2001/12/05 - PL. ÚS 9/01: LUSTRATION II

HEADNOTES

The "Constitutional Court of the CSFR" cannot be considered to be the "Constitutional Court" under § 35 par. 1. Constitutional Act no. 542/1992 Coll. A systematic interpretation of § 35 para. 1 leads to the conclusion that this provision has in mind only the Constitutional Court of the CR, as it is a component of that part of the Constitution of the CR, which establishes the Constitutional Court of the CR. Significant changes in society occurred during the course of more than eight years since the judgment of the Constitutional Court of the CSFR was issued, and the Constitutional Court in no way casts doubt on these changes. Therefore, the judgment by the Constitutional Court of the CSFR of 26 November 1992 does not establish the obstacle of res judicata under § 35 par. 1 Act no. 182/1993 Coll.

Thus, even though the judgments of the Constitutional Court of the CSFR do not create for the Constitutional Court of the CR the formal obstacle of an already decided matter under § 35 par. 1 of Act no. 182/1993 Coll., they represent for it a real authority, based on the fact that the Constitutional Court of the CSFR was the "judicial body for protection of constitutionality" with jurisdiction in the Czech Republic, which it now is itself. The postulate of continuity of the protection provided, which is characteristic for the decision making of a judicial body which steps into the place of a body which has ceased to exist or been annulled, has two aspects. On one hand it permits the new court to diverge from the legal opinion of the preceding court if there has been a change in the circumstances under which that previous court made its decision, and on the other hand it requires it not to cast doubt on the decisions of the previous court if no such change in circumstances has occurred.

Determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question. Thus, the Constitutional Court is not able to review the claim of "culmination" or, on the contrary "non-culmination" of the democratic process by the means which it has at its disposal.

However, it can, in some agreement with the petitioners, confirm that the public interest resting in the state's needs during the period of transition from totalitarianism to democracy have declined in intensity and urgency since 1992.

A democratic state, and not only in a transitional period after the fall of totalitarianism, can tie an individual's entry into state administration and public services, and continuing in them, to meeting certain prerequisites, in particular meeting the requirement of (political) loyalty. The Constitutional Court begins with the premise that the concept of "loyalty" must be interpreted - like other key concepts, e.g. impartiality and independence of courts - by two complementary methods. The concept of loyalty covers the level of loyalty of each individual active in public services, and the level of loyalty of the public services as a whole. Here it is not only relevant whether the public services are actually loyal, but also whether they appear loyal to the public. For that it is necessary that doubts about their loyalty not arise. Such doubts undermine the public's trust in the public services and also in the

democratic state which these services represent. Untrustworthy public services and state administration as a result endanger democracy, and a democratic state is entitled to defend itself against such danger by ensuring that the public services cannot appear untrustworthy to the public by eliminating reasons for doubts.

The Constitutional Court is aware that an individual's attitudes to the democratic establishment are determined primarily by his actual actions. The longer the period which has passed from the collapse of the totalitarian regime, the more and the more thoroughly will an individual's attitude to the democratic state be verified by his daily interaction with it and with the democratic society. In other words, with the passing of time the relative significance of attitudes and the position of persons in the totalitarian state certainly does not disappear, but certainly does decrease. There is evidently consensus in Europe in this regard.

The large and small lustration laws still protect an existing public interest, or – in other words – they pursue a legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and little trustworthy public services.

The Constitutional Court of the CR, in agreement with its Czechoslovak predecessor, considers the closer connection of persons with the totalitarian regime and its repressive components to still be a relevant circumstance which can cast doubt on political loyalty and damage the trustworthiness of the public services of a democratic state and also threaten such a state and its establishment. At the present time other newly democratic European states view this aspect of the past of their public representatives and bureaucrats analogously.

Thus, both lustration laws, in a limited extent and by setting specific prerequisites for working in state services supplement the absence of a key law required by the Constitution, and their existence is therefore, in the given situation in the Czech democratic society, still necessary. However, the Constitutional Court does not consider this present situation to be optimal. The legislator should speedily regulate the prerequisites for access to public office in the full extent and establish in a generally applicable law the personal prerequisites directly in relation to a democratic society, not only through an intermediary and negatively – with reference to the past excessive loyalty to a totalitarian state and its repressive components.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court of the Czech Republic, after oral proceedings on 5 December 2001, decided in the matter of a petition by a group of 44 deputies to annul Act no. 451/1991 Coll., CNR Act no. 279/1992 Coll., Act no. 422/2000 Coll. and Act no. 424/2000 Coll., as follows:

The provisions of § 3 par. 1 letter d), § 3 par. 3, § 3 par. 4 and § 5 par. 2 of CNR Act no. 279/1992 Coll., on certain additional prerequisites for holding of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps (Sbor nápravné výchovy) of the Czech Republic, as amended by later regulations, are annulled as of the day this judgment is promulgated in the Collection of Laws.

The remainder of the petition is denied.

REASONING

I.

On 2 March 2001 the Constitutional Court received a petition from a group of 44 deputies in which the petitioners seek the annulment of:

* Act no. 451/1991 Coll., which sets down certain additional preconditions for holding certain offices in governmental bodies and organizations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic, as amended by later regulations (also the "large lustration law"),

* Act no. 279/1992 Coll., on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps of the Czech Republic, as amended by later regulations (also the "small lustration law"),

* Act no. 422/2000 Coll., which amends the large lustration law,

* Act no. 424/2000 Coll., which amends the small lustration law.

The petitioners intention is aimed, for reasons discussed further below, at removing the cited laws in future from the legal order of the Czech Republic due to their conflict, in

particular with the provisions of Art. 1 of the Constitution of the Czech Republic no. 1/1993 Coll., as amended by later regulations (the "Constitution"),1) Art. 1,2) Art. 4 par. 2 and 43) and Art. 21 par. 44) of the Charter of Fundamental Rights and Freedoms, no. 2/1993 Coll., as amended by later regulations (the "Charter"), Art. 4 of the International Convention on Economic, Social and Cultural Rights, no. 120/1976 Coll.,5) and with the World Trade Organization Discrimination (Employment and Occupation) Convention, no. 111 from 1958 (no. 465/1990 Coll. – "Convention no. 111").

The Constitutional Court of the CSFR reviewed the constitutionality of the large lustration law in 1992 upon a petition from 99 deputies of the Federal Assembly. By judgment of 26 November 1992, file no. Pl. ÚS 1/92, it found that § 2 par. 1 letter c), § 2 par. 2 and § 4 par. 2, 4 of the contested Act are not in accordance with Art. 2 par. 3 and Art. 4 par. 1 and 3 of the Charter and Art. 4 of the Convention; § 2 par. 3, § 3 par. 2 and § 13 par. 3 of the contested Act are not in accordance with Art. 1 of the Charter, and § 11, § 12, § 13 par. 1, 2, 4 and 5, § 18 par. 1 and § 20 of the contested Act are not in accordance with Art. 37 par. 1 and Art. 38 of the Charter and with Art. 98 par. 1 of the Constitution of the CSFR, no. 100/1960 Coll., as amended by Constitutional Act no. 326/1991 Coll.6) The cited provisions became ineffective on 15 December 1992.

In evaluating the constitutionality of Act no. 451/1991 Coll., as the petition states, the Constitutional Court of the CSFR began with the situation at the time the Act was passed (4 October 1991), or at the time roughly one year later. This Act primarily pursued the aim of arranging that in state and public bodies and in workplaces which are connected to national security, persons who held leading offices under the previous regime could be replaced by persons from whom loyalty could be expected to democratic principles on which the state is built. It was also to help avert the risk of subversion or a possible return of totalitarianism or at least to limit it. The Constitutional Court of the CSSFR also emphasized its view by references to the limited time during which the lustration laws was to be in effect. In its judgment it stated: "The conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished (by 31 December 1996). The basic purpose of this statute is to prescribe, exclusively for the future, the preconditions for holding certain narrowly defined offices or for engaging in certain activities precisely specified in the statute, and not permanently, but only for a transitional period."

