

1999/02/18 - I. ÚS 526/98: ELECTION CAMPAIGN

Headnotes

In proceedings under Part 3 Chapter 2 of the Act on the Constitutional Court the Constitutional Court decides on an appeal against a decision in the matter of verifying the election of a deputy or senator, and because it acts as - sui generis - the appeal level, it must evaluate the particular case not only in terms of protection of constitutionally guaranteed rights or freedoms, but primarily in terms of the trustworthiness of the democratic election process.

The Supreme Court of the CR is entitled to decide by verdict about whether a particular senator was validly elected or not. Therefore, it cannot be said that the Supreme Court of the CR only evaluates whether or not there are grounds for a filed complaint (it is justified), and that it is not entitled to decide on the validity of the election.

A body of the Senate reviews the validity of the election from other viewpoints, particularly with regard to Art. 19 para. 2 of the Constitution³⁾ and § 57 of the Elections Act (Act No. 247/1995 Coll.).

The filed application (appeal against a decision of verifying the election of a senator) cannot be formally denied with reference to the fact that it is aimed “against a legally irrelevant decision of the Senate”. The relevance of a Senate decision in verifying the election of a deputy or senator can be derived from § 85 of the Act on the Constitutional Court⁵⁾.

The argument concerning objective or subjective violation of the Elections Act (§ 166)) is considerably misleading. Generally, the issue should not be exclusively whether the Elections Act was violated objectively or subjectively, but it is necessary to take into account the circumstances of the specific case and the intensity and way in which the Elections Act was violated. Thus, it cannot be generally stated that each violation of the Elections Act (if appealed) results in the invalidity of the election, or that the penalty of invalidity of the election cannot be applied to violation of the Elections Act at all.

It is clear from the nature of the matter that in the “moratorium period” of 48 hours before elections begin and in the election days it is not possible to completely ban any election campaigning whatsoever. Therefore, § 16 para. 5 of the Elections Act⁶⁾ must be interpreted rather restrictively, in the sense that the legislature intended to ban active election campaigns, i.e., intentional and purposeful campaigning, purposefully aimed for political parties, coalitions and candidates.

Although proceedings on an appeal in the matter of verifying the election of a deputy or senator are specific proceedings - whose primary task is to protect the function of elections in a democratic society in terms of the “objective” constitutional law - it is necessary in them to reflect the protection of fundamental rights and freedoms of natural persons and legal entities. Although the Elections Act bans active election

campaigning in the statutorily defined period, the intended aim of this restriction (i.e. protection of the subjective decision making of voters) may not violate other fundamental rights and freedoms, in particular freedom of expression and the right to information. Thus, even in the statutorily protected period the media have the right to provide information, and may present their own opinions; they are only forbidden to campaign actively for any particular candidate. Freedom of expression and the right to information are among the main pillars of a democratic society, which the media, in particular, naturally use in their work. This fundamental right and its exercise are necessarily an essential for their free existence.

The right to freedom of expression and the right to information are one of the cornerstones of a democratic state, as only free information and its exchange and free discussion make a person a citizen of a democratic country. It is the press, radio and television which spread and provide the information; in this regard freedom of information has extraordinary importance.

Thus, the principle of honorable and honest election campaigns and the ban on campaigning in the period of 48 hours before elections and during them cannot be interpreted so widely that the act would create social vacuum which makes the existence of freedom of expression and the right to information (in connection with elections) impossible.

Consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is judicial decision making which - although it does not have a classical precedential nature - interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court of the CR, which is the supreme judicial body in the field of the general judiciary (cf. § 92 of the Constitution). This, of course, does not deny that judicial case law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions.

