed the question of whether the contested constitutional act, under Art. 9 par. 1 of the Constitution *supplements* or *amends* the valid constitution. It stated that this constitutional act applied to a specifically designated subject (the Chamber of Deputies of the Parliament of the Czech Republic, elected in 2006) and a specific situation (termination of its term of office on the day of elections, which are to be held by 15 October 2009, and shortening deadlines under the Act on Elections to the Parliament of the Czech Republic, and under the Administrative Procedure Code, only for this instance). **Therefore, by its content, this is not a statute, but an individual, specific decision, taken in the form of a constitutional act.** With reference to the experience of history, for example, the Weimar Republic in Germany between the two world wars, when the Weimar Constitution, without being formally amended, was repeatedly suspended by one-time constitutional acts that were inconsistent with the text of the Constitution, the Constitutional Court concluded that "an *ad hoc* constitutional act (for an individual case) is not a supplement or an amendment to the Constitution," but is in fact a case of **breach of the Constitution**. The reasoning emphatically states: "If the Constitutional Court is forced to answer the question of whether Art. 9 par. 1 of the Constitution also authorizes Parliament to issue individual legal acts in the form of constitutional acts (e.g. to issue criminal verdicts against specific persons for specific actions, to issue administrative decisions on expropriation, to shorten the term of office of a particular official of a state body, etc.), the answer is – no!"

The Constitutional Court again emphasized that it considers **the principle of generality of a constitutional act** to be one of the essential requirements of a state governed by the rule of law – the principle of separation of powers means that the legislative branch adopts general laws; on the other hand, issuing specific decisions, based on those general laws, but concerning specific persons and specific situations, is the domain of the executive and judicial branches. The Constitutional Court pointed out that the requirement that a law be general is not an aim in and of itself: "its aim is to ensure separation of the legislative, executive and judicial branches, an equal constitutional framework for analogous situations, and thereby to rule out arbitrariness in the application of state authority, and enable a guarantee of the protection of individual rights in the form of a right to judicial protection. Therefore, the essence and significance of the generality of a constitutional act, as a conceptual element of the category of a state governed by the rule of law, is **protection of freedom**."

If the aim of passing constitutional Act no. 195/2009 Coll. was to quickly resolve the governmental (parliamentary) crisis, and accordingly, quickly dissolve the Chamber of Deputies and call early elections, in the Constitutional Court's opinion this aim could also have been achieved by a constitutional conforming process under Art. 35 par. 1 of the Constitution [specifically, a process according to letter b) of that Article, i.e., that, based on agreement between political representatives, the government would attach a motion of

confidence to a particular government proposal, and the Chamber of Deputies would knowingly, with the aim of dissolving itself, not pass a resolution on that proposal within three months]. The Constitutional Court concluded from this that the reason for passing the contested constitutional act was not to resolve the government crisis quickly, but to shift the date until which the Chamber of Deputies would remain in office until the date of the elections. Thus, this breach of the constitutional framework contained in Art. 35 of the Constitution also circumvented the constitutional purpose of the institution of dissolving the Chamber of Deputies, which is constitutional pressure to connect a vote of no confidence in the government (or a refusal to give a vote of confidence) with awareness of the constitutional consequences, in the event that there is no new parliamentary majority capable of forming a government.

The Constitutional Court emphasized that the most important public interest arising from Art. 9 par. 2 of the Constitution is the formation of a legitimate Parliament, based on elections whose legal basis is not open to constitutional challenge. **In the Constitutional Court's opinion, the contested constitutional act temporarily *ad* hoc suspends Art. 35 of the Constitution and, outside the framework of constitutionally prescribed procedure, establishes a procedure for this individual case that is completely different from what the Constitution presumes and requires.**

In the Constitutional Court's opinion, as stated in the discussion of a similar constitutional act of 1998, "the danger of the proposed act lies primarily in the fact that it creates a precedent of the highest legal force, a precedent that say that it is possible, for momentary, utilitarian, political reasons, to change the fundamental law of the land. If that is possible once, it is possible always. Parliament could, for the same reasons, suspend the powers of the Constitutional Court if its decisions were not in line with the political will of the moment; it could, for the same reasons, suspend the powers of the president if they were inconsistent with the political will of the moment, it could, for the same reasons, suspend the Charter of Fundamental Rights and Freedoms if it were an obstacle to achieving political aims. Putting fundamental legal certainties in doubt for political reasons puts democracy in doubt, and it creates the potential danger that authoritarianism and totalitarianism will arise. And it is to no avail that the authors of this precedent did not and do not … have anything of the sort in mind, and … only want to arrange for early elections to be held."

The Constitutional Court concluded that **even the constitutional framers cannot declare constitutional an act that lacks the character of a statute, let alone of a constitutional act. Such a procedure is unconstitutional arbitrariness.** The claim that the Constitutional Court could not review such acts would completely erase its role as the protector of constitutionality.

In conclusion, the Constitutional Court stated that **the contested constitutional act is also retroactive,** and the principle of a prohibition on retroactivity of law is also among the essential requirements of a democratic state governed by the rule of law. The retroactivity of the contested constitutional act lies in the fact that changing the rules during the course of a term of office violated the right of citizens to vote and be elected with knowledge of the conditions for creating the democratic public authorities resulting from the elections, including knowledge of their term of office.

The Constitutional Court summarized that every constitutional act must meet three elements (conditions), i.e., the procedural condition under Art. 39 par. 4 of the Constitution (it must be

passed in a constitutionally prescribed manner), the condition of competence (authorization) under Art. 9 par. 1 of the Constitution (i.e., it must involve an amendment or supplement to the Constitution, or be a constitutional act adopted on the basis of another express constitutional authorization) and the material condition, i.e. consistency with the essential requirements of a democratic state governed by the rule of law under Art. 9 par. 2 of the Constitution. **In the adjudicated matter, the Constitutional Court concluded that the contested constitutional act is unconstitutionally individual, not general, and retroactive, not prospective, i.e. taking effect for the future. This violated Art. 9 par. 1 of the Constitution, Art. 21 par. 2 of the Charter, in connection with Art. 16 par. 1 of the Constitution, and Art. 1 par. 1 of the Constitution, at a level of intensity that establishes violation of Art. 9 par. 2 of the Constitution.**

The judge rapporteur in the matter was the Deputy Chairman of the Constitutional Court, Pavel Holländer. Judges Vladimír Kůrka and Jan Musil filed dissenting opinions to the judgment.

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Secretary General