In January 1999 the Chamber of Deputies of the Parliament of the Czech Republic rejected a bill proposed by deputies which was to annul the large lustration law (PS 1998, 3rd election period, publication no. 74). The background report to the bill stated, among other things, the position of the Administrative Council of the International Labour Office (file no. GB.252/16/19). It contained a call on the CSFR government to implement necessary measures to annul or amend the (large) lustration law and ensure compensation of damages to all persons who had been unfairly affected by it. The background report also points out that the lustration law is subject to constant criticism in the Council of Europe, the European Parliament and European and world non-governmental organizations, and therefore it is highly desirable to annul this extraneous law. In evaluating the situation connected with the performance of lustrations the investigation commission of the International Labour Organization stated in 1994 that there had been only a little progress

in implementing the recommendation of the Administrative Council of the ILO. It expressed "deep regret" that the law had been extended to 2000 without regard to the position of the ILO Administrative Council. The commission recommended that the ILO Administrative Council, among other things, call on the Czech Republic government to take measures which would lead to the annulment or amendment of those provisions of Act no. 451/1991 Coll., which are incompatible with Convention no. 111.

The constitutionality of the small lustration law was not reviewed, so it continues to be valid and in effect, even in those parts which correspond to parts of the large lustration law which the Constitutional Court of the CSFR declared to be unconstitutional. It too was to be affected by the bill submitted in 1998 as chamber of deputies publication no. 73, which was aimed at annulling it; the Chamber of Deputies rejected this bill also.

The group of deputies sees the substance of its petition in the time factor of the social dynamic between November 1989 and 2000, in which one set of democratic elections took place (to regional representative bodies), and in the changes which took place during that time. In the petitioners' opinion, the legislative, executive and judicial powers have been definitively constituted on democratic foundations, leading positions in state and other public bodies and institutions have not, for a long time, been held by persons who were put in place by the previous political regime, whereby the reasons for both lustration laws, insofar as they lay in the need to change the circle of persons holding these positions, lost their justification during the course of that time. Leading positions are mostly filled on the basis of a selection process in which it is possible to consider the applicant's loyalty to the Czech Republic as a democratic state based on the rule of law, as documented by the applicant's actual behavior in the period after November 1989; this applies even more so in matters of public law service relationships in the armed forces and security forces, which are decided in administrative proceedings. Only individuals who have been issued a certificate can be acquainted with classified information of all classified levels. One of the conditions for issuing the certificate is the circumstance that the individual is reliable in terms of security, i.e. that the individual was not found to have a security risk, consisting, e.g. in activity aimed at suppressing human rights or freedoms or in support of such activity (§ 17, § 18 and § 23 of Act no. 148/1998 Coll., on Protection of Classified Information and Amending Certain Acts, as amended by later regulations (the "Protection of Classified Information Act").

The petitioners believe that the risk of subversion or a possible return of totalitarianism, the existence of which the Constitutional Court of the CSSFR admitted in 1992 in connection with the holding of public office by persons tied to the previous regime, is no longer a danger. The intelligence services are required to secure information on possible intentions and activities aimed against the democratic foundations of the Czech Republic under Act no. 153/1994 Coll., on the Intelligence Services of the Czech Republic, as amended by later regulations (the "Intelligence Services Act"). Moreover, as the petitioners point out, the Communist Party of Bohemia and Moravia functions legally in the Czech Republic as a political party with not negligible voter support in parliamentary and communal elections. The law permits the activities of political parties which seek to remove the democratic foundations of the state or which are aimed at seizing and holding power restricting other parties and movements from seeking power by constitutional means to be suspended by a court, or for such a party to be dissolved by court decision.

The Czech Republic, in which the "democratic process was accomplished," is at present struggling with serious risks of an entire different kind, examples of which are economic crime, organized crime, corruption and racial hatred.

Under Art. 3 of the Constitution, the Charter is part of the constitutional order of the Czech Republic. One can conclude from its status the binding nature of the decisions of the Constitutional Court of the CSFR, which were issued on the basis of the Charter. That court recognized the substance of the regulation implemented by the large lustration law as constitutional in view of the situation at the time in the state and in society, i.e. the situation shortly after the fall of the previous regime and the renewal of democracy, and also in view of the fact that the restrictions implemented by the law were not to apply absolutely, but only for a transitional period, i.e. until 31 December 1996. In this context the Constitutional Court of the CSFR recognized in 1992 that the interest of society and the state (the public estate) in having persons in certain publicly important positions to be replaced and to have measures implemented to avert the risk of subversion or a possible return to totalitarianism takes precedence before the fundamental right of citizens to have access under equal conditions to elected and other public offices (Art. 21 par. 4 of the Charter) and before the right to conduct one's employment or profession without discrimination, under Convention no. 111.

Because the public interest (the public estate), the then existence of which the federal Constitutional Court took as a starting point in 1992, has passed, the reasons for restricting fundamental rights and freedoms guaranteed by the Charter and international treaties under Art. 10 of the Constitution have also passed.

The large and small lustration laws, as well as amendments to them, no. 422/2000 Coll. and no. 424/2000 Coll., which extended the validity and effectiveness to an indefinite period, restrict without due cause the abovementioned fundamental rights, and are thus in conflict, in particular with Art. 4 par. 2 and 43) of the Charter, as well as with Art. 1 of the Constitution,1) under which the Czech Republic is a democratic state governed by the rule of law. For all the foregoing reasons, therefore, the group of deputies petitions the Constitutional Court to make a judgment annulling all four of the cited laws.

II.

The Constitutional Court, under § 69 par. 1 Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the "Act"), requested from the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, as participants, their positions on the petition.

The Chairman of the Chamber of Deputies of the Parliament of the Czech Republic stated concerning the petition, among other things: "…each democratic state is entitled to pass, within the limits of its constitutional order and international obligations, such regulations as protect and promote the principles on which it is founded. Determination of the period for which such regulations are passed is not merely a legal issue, but in my oopinion primarily a political issue, connected with the situation in our society. At the same time it is also necessary to consider the fact that in a democratic state a right to any positions of power does not exist and cannot exist, as it is up to the state to decide the criteria by

which it will fill them. It is undoubted that such criteria must be set in advance and must apply equally to all cases which meet the set conditions. On the other hand, the Chamber of Deputies also took into account the fact that every citizen has the right to turn to the courts with a petition to issue a decision whereby his possible collaboration with the communist regime would be reviewed. The purposes of the cited laws is at the present time to a certain extent also fulfilled by other laws in effect; however, their full replacement can be expected only in connection with passage of the Act on State Service, which is to contain a provision that designated positions in state administration can be held only by persons who have not personally been at fault in violation of human rights and freedoms. Based on the foregoing, I cannot but state my belief that the legislative bodies passed the abovementioned laws in the belief that they are in accordance with the constitutional order and relevant international agreements."

The Chairman of the Senate of the Parliament of the Czech Republic in his position on the second amendment of both lustration laws(Acts no. 422/2000 Coll. and no. 424/2000 Coll.) stated, among other things: "The Senate committees which were assigned the draft amendments for review, recommended that the Senate approve them … The Senate's discussion was not limited to the content itself of the minor amendments (extending the validity of the given laws), but to a decisive degree took place as a dispute over the "lustration laws" themselves … The arguments for rejecting the amendments were based in particular on the fact that excluding citizens from the opportunity to seek positions in state administration was being done by formal, group characteristics, not by individual evaluation of persons according to statutory criteria as to whether or not they are capable of observing democratic principles … Critics of the amendments in question also submitted that these laws clearly did not include all categories of persons which they should include, but do include some which they clearly should not include … the general doubt was also raised, whether it is possible to find a solution which would not permit discrimination and simultaneously ensure uncovering those who were responsible for communist repression and could endanger the transition to democracy. The arguments for approving the amendments … were based in particular on the fact that each state has the right to set by statute personal conditions for holding positions in state administration. One such condition is … also loyalty to the method of government. The democratic method then requires a guarantee of the certainty that its office holders will, under all circumstances, heed the democratic rights of citizens. This guarantee is provided … precisely by "lustrations"… Anyone who consciously participated in suppressing the rights of citizens is a potential danger to a democratic society, and thus does not meet the prerequisites for important positions in state administration … there is no legal right to hold a position in state administration … the lustration laws … do not restrict anyone in entering into a political office (deputies, senators, etc.) … the lustration laws are not concerned with determining guilt and punishment. In cases where the instrument of "lustration" is the records of those who worked with the secret police, the person affected can turn to the courts to deny the truthfulness of the entry in the records. Finally, those who defended passing the amendments stated the opinion that, in principle, it is a right and obligation of democracy to protect itself. The criteria for the continuation of such defense is whether that which should be natural in a society works by itself. If it is not so, the law must continue to be used to delimit the necessary rules."