The purpose of § 16 para. 2 and 5 of Act no. 247/1991 Coll.6) is undoubtedly protection of honorable and honest elections. It can be agreed that - institutionally speaking - it would generally not be appropriate to concentrate exclusively on the question whether it was only a candidate (political party) who violated the cited provision. On the other hand, however, it is difficult to comprehensively accept a strictly objective criterion and ignore the fact that the candidate did not subjectively cause the violation of the election rules. The opposite interpretation would necessarily lead to a situation in which any subject could achieve the invalidity of the election of any candidate completely without his fault, which could - in eventum - significantly interfere with elections. The legislature naturally did not intend such consequences.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court, in a panel, decided on 18 February 1999 by a finding in the matter of the petitioner, the Civic Democratic Party (Občanská demokratická strana), the party to the proceedings - the Supreme Court of the Czech Republic and the Senate of the Parliament of the Czech Republic, secondary parties - D. L. and the Czech Social Democratic Party (Česká strana sociálně demokratická) on the appeal against the decision of the Senate of the Parliament of the Czech Republic of 16 December 1998 and the Mandate and Immunity Committee of the Senate of the Parliament of the Czech Republic no. 18 of 15 December 1998 in the matter of verification of the election of senator D. L. and against a decision by the Supreme Court of the Czech Republic of 3 December 1998, file no. 11 Zp 54/98, as follows:

D. L. was validly elected a senator in elections to the Senate of the Parliament of the Czech Republic, held on 13 - 14 November 1998 and 20 - 21 November 1998 in the election district no. 58 Brno-city.

REASONING

I.

The petitioner appeals against the decision of the Supreme Court of the CR indicated in the introduction, in which the court decided that “the election of a senator in elections to the Parliament of the CR held on 20 - 21 November 1998 is invalid and D. L. cannot be given a certificate of election as a senator”.

In the reasoning of the decision, the Supreme Court of the CR stated that, in deciding on the complaint against issuing a certificate of election as a senator under § 88 of Act no. 247/1995 Coll. on Elections to the Parliament of the CR and Amending and Supplementing Certain Other Acts, as amended by other regulations (the “Elections Act”), and on the basis of § 200n of Civil Procedure Code, it evaluated “whether the statutorily prescribed procedure of elections and determination of their results was observed”. Judiciary review is done in proceedings which are, by their nature, a special kind of adversary civil court proceedings, and the petitioner is therefore required to identify evidence to prove its claims. The petitioner in the proceedings before the Supreme Court of the CR (the Czech

Social Democratic Party, Česká strana sociálně demokratická), in the adjudicated matter identified five events as evidence of violation of the Elections Act:

1. On the first day of the second round of elections (20 November 1998) the daily newspaper Lidové noviny published an article on the front page entitled “Brno mayor D. L. has a chance to become chairman of the Senate”. On that same day the same daily published a pre-election poll, in which it identified D. L. as the clear favorite.
2. On 21 November 1998 the same daily published, in the article “Commissions discussed campaign” a section with the sub-title “ČSSD candidate Božek acted immorally”.
3. In the first round of the Senate elections, D. L. allegedly had access to the district election commission, before the protocol on the termination of its work was signed.
4. On 20 November 1998, i.e. during the first day of the elections, D. L. was able to appear in the television news program Jihomoravský večerník, where she allegedly spoke about and evaluated her election campaign.
5. D. L.’s election materials were allegedly distributed on the second day of the elections, i.e. 21. November 1998, in the morning.

In this connection, the Supreme Court of the CR pointed to § 16 para. 2 of the Elections Act⁶), under which an election campaign must take place honorably and honestly, in particular, untrue information may not be published about candidates and political parties or coalitions on whose candidate lists they stand. Paragraph 5 of this provision primarily forbids election campaigning for political parties, coalitions and candidates in the period of 48 hours before elections begin and on election days. It is also forbidden to publish the results of pre-election public opinion polls, “provided that they may be published no later than the seventh day before election day”.