The Constitutional court also requested the position of the Ministry of the Interior of the CR on the petition, and the same ministry's position on the court disputes for protection of personhood which were led against the Czech Republic by persons who received a positive lustration certificate, as well as on the result of proceedings in matters of issuing incorrect negative lustration decisions.

The Ministry of the Interior stated that, on the basis of the contested laws, from 1991 until 5 September 2001 it issued a total of 366,980 lustration certificates, of which 3.45 % were positive. For that period, the ministry's records show a total of 692 petitions for protection of personhood on the grounds of positive lustration certificates issued by the ministry, in various stages of the proceedings. However, it does not keep separate records of disputes where a final decision has been made and the results of these disputes, for reasons which it described in more detail in its position. On the basis of review of the correctness of issued lustration decisions, the Ministry found 117 cases of incorrectly issued decisions. All the persons concerned were issued new certificates and they were simultaneously notified of their obligation to present them to their employer if they held positions which were subject to the lustration laws. The new decisions were not issued to persons who are at present citizens of the Slovak Republic. Written materials concerning these persons were delimited by the Ministry of the Interior of the Slovak Republic on the basis of an international agreement between the Czech Republic and the Slovak Republic.

III.

Under § 68 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, the Constitutional Court, in its decision-making in proceedings to annul statutes and other legal regulations, evaluates the content of these regulations in terms of their compliance with constitutional acts and international agreements under Art. 10 of the Constitution and determines whether they were passed and issued within the limits of the competence provided by the Constitution and in a constitutionally prescribed manner. With legal regulations issued before the Constitution of the Czech Republic no. 1/1993 Coll. went into effect the Constitutional Court is entitled to review only their compliance with the existing constitutional order, but not their constitutionality of the procedure of their creation and observance of legislative jurisdiction (see judgment file no. Pl. ÚS 9/99, published in the Collection of Judgments and Resolutions, vol. 16, p. 13-14).

In the matter at hand the Constitutional Court therefore limited itself to evaluation the constitutionality of the procedure of the creation of amendments to both the lustration laws (Acts no. 422/2000 Coll. and 424/2000 Coll.) and did not evaluate the constitutionality of the procedure of the creation of Acts no. 451/1991 Coll. and no. 279/1992 Coll.

The bill amending Act no. 451/1991 Coll., as amended by later regulations, was validly passed and promulgated on 13 December 2000 in the Collection of Laws under no. 422/2000. The bill amending Act no. 279/1992 Coll., as amended by later regulations, was validly passed and promulgated on 13 December 2000 in the Collection of Laws under no. 424/2000.

IV.

The Constitutional Court considers it necessary right at the beginning of its evaluation to refer to its judgment of 15 August 2000 (Pl. ÚS 25/2000), in which it rejected a petition from a group of deputies of the Chamber of Deputies of the Parliament of the CR to annul provisions of the amending act. In it the Constitutional Court points out that an amending act has no independent legal existence and becomes part of the amended act. In the petition considered here, therefore, the Constitutional Court can not state a separate opinion on amendments no. 422/2000 Coll. and no. 424/2000 Coll., but only on Acts no. 451/1991 Coll. and no. 279/1992 Coll., of which both amendments became part. Therefore, it will further consider exclusively Acts no. 451/1991 Coll. and no. 279/1992 Coll., both as amended by later regulations.

V.

The Constitutional Court first had to address the fact that Act no. 451/1991 Coll. was evaluated in terms of its constitutionality by the Constitutional Court of the CSFR.

A petition from 99 deputies of the Federal Assembly of the CSFR requested, in the alternative, that the Constitutional Court of the CSFR make a judgment that Act no. 451/1991 Coll. ceased to be in effect on 31 December 1991, or that this Act – again as a whole – is not in accordance with various provisions of the Charter of Fundamental Rights and Freedoms, other provisions of a constitutional nature, and some provisions of several international agreements on human rights and fundamental freedoms. The Constitutional Court of the CSFR therefore, within the framework of its powers provided in Art. 2 letter a) and b) of Constitutional Act no. 91/1991 Coll. addressed Act no. 451/1991 Coll. as a whole (that is, all its provisions). Not being bound by the grounds in the deputies' petition, it evaluated the Act in terms of all applicable constitutional law provisions and international agreements on human rights and fundamental freedoms, including those which the deputies' petition did not specifically set forth. It completed its proceedings with a judgment of 26 November 1992, in which it stated the conflict of some provisions of Act no. 451/1991 Coll. with the Constitutions of the CSFR, the Charter, and the International Covenant on Economic, Social and Cultural Rights. These provisions ceased to be in effect on 15 December 1991 and the Czech Republic took over the Act in this expurgated form.

The current petition from the group of deputies request the issuance of a judgment which would annul Act no. 451/1991 Coll. as a whole and also annul Acts no. 279/1992 Coll., no. 422/2000 Coll. and no. 424/2000 Coll. Of course, Act no. 451/1991 Coll. was already reviewed by the Constitutional Court of the CSFR and the results of the review were incorporated into its cited judgment.

As a result of this, the Constitutional Court had to answer the question whether § 35 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, which reads: "A petition instituting a proceeding is inadmissible if it relates to a matter upon which the Constitutional Court

has already passed a judgment, and in other instances cases provided for by this Act." is applicable in connection with that part of the deputies' petition which proposes annulment of Act no. 451/1991 Coll.

The Constitutional Court had to interpret whether the "Constitutional Court of the CSFR" can be considered to be the "Constitutional Court" under § 35 par. 1. Constitutional Act no. 542/1992 Coll. (Art. 3 par. 1) terminated the activity of all bodies of the CSFR ex constitutione. The jurisdiction of the Constitutional Court of the CSFR was transferred under Art. 6 par. 2 of the same Constitutional Act to the Supreme Courts of the CR and SR, unless the constitutional acts of both successor states provided otherwise. The last cited provision became obsolete at the moment of establishment of the Constitutional Court of the CR on the basis of Art. 83-89 of the Constitution of the CR. Neither the Constitution of the CR nor any other constitutional act provides that the jurisdiction of the Constitutional Court of the CSFR is transferred, in relation to the CR, to the Constitutional Court of the CR. The constitutional law existence of both constitutional courts is therefore mutually independent. There is no formal constitutional law continuity between them.

Act no. 182/1993 Coll., on the Constitutional Court, is a regulation whose passage is anticipated by Art. 88 par. 1 of the Constitution of the CR, which reads: "An Act shall specify who shall be entitled to submit a petition instituting a proceeding before the Constitutional court, and under what conditions, and shall lay down other rules for proceeding before the Constitutional Court." A systematic interpretation leads to the conclusion that this provision has in mind only the Constitutional Court of the CR, as it is a component of that part of the Constitution of the CR, which establishes the Constitutional Court of the CR. On the contrary, the Constitutional Court of the CSFR was established by Constitutional Act no. 91/1991 Coll. and the rules of procedure before it were regulated by Act no. 491/1991 Coll.

Act no. 182/1993 Coll. thus functions in a system of judicial protection of constitutionality established by the Constitution of the CR, i.e. in a different system than was the analogous system established by Constitutional Act no. 91/1991 Coll.

Although the Constitutional Court of the Czech Republic is to consider, just as the Constitutional Court of the CSFR did in 1992, Act no. 451/1991 Coll., in its opinion this is not the identical matter. In this regard it points to its opinion expressed in its judgment of 24 January 2001, by which it annulled certain provisions of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic (see no. 64/2001 Coll.). In it, it reached the conclusion that, under certain circumstances, after the passage of more than 4.5 years, the same thing can appear in a somewhat different light, in particular if social changes have occurred during that period of time. Such an occurrence does not in any way step out of the bounds of constitutionality. The petition from a group of deputies in the matter of the lustration laws which the Constitutional Court is evaluating now, in 2001, points to significant changes in society, which occurred during the course of more than eight years since the judgment of the Constitutional Court of the CSFR was issued, and the Constitutional Court in no way casts doubt on these changes. Therefore, it considers its conclusion in the judgment in the matter of the Election Act to be relevant in this case as well. In addition, the fact that Constitutional Court is evaluating an amended, i.e. altered version of Act no. 451/1991 Coll. plays its part here, as does the fact that this Act is now also to be evaluated in the light of instruments which were not valid at the time of the

judgment by the Constitutional Court of the CSFR. This is true primarily of the Constitution of the Czech Republic, or for certain international agreements which became binding on the CSFR, or the Czech Republic, only after the judgment was issued in 1992.

In view of the foregoing, the Constitutional Court of the CR reached the conclusion that the judgment by the Constitutional Court of the CSFR of 26 November 1992 does not establish the obstacle of res judicata under § 35 par. 1 Act no. 182/1993 Coll. The Constitutional Court of the CR is thus formally entitled to evaluate the submitted petition from the group of deputies in full.

VI.

The Constitutional Court of the CR then summarized its relationship to the case law of the Constitutional Court of the CSFR. In its judgment on the question of the difference between restitution and expropriation of 24 May 1994, file no. Pl. ÚS 16/93 the Constitutional Court of the CR cites from the decision of the Constitutional Court of the CSFR sentences devoted to the principle of equality. It states about them: "Because under Art. 3 of the Constitution of the Czech Republic the Charter of Fundamental Rights and Freedoms is part of its constitutional order, from the foregoing we can conclude the binding nature of decisions of the Constitutional Court of the CSFR which were issued based on it." The petitioners also expressly rely on this conclusion of the Constitutional Court of the CR.

The cited conclusion of the Constitutional Court of the CR on the binding nature of decisions by the Constitutional Court of the CSFR of course has only limited effect in practice, in view of the fact that during abstract review of the constitutionality of laws the Constitutional Court generally measures the statutory text not only by the Charter or other constitutional acts which form the constitutional order (Art. 112 par. 1 of the Constitution), but also by international agreements on human rights and fundamental freedoms, which, in contrast, are not part of the constitutional order. In the past the Constitutional Court of the CSFR also proceeded in this manner, including in the case of Act no. 451/1991 Coll. Application of the conclusion about the binding nature of decisions of the Constitutional Court of the CSFR would thus lead to the impractical and logically unsustainable conclusion that its judgment in the matter of the lustration law of 1991 is partly binding and partly not.

Moreover, the Constitutional Court of the CR, in its later decisions, acceded to the decisions of its Czechoslovak predecessor less formally. It considers itself as continuing its material concept of constitutionality in the Czech Republic, though it is not formally its legal successor. It formulated this in a number of its judgments, in which it relies in agreement on the case law of the Constitutional Court of the CSFR, without considering it necessary to repeat its deduction on the binding nature of its decisions based on the Charter (see, e.g., judgments I. ÚS 68/93 of 21 April 1994, I. ÚS 108/93 of 30 November 1994, and Pl. ÚS 5/95 of 8 November 1995).

Judgment I. ÚS 56/95 is persuasive, which states: "For completeness the Constitutional Court also took into consideration the complainant's objection, which relies on the

judgment by the Constitutional Court of the CSFR of 21 December 1992. However, this reference is incorrect… Taking account of this, the Constitutional Court of the CSFR also evaluated the instructional obligations of the court under § 5 of the Civil Procedure Code.7) The cited decision is thus unusable for resolving the adjudicated matter, as its substance concerns a completely different problem." It is evident from this citation that the Constitutional Court of the CR treats the judgments of the Constitutional Court of the CSFR de facto as its own judgments, and does not seek formal grounds which would rule out the use of such decisions or, on the contrary, permit them.

Thus, in its practice the Constitutional Court of the CR promotes the idea of continuity of protection of constitutionality in democratic Czechoslovakia and in the democratic Czech Republic, which is its successor state. It was not led to this only by a spontaneously arising identity of opinion with individual cases of the Czechoslovak Constitutional Court, but also by the imperative arising from Art. 1 of the Constitution of the CR, under which the Czech Republic is a "democratic state based on the rule of law." The essential attributes of the sovereignty of law in a democratic state include its predictability, which is closely tied to the categories of continuity in law and legal certainty. Constitutionality in democratic Czechoslovakia and in the democratic Czech Republic was and is identically established on values guaranteed by the Charter of Fundamental Rights and Freedoms and international agreements on human rights and fundamental freedoms. Therefore, there is no real reason for the concept of constitutionality of the Constitutional Court of the CSFR and that of the Constitutional Court of the CR to differ essentially and fundamentally.

Thus, even though the judgments of the Constitutional Court of the CSFR do not create for the Constitutional Court of the CR the formal obstacle of an already decided matter under § 35 par. 1 of Act no. 182/1993 Coll., they represent for it a real authority, based on the fact that the Constitutional Court of the CSFR was the "judicial body for protection of constitutionality" with jurisdiction in the Czech Republic, which it now is itself.

This occurrence, connecting a spontaneous identity of concept with the imperatives of a state based on the rule of law, or the sovereignty of law, can be seen in the case law of the European Court for Human Rights (the "European Court"). The analogy with the relationships between the Czechoslovak and Czech Constitutional Courts is evident. The previous and present European Court are two separate entities. The first was established by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (the "European Convention"), the second by the 11th protocol to it of 1994. Proceedings before them differ. Both evaluate the compliance of the behavior of states parties with the European Convention. The 11th protocol does not contain any provisions on the binding nature of decisions by the previous European Court for today's European Court.

The present European Court, which began its activity in 1998, did not consider it necessary to consider the question of the binding nature of decisions by the previous court. It simply resolved it, beginning with its first decision, by relying on the cases of its predecessor as if they were its own decisions. In the judgment of 21 January 1999 in the matter Geyseghem versus Belgium it confirms without any explanations whatsoever, that in the adjudicated matter it will apply the principle used in the cases Lala and Pelladoah versus The Netherlands of 1994, and also relies on the case Poitrimol versus France of 1993.

The postulate of continuity of the protection provided, which is characteristic for the decision making of a judicial body which steps into the place of a body which has ceased to exist or been annulled, has two aspects. On one hand it permits the new court to diverge from the legal opinion of the preceding court if there has been a change in the circumstances under which that previous court made its decision, and on the other hand it requires it not to cast doubt on the decisions of the previous court if no such change in circumstances has occurred.

VII.

The Constitutional Court then applied its deliberation on the degree of reviewability of judgments of the Constitutional Court of the CSFR to its judgment of 26 November 1992 and in light of it evaluated the petition from the group of deputies. In it, the petitioners state: “Therefore, the undersigned deputies can not but petition the Constitutional Court to annul both Acts no. 422/2000 Coll. and no. 424/2000 Coll., and Act no. 451/1991 Coll. and no. 279/1992 Coll. themselves, due to their conflict with the provisions of Art. 1 of the Constitution,1) Art. 1,2) Art. 4 par. 2 and 43) and Art. 21 par. 44) of the Charter of Fundamental Rights and Freedoms, Art. 4 of the International Covenant on Economic, Social and Cultural Rights5) and with the International Labour Organization’s Convention on Discrimination (Employment and Profession) of 1958 (no. 111), which is undoubtedly an international agreement under Art. 10 of the Constitution.”