In the opinion of the Supreme Court, the Elections Act was violated, specifically § 166) concerning regulation of an election campaign. The violation was to have occurred by the fact that (1.) on the first day of the second round of elections (20 November 1998) the daily Lidové noviny published an article on the front page entitled “Brno Mayor D. L. has a chance to become Chairman of the Senate”. On that same day the same daily published a pre-election poll, in which it identified D. L. as the clear favorite, that (2.) on 21 November 1998 the same daily published, in the article “Commissions discussed campaign” a section with the sub-title “ČSSD candidate Božek acted immorally” and that (3) on 20 November 1998, i.e. during the first day of the elections, D. L. was able to appear in the television news program Jihomoravský večerník, where she allegedly spoke about and evaluated her election campaign. Concerning the objection about D. L.’s alleged interference with the work of the District Election Commission, the Supreme Court of the CR stated that this fact had not been proved in any way. Concerning the point of the complaint about distribution of D. L.’s election materials on the second day of the elections, the Supreme Court of the CR stated that if this did actually occur, it could have been violation of the Elections Act, nonetheless, “in view of the conclusions cited above and the shortness of the time which the Supreme Court of the CR has available for decision making, it no longer considered it useful to concern itself with this question”.

The Supreme Court stated that in terms of the degree and seriousness of the violation of the Elections Act, it is of course important whether the violation occurred through the active actions of the candidate or her party, or another entity without her knowledge. In the case of isolated, less significant interference of third entities with the election, there would clearly not be such violation of the law which would result in invalidity of the elections. Nonetheless, if such interference is committed by the mass media (a national daily considered “trustworthy” and state-wide public television), “the question of some sort of fault or participation by the candidate in such election campaigning in these cases is irrelevant”. At the same time, the obligation to refrain from election campaigning in the statutorily defined period allegedly can not be considered interference with freedom of speech and the right to information, as it is in the interest of the free decision making of voters just before elections and during elections to have an opportunity to consider their decision in peace. Likewise, the absolute ban on publishing results of pre-elections of public opinion polls during the specified period cannot be circumvented in the way that Lidové noviny did, as this would cast doubt on its very purpose. Thus, although in the opinion of the Supreme Court of the CR “there is no discussion” about the fact that D. L. did not subjectively cause violation of the rules of elections - with the exception of the television appearance - (and there is no evidence that she instigated the articles and the television program), the Elections Act is based on the fact that it is to be objectively observed, and if it is not observed, (“if someone attacks this shortcoming, it can have only one consequence - invalidity of the elections”. The media are also required to observe the law, and if they violate it, they should bear the liability, including criminal liability.

The Mandate and Immunity Committee of the Senate of the Parliament of the Czech Republic by decision on verification of the validity of elections of senators stated “that it could not verify the mandate for the election district in question in view of the fact that the Supreme Court of the CR decided that the election was invalid and D. L. could not be issued a certificate on election as a senator”. The Senate of the Parliament of the Czech Republic, by resolution of 16 December 1998, took cognizance of the cited report from the Mandate and Immunity Committee.

II.

The petitioner summarized its main arguments against the decision of the Supreme Court of the CR. First of all, in its opinion, the Supreme Court decided on the invalidity of the election without a legal basis, as neither the Election nor the Civil Procedure Code provides for the subject matter jurisdiction of the Supreme Court of the CR. Section 79 of the Elections Act is allegedly a statutory basis for decision making by the President of the Republic and not the court. The question of whether individual deputies and substitute deputies were validly elected is decided, under § 45 para. 1 letter a) of the Act on the Rules of Procedure of the Chamber of Deputies, by the Mandate and Immunity Committee and the Chamber of Deputies (or Senate). Second, the petitioner claims that the Elections Act does not connect violation of obligations provided in § 16 para. 2 and 56) with the sanction/penalty of invalidity of the election, as such a serious consequence would have to be stated *expressis verbis* in the law or “must be derived by unambiguous legal arguments”. The petitioner sees the third level of its objections in the fact that any violation of § 16 para. 2 and 5 of the Elections Act⁶⁾ in this case was of low intensity, did not influence

voters' decision making and consisted of actions by subjects other than the candidate and the political party which nominated her. Fourth, the petitioner concluded that § 16 of the Elections Act⁶) and its interpretation are in conflict with the constitutionally guaranteed right to freedom of expression and right to information under Art. 17 of the Charter of Fundamental Rights and Freedoms¹), so it is clearly unconstitutional.