Act no. 451/1991 Coll. was amended twice after 26 November 1992: by Act no. 254/1995 Coll., which established its validity until 31 December 2000, and by Act no. 422/2000 Coll., which annulled the cited provision on the period of validity amended in 1995 and also removed from the jurisdiction of § 1 to § 3 of the lustration law citizens born after 1 December 1971. The only provisions of Act no. 451/1991 Coll. whose constitutionality the Constitutional Court of the CSFR did not evaluate in 1992 and which are now part of it, are thus the provisions contained in the present § 20 and incorporated in it by Act no. 422/2000 Coll.

The Constitutional Court of the CSFR reviewed the constitutionality of Act no. 451/1991 Coll. under all applicable provisions of the Charter and international agreements on human rights and fundamental freedoms, including the International Covenant on Economic, Social and Cultural Rights and Convention no. 111, on which the petitioners explicitly rely. Review of compliance with both cited international agreements was also expressly requested by the petition from the group of deputies of the Federal Assembly, and in its judgment the Constitutional Court of the CSFR expressed itself clearly concerning both.

The petitioners also refer to conflict of Act no. 451/1991 Coll. with Art. 1 of the Constitution of the CR, which, naturally, in 1992 could not serve as a measuring instrument for the Constitutional Court of the CSFR. Art. 1 of the Constitution states that “the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law and founded on respect for the rights and freedoms of man and of citizens.” At the time when the Constitutional Court of the CSFR reviewed the constitutionality of the large lustration law, Art. 1 of the Constitution of the CSFR read as follows: “The Czech and Slovak Federal Republic is a democratic state governed by the rule of law, composed of the Czech

Republic and the Slovak Republic" (see Constitutional Act no. 493/1992 Coll. of 8 October 1992). Thus, the common central concept of both articles 1 is the concept of a "democratic state based on the rule of law," where respect for the rights and freedoms of the human being and the citizen was then and now guaranteed by the constitutional Charter of Fundamental Rights and Freedoms. It is undoubted that the Constitutional Court of the CSFR also reviewed the constitutionality of the large lustration law from the point of view of Art. 1 of the then Constitution, i.e. from the point of view of the attributes of a democratic state based on the rule of law, and did not find conflict with it. In the reasoning of its judgment it refers to the concept of a democratic state based on the rule of law many times, in particular concerning its value framework. For example, the cited judgment states that a "state based on the rule of law which is tied to democratic values implemented after the fall of totalitarianism can not … be seen as amorphous from the point of view of values."

CNR Act no. 279/1992 Coll., i.e. the small lustration law, was not, in terms of its constitutionality, reviewed either by the Czechoslovak or the Czech Constitutional Court. According to the background report, it is based on the overall concept of Act no. 451/1991 Coll. The reason why it had to be passed – as a lex specialis to the large lustration law – lay in Art. 27 of the constitutional act on the Czechoslovak Federation. Under that, establishing their own armed forces and regulation of their status fell under the exclusive jurisdiction of each of the republics, i.e. the legislative jurisdiction of the Czech National Council. The construction of the small lustration law is identical with the structure of the large lustration law. The small lustration law contains an enumeration of positions in the Police of the CR and the Corrections Corps of the CR, to which a citizen who does not meet some of the prerequisites provided in § 3 of Act no. 279/1992 Coll. (for positions in the Police of the CR), or in § 5 (for a position in the Corrections Corps of the Czech Republic) can not be nominated or appointed.

It is proposed that the Constitutional Court of the CR annul the entire Act no. 279/1992 Coll. The petitioners do not provide specific grounds, where they find its provisions to be in conflict with the Charter or international agreements on human rights, i.e. grounds which would have their origin only in this small lustration law, but not in Act no. 451/1991 Coll. Under these circumstances, the Constitutional Court of the CR does not find grounds to exceed, in its review of the constitutionality of the small lustration law, the framework of the review conducted in 1992 by the Constitutional Court of the CSFR in connection with Act no. 451/1991 Coll. With reference to the arguments provided in the reasoning of the judgment of the Constitutional Court of the CSFR of 26 November 1992, the Constitutional Court of the CR finds conflict of the provisions of § 3 par. 1 letter d)8) and § 3 par. 39) Act no. 279/1992 Coll., on conscious collaboration with the State Security, whose content is identical to § 2 par. 1 letter c) and § 2 par. 2 of Act no. 451/1991 Coll., specifically conflict with Art. 2 par. 310) and Art. 4 par. 1 and 311) of the Charter and Art. 4 of the International Covenant on Economic, Social and Cultural Rights.5) Likewise with reference to the arguments in the reasoning of the judgment of the Constitutional Court of the CSFR it finds conflict of § 3 par. 412) and § 5 par. 213) of Act no. 279/1992 Coll., on granting exceptions, with Article 1 of the Charter.2) Both of the latter provisions are, in terms of their content, basically identical with the provisions of § 2 par. 3 and § 3 par. 2 of Act no. 451/1991 Coll., whose conflict with Art. 1 of the Charter was found by the Constitutional Court of the CSFR. The cited provisions of the large lustration law do presume violation of

an "important security interest of the state," whereas the corresponding provisions of Act no. 279/1992 Coll. only violation of an "important security interest of the service" (§ 3 par. 3),9) or "important interest of the service" (§ 5 par. 2),13) but from the point of view of reviewing constitutionality these differing expressions are irrelevant. In the case of Act no. 451/1991 Coll. the cited provisions established an unjustified inequality between employees of two ministries (the interior and defense) and other person affected by the Act. In the case of Act no. 279/1992 Coll., on the contrary, there is an unjustified inequality between employees of the ministries of the interior and justice, who, until the present time, can be granted an exception on the basis of the Act, on the one hand, and other persons affected by lustration legislation, i.e. Act no. 451/1991 Coll., in which provisions on providing exceptions lost their validity in the past, as a result of the judgment of the Constitutional Court of the CSFR, on the other hand.

The Constitutional Court's statement annulling the cited provisions of the small lustration law due to their conflict with the Charter and international agreements on human rights and fundamental freedoms also has an influence on some other provisions of this law, which refer to the annulled provisions. These are, in particular, the provisions of § 6 par. 1, § 8 par. 1 and § 9 par. 5. In view of the fact that the subject-matter applicability of these provisions is not exhausted by reference to the provisions which the Constitutional Court found to be unconstitutional, and it is merely narrowed, the cited provisions continue to have their purpose and place in Act no. 279/1992 Coll. In addition, the fact that certain provisions refer to another provision, which was found unconstitutional, does not establish the unconstitutionality of the referencing provision. Therefore, the Constitutional Court did not find grounds to annul the cited referencing provisions. Likewise, it did not find grounds to annul those parts of the text of Act no. 279/1992 Coll. which rely on the content of the provisions of Act no. 451/1991 Coll. which ceased to be valid as a result of the judgment of the Constitutional Court of the CSFR. These are especially the provisions relating to the decisions of the independent commission established under § 11 - § 13 of Act no. 451/1991 Coll. A reference to the commission's decisions is found in, e.g. the provisions of § 6 par. 1 in fine and § 8 par. 1 of Act no. 279/1992 Coll. The Constitutional Court is a judicial body for the protection of constitutionality, and it is not its job to make editorial changes in Acts which were submitted to it for review. It would thereby interfere in the competence of the legislator.

Together with the amendment of the large lustration law, in 2000 Act no. 279/1992 Coll. was amended analogously, by Act no. 424/2000 Coll. The amendment pursues the same aim as amendment no. 422/2000 Coll. of the large lustration law, and therefore the further conclusions of the Constitutional Court concern both lustration laws jointly.

VIII.

With their petition, the petitioners seek to have the large and small lustration Acts pro futuro "removed from the legal order of the Czech Republic." The substance of the arguments is summarized in part V of the petition. They begin with the judgment of the Constitutional Court of the CSFR of 1992. They state: "The Constitutional Court of the CSFR found the substance of the regulation implemented by Act no. 451/1991 Coll. to be constitutionally conforming in view of the situation of the state and the society shortly

after the fall of the previous regime and the renewal of democracy and in view of the fact that the restrictions introduced by the Act are not to apply absolutely, but only for a transitional period, i.e. until 31 December 1996. The Constitutional Court of the CSFR would apparently have taken an analogous position toward CNR Act no. 279/1992 Coll., had it considered it. Under the stated circumstances and conditions, the Constitutional Court of the CSFR recognized in 1992 that the public interest (the public estate) consisting of the need of society and the state to have persons in certain publicly significant positions replaced and to apply measures aimed at averting the risk of subversion or a possible return of totalitarianism takes precedence …" before the fundamental rights of citizens which the petition further specifies. From the cited substantive review of the judgment of the Constitutional Court of the CSFR, the petitioners also draw the conclusion to which their petition provides various arguments. This argument is formulated as follows: "Because … the public interest (the public estate), the then existence of which the Constitutional Court of the CSFR took as a starting point in 1992, has ceased to exist, the reasons for restricting fundamental rights and freedoms … which were based on the existence of that public interest have also ceased to exist." In other words, the petitioners believe that the time factor plays a key role in reviewing the constitutionality of the lustration laws. Because their validity and period of effectiveness were expanded to an indefinite period of time, they restrict fundamental rights and freedoms at the present time "without appropriate reasons," and are thus in conflict with some provisions of the Constitution, the Charter and international agreements on human rights and fundamental freedoms.

IX.

The Constitutional Court agrees with the petitioners' opinion that the amendment of the lustration laws, which removed provisions about their restricted validity in time, was considerable intervention in their meaning. This intervention undoubtedly represents a marked change in circumstances in terms of reviewing the constitutionality of both lustration laws. The Constitutional Court therefore cannot simply assume all the conclusions contained in the judgment of the Constitutional Court of the CSFR, but must first answer the question whether, when they were being drawn, the restriction of the time validity of Act no. 451/1991 Coll. to the end of 1996 was for the Constitutional Court of the CSFR a sufficiently significant factor that it influenced its decision, in which it did not find most of the provisions of this Act to be in conflict with the Constitution, the Charter or international agreements on human rights and fundamental freedoms.

In this regard the Constitutional Court believes that the petition inexactly and especially incompletely perceived the substance of the arguments used by the Constitutional Court of the CSFR in the reasoning of its judgment, and therefore cannot agree with the interpretation made by the petitioners. It is true that the Constitutional Court of the CSFR recognized the justification for the need of society and the state to replace person in certain public positions and to implement measures aimed at averting the risk of subversion or a possible return of totalitarianism. It also emphasized the relevance of the time restriction on the validity of the lustration law.

However, the judgment of the Constitutional Court of the CSFR also states other arguments, which the petition completely omits. The Constitutional Court of the CSFR emphasizes that in "stabilized democratic systems part of the requirements placed on persons seeking employment in state service, in public service and in workplaces which are considered risky in terms of the security and stability of the state is fulfillment of certain civic prerequisites signaling a consensus of opinion and loyalty to the interests of the state and the democratic principles on which the state is built." In light of this maxim it approves the actions of the legislator which "justifiably took as its starting point the opinion" that, at least to a necessary degree of justification it cannot be assumed that the values of democratic constitutional principles "will be without anything further and without reservation brought to life by the members of former power structures." Finally it also states the belief that the state cannot be denied the ability to set, for the performance of management or other decisive positions, conditions or prerequisites in which "it takes into consideration its own security, the security of citizens, and further democratic development."

Thus, the argumentation of the Constitutional Court of the CSFR is thus infinitely richer and more diverse than as the group of deputies presents it. Some of its arguments are tied to the needs of the state and the society in the conditions during the transition from totalitarianism to democracy, which the petition reflected in full. In this regard the Constitutional Court of the CSFR also pointed to the time restricted validity of the lustration law, without itself necessarily tying the end of its justified validity to the year 1996. It merely states the time restricted validity of the law and identifies 1996 for reference as the year "in which the democratic process is expected to culminate." It thus takes over a sort of working hypothesis about the tempo of the dynamics of the development of democracy in the CSFR. The petition from the group of deputies brings many data which convincingly document that the development of democratic changes after 1992 is stormy and that – as they expressly state – the "democratic process culminated." Nonetheless, the Constitutional Court considers it necessary to add to these data that determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question. Thus, the Constitutional Court is not able to review the claim of "culmination" or, on the contrary "non-culmination" of the democratic process by the means which it has at its disposal. However, it can, in some agreement with the petitioners, confirm that the public interest resting in the state's needs during the period of transition from totalitarianism to democracy have declined in intensity and urgency since 1992.

The second group of reasons, neglected by the petition of the group of deputies, which the Constitutional Court of the CSFR states, relates to the need of a democratic society and a democratic state to protect its state administration and public services from the entry of persons who do not meet certain prerequisites. Among these prerequisites it expressly mentions "loyalty with the interests of the state and the democratic principles on which the state is built." It considers the setting of such prerequisites a measure which belongs not only to states in a period of transition from totalitarianism to "democracy, but to all "stabilized democratic systems." Finally, it stated the belief that such loyalty cannot "without anything further and without reservation" be expected from "members of previous power structures" and from those who "were put in important state, social and economic positions on the basis of conflicting value criteria only so that, as representatives

of the previously ruling ideology, they served to maintain the power monopoly of the ruling bureaucratic apparatus."

With these arguments the Constitutional Court of the CSFR expressed its support for another public interest (public estate), which is the right and obligation of a democratic state to actively defend its democratic establishment, including by restricting access to state and public services, using the condition of loyalty of its representatives and employees. The Constitutional Court of the CSFR unambiguously assigns this public interest to a democratic state generally, i.e. in a phase where its democratic establishment is still being built and in a phase where its democracy has culminated (in "stabilized democratic systems").

Therefore, the task of the Constitutional Court of the Czech Republic was to state its opinion as to whether the cited public estate is of a "timeless nature" and is thus relevant even now, ten years after passage of Act no. 451/1991 Coll.. The Constitutional Court states above all that the justification of the idea of "a democracy capable of defending itself" (wehrhafte Demokratie, démocratie apte à se défendre) was repeated recognized by the European Court in its decisions. The European Court considers achievement of it as a "legitimate aim," fulfillment of which permits, within appropriate bounds, states to restrict the rights guaranteed in the European Convention. At the same time it has often emphasized that the creators of the European Convention consciously omitted to include in its text the right of an individual to equal access to a state's public services (see, e.g. the verdict in the matter Glasenapp versus Germany from 1986). The European Court stated its position on the question of loyalty of persons in state administration and public services in its verdict in the matter Vogt versus Germany from 1995, as follows: "The court takes as its starting point the assumption that a democratic state is entitled to require of its bureaucrats that they be loyal to the constitutional principles on which it is based. In this regard it takes into account the experience in Germany during the Weimar Republic and during the bitter period which followed the collapse of this regime until the passage of the Founding Act in 1949. Germany wished to bar the possibility that these experiences would repeat themselves, and therefore established its new state on the idea of a democracy able to defend itself … It is understood that the cited circumstances added to the seriousness of this substantive concept and the corresponding obligation of political loyalty imposed on bureaucrats."

Thus, in the given question several conclusions arise from the two cases of the European Court :
1) Promoting the idea of "a democracy able to defend itself" is a legitimate aim of the legislation of each democratic state, in any phase of its development.
2) The requirement of political loyalty of persons in state administration and public services is considered an undoubted component of the concept of "a democracy able to defend itself."
3) The specific degree of loyalty required depends on the historical, political and social experiences of each individual state and on the degree of threat to democracy in the given state. In this regard, the European Court, in the decision in the matter of Vogt, states that no state in Europe in the 80s (in the period of the evens being reviewed) required loyalty with such strictness as Germany, and it paused over the "absolute nature" of this requirement in the German conditions, as the German courts apply the requirement of

loyalty equally to all bureaucrats, regardless of their positions and place in the hierarchical structure of the public services.