III.

The Constitutional Court stated that the file indicates that the appeal against the decision in the matter of verifying the election of senator D. L. meets all statutory formal requirements, and thus nothing prevents review of and a decision in the matter itself.

IV.

After discussing the matter, the Constitutional Court concluded that the appeal is justified.

A) The Constitutional Court stated that, in the first place, it considers it necessary to state that proceedings under Art. 87 para.1 letter e) of the Constitution⁴) and under Chapter 2 of Part three of the Act on the Constitutional Court, i.e. proceedings on an appeal against the decision in the matter of verifying the election of a deputy or senator are special and relatively separate kind of proceedings before the Constitutional Court, to which general provisions on proceedings before the Constitutional Court apply only in a subsidiary manner.

In proceedings under Part 3 Chapter 2 of the Act on the Constitutional Court, the Constitutional Court decides on an appeal against a decision in the matter of verifying the election of a deputy or senator, and because it acts as - sui generis - the appeal level, it must evaluate the particular case not only in terms of protection of constitutionally guaranteed rights or freedoms, but primarily in terms of the trustworthiness of the democratic election process. Violation of the subjective rights of individuals can become an instigation to review the regularity of elections, but the substantive content of that review must be a determination whether the existing shortcomings have such impact that they cast doubt on the results and thereby also the validity of the elections. Based on foregoing, although it is true in these proceedings that the Constitutional Court is a judicial body for protection of constitutionality (Art. 83 of the Constitution) and that Constitutional Court judges are bound in their decision making only by constitutional acts and international treaties under Art. 10 of the Constitution (Art. 88 para. 2 of the Constitution), nonetheless, the viewpoints from which the Constitutional Court evaluates the justification of a decision in the matter of verifying an election are given not only by constitutional norms but also by statutory norms.

B) It must be said that the existing legal regulation of proceedings in the matter of an appeal against issuing a certificate of election as a senator (§ 88 para. 1 of the Elections Act) and its interpretation are considerably disputed and not unified. Therefore, before turning to the specific adjudicated matter, the Constitutional Court considers it

appropriate to take a position on certain general procedure aspects of proceedings about this type of election complaint.

Section 88 para. 1 of the Elections Act indicates that a complaint against issuing a certificate on election as a senator can be used by every citizen registered in the list of voters in the relevant election district, and every political party or coalition which filed a registration application in that district to seek a court decision under a special act. In this case, that act is the Civil Procedure Code, under § 200n of which on a complaint against issuing a certificate of election as a senator shall be decided by a court by resolution, without court proceedings, within ten days. The court's decision cannot be appealed. Section 89 of the Elections Act indicates that the Supreme Court of the CR has jurisdiction for proceedings in this matter. Under § 88 para. 2 of the Elections Act, "the court shall send its position in the decision, depending on the nature of the matter, to the Chamber of Deputies or the Senate". Under § 79 of the Elections Act, "if a senator was not elected in the election district due to a court decision on the invalidity of the election, or due to the fact that the elections were not held properly, the Ppresident of the Republic shall call supplemental elections".

Section 45 para. 1 letter a) of Act no. 90/1995 Coll. on the Rules of Procedure of the Chamber of Deputies (which is also used commensurately for sessions of the Senate, under § 126 of the act until such time of the Act on the Rules of Procedure of the Senate is passed) gives the Mandate and Immunity Committee the right to review whether individual deputies and substitute deputies were dully elected and, depending on the nature of the matter, it shall present its findings to the Chamber of Deputies or the Chairman of the Chamber of Deputies.