Of course, the European Court also expressed its opinion concerning the requirement of loyalty of state employees in other cases, in which the complaint was directed against a consolidated democratic state. The Constitutional Court points out at least the judgment in the matter of Pellegrin versus France from 1999, in which the European Court state its belief that the state has a "legitimate interest" in requiring from state employees a "special tie of trust and loyalty" because these employees are in a way the holders of part of its sovereignty.

Thus, on the basis of its excursion into the case law of the European Court the Constitutional Court can reach this conclusion: a democratic state, and not only in a transitional period after the fall of totalitarianism, can tie an individual's entry into state administration and public services, and continuing in them, to meeting certain prerequisites, in particular meeting the requirement of (political) loyalty. Moreover, this is proved by, e.g. the legislative or judicial practice in the United States of America (see the decision of the Supreme Court of the USA in the matter of Adler v. Board of Education).

The Constitutional Court begins with the premise that the concept of "loyalty" must be interpreted – like other key concepts, e.g. impartiality and independence of courts – by two complementary methods. The concept of loyalty covers the level of loyalty of each individual active in public services, and the level of loyalty of the public services as a whole. Here it is not only relevant whether the public services are actually loyal, but also whether they appear loyal to the public. For that it is necessary that doubts about their loyalty not arise. Such doubts undermine the public's trust in the public services and also in the democratic state which these services represent. Untrustworthy public services and state administration as a result endanger democracy, and a democratic state is entitled to defend itself against such danger by ensuring that the public services can not appear untrustworthy to the public by eliminating reasons for doubts.

The Constitutional Court then turned to answering the question whether an individual's close connection with the power apparatus and repressive components of a totalitarian state can be considered an expression of disloyalty to a democratic state, or at least a relevant reason for casting doubt on loyalty in the eyes of the public.

The Constitutional Court points first of all to Act no. 198/1993 Coll. on the Lawlessness of the Communist Regime and Resistance to It and to its judgment concerning this Act published under no. 14/1994 Coll.. The cited Act enumerates crimes and other comparable events which occurred in the territory of the present-day Czech Republic during 1948-1989, and in the operative part of the text assigns full co-responsibility for them to those "who promoted the communist regime as functionaries, organizers and instigators in the political and ideological area." In the preamble it states the special responsibility of the pre-November Communist Party, including its leadership and members. Thus, it is evident that an individual's close connection to the pre-November regime and its repressive components is a circumstance capable of having an adverse effect on the trustworthiness of a public position which that individual holds in a democratic state, as the communist regime was identified by the Parliament of the Czech democratic state as "criminal, illegitimate, and abominable."

In this regard the Constitutional Court considers irrelevant the petitioners' objection that the present Communist Party of Bohemia and Moravia is a "legally functioning party with not negligible voter base." The regulation of the lustration legislation only takes a position on the pre-November Communist Party and draws certain conclusions only from classified forms of involvement with it.

In its judgment of 1992 the Constitutional Court of the CSFR pointed out that other European states where a totalitarian regime of monopoly power collapsed during the 80s and 90s also apply lustration legislation. In view of the fact that no international court has yet issued a decision in the question of the compliance of lustration laws with international agreements, the Constitutional Court considers it desirable to use other international and foreign indicators for its answer to the abovementioned question.

A common feature of the "lustration laws" passed in Europe during the 90s is the fact that they concentrate on an individual's position and/or behavior under totalitarianism and draw negative consequences for him from them in terms of his involvement in public life in the present democratic state. Such Acts were passed in Germany (Act on Stasi Documentation of 20 December 1991), in Bulgaria (Act on Additional Conditions Concerning Scientific Institutions and the High Verification Commission of 9 December 1992), in Hungary (Act on Reviewing the Background of Persons Holding Certain Key Positions of 9 March 1994), in Albania (two Acts of 22 September and 30 November 1995), in Poland (Act on Recognizing the Employment or Service Relationship of Persons who Hold Public Office in State Security Forces or Collaboration with Them in 1994-1990 of 11 April 1997), in Romania (Act on Citizens' Access to their Personal Files Maintained by the Securitate and Aimed at Revealing the Character of That Organization as Political Police of 20 October 1999) and to a limited extent also in other countries in central and eastern Europe. Without going into the details of the individual Acts, the Constitutional Court states that practically all the cited Acts consider persons' membership in a totalitarian state's secret police or collaboration with it to be relevant, some of them also include persons' positions in the party or state apparatus (the Albanian and Bulgarian Acts). The Parliamentary Assembly of the Council of Europe, in its Resolution no. 1096(1996) (point 11) fundamentally admits the compatibility of lustration laws with the attributes of a democratic legal state, with the presumption that their purpose is not to punish the affected persons, but to protect the forming democracy.

In light of the foregoing facts, the Constitutional Court has grounds to state that certain behaviour or a certain position of an individual in a totalitarian state is generally considered, from the viewpoint of the interest of a democratic state, to be a risk to impartiality and trustworthiness of its public services, and therefore has a restrictive influence on the possibility and manner of including "positively lustrated" persons in them.

The Constitutional Court then addressed the question whether certain behavior and/or a certain position of an individual in a former totalitarian state represents, from the point of view of the interests of a democratic state which was constituted in its place, a "timeless" or only a temporary risk. The Constitutional Court is aware that an individual's attitudes to the democratic establishment are determined primarily by his actual actions. The longer the period which has passed from the collapse of the totalitarian regime, the more and the more thoroughly will an individual's attitude to the democratic state be verified by his daily interaction with it and with the democratic society. In other words, with the passing

of time the relative significance of attitudes and the position of persons in the totalitarian state certainly does not disappear, but certainly does decrease. There is evidently consensus in Europe in this regard. The time of application of individual lustration laws or individual provisions based on them is generally restricted in Europe, either by the temporary validity of the Act (the Albanian Act – to the end of 2002), or by setting a period in which individual lustrations can be conducted, which is, according to available information, in Hungary to the end of 2004, in Germany to the end of 2006, in Romania to the end of the six-year existence of the lustration body established on the basis of the abovementioned Act in 2000, i.e. until 2006 (with a possibility of extension by Parliament), or, finally, by restricting the time of the effects of individual lustration measures. This is the case in Poland, where the effects of the relevant court decision last ten years. Although the Constitutional Court is convinced of the temporary nature of lustration legislature, it also states that in the great majority of other European states which addressed the same problem in the last decade, lustration laws are still valid and are in effect.

X.

After the Constitutional Court answered all the questions which it raised for itself as preliminary, it turned to reviewing the constitutionality of Acts no. 451/1991 Coll. and no. 279/1992 Coll., exclusively in light of their amendments no. 422/2000 Coll. and no. 424/2000 Coll., which removed their temporary time of validity.

The Constitutional Court does not share the legal opinion of the petitioners, according to which the public interest (public estate) the then existence of which the Constitutional Court of the CSFR took as a starting point in 1992, has ceased to exist and the reasons for restricting fundamental rights and freedoms which were based on this public interest have also ceased to exist.

The large and small lustration laws still protect an existing public interest, or – in other words – they pursue a legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and little trustworthy public services. Both Acts pursue this legitimate aim by setting certain prerequisites for the performance of certain positions in state bodies and organizations, in the Police of the CR and in the Corrections Corps of the CR. A legislative measure of this kind is not exceptional in Europe at the present time, and is expressly admitted by, e.g. recommendation no. (2000)6 of the Committee of Ministers of the Council of Europe, in which the Czech Republic is a member. This recommendation regulates the position of representatives of public power (public officials, agents publics). In the preamble the recommendation points out that the public administration plays a substantial role in democratic societies and that persons in it are subject to special obligations and commitments because they serve the state. Point 4 explicitly recognizes that both general and specific prerequisites may exist for access to public positions, on the assumption that they are provided by law.

Both lustration laws set special prerequisites for access to only some (basically only management or significant) positions in state or public services. This method of selection

positions, the performance of which is tied to special prerequisites, is also normal in a democratic state, and in the Czech Republic it is applied, e.g. in connection with Act no. 148/1998 Coll., which the petitioners themselves refer to.

The specific presumptions which the lustration laws introduced reflect the position of an individual in the period of totalitarianism, 1948-1989. While this position meets the elements provided in the lustration laws, it makes impossible the access of a lustrated individual to public positions named in them. The Constitutional Court of the CR, in agreement with its Czechoslovak predecessor, considers the closer connection of persons with the totalitarian regime and its repressive components to still be a relevant circumstance which can cast doubt on political loyalty and damage the trustworthiness of the public services of a democratic state and also threaten such a state and its establishment. At the present time other newly democratic European states view this aspect of the past of their public representatives and bureaucrats analogously.

The Constitutional Court considers it undoubted that the relevance of the stated presumption decreases with the passage of time from the fall of the totalitarian establishment, and therefore considers lustration legislation to be temporary, as is the case in Germany and in various countries in central and eastern Europe. Therefore, the question is posed, whether the restrictions of certain rights introduced in them are still "necessary in a democratic society," in other words, whether these restrictions are still commensurate to the legitimate aim which they pursue.

In its review, the Constitutional Court takes as a starting point the fact that lustration prerequisites apply only to a restricted circle of fundamentally important positions, and that, on the contrary, they do not restrict an individual's access to most positions in state administration and the public services. It also takes into account the declining tendency to apply the lustration laws in practice. As is indicated by the statement from the Ministry of the Interior which the Constitutional Court requested, in the first eight months of 2001 roughly 5,800 certificates were issued based on the laws, of which about 2 % were positive. Thus, in practice, in the period from January to August 2001 the lustration laws restricted access to the named public positions to approximately 120 individuals.

However, the Constitutional Court states, above all, that the imperative incorporated in Art. 79 par. 2 of the Constitution, under which "The legal relations of state employees within the ministries and other administrative offices shall be laid down in a statute" has not yet been fulfilled. An Act on State Service has not yet become part of the Czech legal order. Thus, both lustration laws, in a limited extent and by setting specific prerequisites for working in state services supplement the absence of a key law required by the Constitution, and their existence is therefore, in the given situation in the Czech democratic society, still necessary. With the exception of certain Acts, e.g. no. 483/1991 Coll., on Czech Television, no. 6/1993 Coll. on the Czech National Bank, no. 335/1991 Coll., on Courts and Judges, no. 148/1998 Coll., on Protection of Classified Information, and no. 455/1991 Coll., on Licensed Trades (the Trades Licensing Act), access to elected, appointed and nominated positions specified in the lustration laws is regulated only by these lustration laws.

However, the Constitutional Court does not consider this present situation to be optimal. The legislator should speedily regulate the prerequisites for access to public office in the

full extent and establish in a generally applicable law the personal prerequisites directly in relation to a democratic society, not only through an intermediary and negatively – with reference to the past excessive loyalty to a totalitarian state and its repressive components. This is the case, e.g. in Germany (Art. 7 § 1 par. 2 of the Bundesbeamtengesetz). In this regard the Constitutional Court also points to the background report to Act no. 422/2000 Coll., under which "the validity of the present Act no. 451/1991 Coll. was to be terminated only upon passage of an Act on State Services." The Constitutional Court welcomes this promise in the background report, and considers approval of general prerequisites for access to public positions, in view of the temporary and subsidiary nature of the specific prerequisites set by the lustration laws, to be urgent.

In view of the argumentation in the petition, the Constitutional Court considers it undoubted that the petitioners did not separately raise the objection of conflict with the Charter or with international agreements on human rights in the case of the amended § 20 of Act no. 451/1991 Coll. and the corresponding § 10a in Act no. 279/1992 Coll. (citizens born after 1 December 1971 are excluded from the application of the lustration laws). These provisions narrow the application of both laws, and their purpose thus in its way pursues a direction which is pursued in a much wider (absolute) degree by the petitioners themselves. Therefore, it does not consider it necessary to state any further opinion on § 20 of the large lustration law and on § 10a of the small lustration law.

XI.

For all the foregoing reasons, the Constitutional Court annulled § 3 par. 1 letter d)8) and § 3 par. 39) of Act no. 279/1992 Coll., on Certain Additional Prerequisites for Holding of Certain Offices Filled by Nomination or Appointment in the Police of the Czech Republic and Members of the Corrections Corps of the Czech Republic, as amended by later regulations, due to their conflict with Art. 2 par. 310)and Art. 4 par. 1 and 3 of the Charter11) and Art. 4 of the International Covenant on Economic, Social and Cultural Rights,5) annulled § 3 par. 412) and § 5 par. 213) of the same Act no. 279/1992 Coll. due to their conflict with Art. 1 of the Charter,2) and denied the remaining part of the petition.

Instruction: Judgments of the Constitutional Court can not be appealed.

Brno 5 December 2001

Pl. US 9/01

Overview of the most important legal regulations

1. Art. 1 of Act no. 1/1993 Coll., the Constitution of the CR, states: The Czech republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.

2. Art. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Basic Freedoms, states: All people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and basic freedoms are inherent, inalienable, illimitable, and not subject to repeal.

3. Art. 4 par. 2 of the Act no. 2/1993 Coll., the Charter of Fundamental Rights and Basic Freedoms, stipulates that limitations may be placed upon the fundamental rights only by law and under the conditions prescribed in the Charter. Par. 4, sentence 1 states that in employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved.

4. Art. 21 par. 4 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Basic Freedoms, stipulates that citizens shall have access to any elective and other public office under equal conditions.

5. Art. 4 of the International Covenant on Economic, Social and Cultural Rights, published under no. 120/1976 Coll. states: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

6. See the footnotes to decision 1/92 of this Collection.

7. Section 5 of Act no. 99/1963 Coll., the Civil Procedure Code, provides that the courts shall instruct the parties on their procedural rights and obligations.

8. Section 3 par. 1 let. d) of Act no. 279/1992 Coll., on certain additional prerequisites for holding of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps (Sbor nápravné výchovy) of the Czech Republic, states that a prerequisite for holding offices provided in § 2 is that a person was not a conscious collaborator with the State Security [secret police] from 25 February 1948 to 17 November 1989.

9. Section 3 par. 3 of Act no. 279/1992 Coll., on certain additional prerequisites for holding of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps (Sbor nápravné výchovy) of the Czech Republic, provides that, for purposes of this Act, conscious collaboration with the State Security means that a person was registered in State Security files as a confidante, candidate for secret cooperation or a secret coworker with confidential contact and knew

that he was meeting with an officer of the National Police and giving him reports through secret contact or fulfilled tasks assigned by him.

10. Art. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Basic Freedoms, provides that everyone may do that which is not prohibited by law; and nobody may be compelled to do which is not imposed on him by law.

11. Art. 4 par. 1 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Basic Freedoms, stipulates that duties may be imposed upon persons only on the basis of and within the bounds of law, and only while respecting the fundamental rights and basic freedoms of the individual. Par. 3 stipulates that any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions.

12. Section 3 par. 4 of Act no. 279/1992 Coll., on certain additional prerequisites for holding of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps (Sbor nápravné výchovy) of the Czech Republic, provides: In justified cases the minister of the interior of the Czech Republic may waive the condition provided in par. 1 a) (the person was not, in the decisive period, a member of the National Police classified in a State Security counterintelligence unit), if applying it would interfere with an important security interest of the corps and the purpose of this Act is not endangered thereby.

13. Section 5 par. 2 of Act no. 279/1992 Coll., on certain additional prerequisites for holding of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Corrections Corps (Sbor nápravné výchovy) of the Czech Republic, provides: In justified cases the minister of the interior of the Czech Republic may waive the condition provided in par. 1 let. d) and e) (i.e. the person did not hold the office of a leader of a department or division or the leader of a group of internal defense of the Corrections Corps of the CR or the person was not listed in the files of the Corrections Corps of the CR as a resident, agent, or confidante of internal defense of the Corrections Corps of the CR), if applying it would interfere with an important security interest of the corps and the purpose of this Act is not endangered thereby.