Under § 85 para. 1 letter a) of the Act on the Constitutional Court⁵), an appeal against the decision in the matter of verifying the election of a senator may be submitted by the senator, or the party for which he was a candidate, against the decision that he was not validly elected. If the Senate verifies the validity of the election of the senator, an appeal against the decision may be filed by "the party whose election complaint was granted" [letter b) of the cited provision].

C) In the opinion of the Constitutional Court, the foregoing overview of the legal regulation of this type of "election complaint" indicates that proceedings in this matter are based on the following principles:

1. A complaint against issuance of a certificate of election as a senator may be filed by every entitled citizen or the appropriate political party (or coalition). The complaint is decided by the Supreme Court of the CR.

2. In this matter, the Supreme Court of the CR is entitled to decide by a verdict about whether the senator in question was validly elected or not. This provision corresponds to the cited provisions of § 88 of the Elections Act and § 200n para. 1 of the Civil Procedure Code which state that a complaint against issuance of a certificate of election as a deputy or a senator shall be decided by a court. Therefore, it cannot be said that the Supreme Court of the CR only evaluates whether a filed complaint does or does not have grounds (is justified) and that it does not have jurisdiction to decide about the validity of the elections. At the same time, it is clear that the legal regulations of proceedings before the

Supreme Court of the CR in election matters (judicial review) is based on the nature of those proceedings, one of the basic - and necessary - requirements of which is that the proceeding must be fast. This fact alone cannot be seen as violation of the procedural guarantee of due process under chapter five of the Charter.

In this regard the Constitutional Court basically begins with the fact that the Parliament of the CR is the supreme body, not of all power, but only legislative power. With regard to the current regulation in the Constitution of the CR and the Elections Act, Parliament primarily has the power - with constitutionally defined exceptions - to decide using the normative form, i.e. in a manner generally binding for a further unspecified range of subjects and not in the form of individual legal acts. Likewise in the case of deciding on an election complaint, the right to issue an authoritative decision (an individual legal act) thus belongs to an independent court and not to the legislative body, with the exception cited below. Under § 45 para.1 letter a of the Act on the Rules of Procedure of the Chamber of Deputies, the Mandate and Immunity Committee is entitled to review whether individual deputies were validly elected, but during this review it must begin with any decisions of the Supreme Court of the CR, issued in proceedings on a complaint against issuance of certification of election. (The body of the Senate itself reviews the validity of an election from other viewpoints, particularly with regard to Art. 19 para. 2 of the Constitution³) and § 57 of the Elections Act.) Therefore, in the adjudicated matter, the decision of the Supreme Court of the CR cannot be questioned on the grounds that the Supreme Court of the CR was not authorized to issue it at all, or that the decision is not binding in the given case.

It is clear from the foregoing that the law distinguishes a situation when a decision is issued that a deputy or senator was not validly elected - which is decided (with the above mentioned exception) by the Supreme Court of the CR - and one when a decision was issued to certify the validity of an election by the appropriate house of Parliament. Thus, if (generally) the Supreme Court of the CR decides on an election complaint under § 88 of the Elections Act, this decision (the position contained in it) is given to the Chamber of Deputies or the Senate, and the appropriate house of Parliament must observe it in deciding about certification of the election of a deputy or a senator.

3. If the Supreme Court decides that the election in question was not valid, this does not mean that the mandate of the senator in question terminates by the decision, but that it was never created.

4. An appeal against the decision in the matter of verifying election of a senator is decided by the Constitutional Court, which shall state in its decision that the senator either was or was not validly elected. By promulgation of a decision of the Constitutional Court granting an appeal, under § 91 para. 3 of Act no. 182/1993 Coll. on the Constitutional Court, decisions of other bodies which are in conflict with this decision lose effect.

V.

The Constitutional Court reached these conclusions:

a) § 16 para. 2 of the Elections Act⁶) indicates that “an election campaign must take place honorably and honestly; in particular, untrue information must not be made public about candidates and the political parties or coalitions on whose candidate lists they are listed.” Under para. 5 of this provision, “in a period of 48 hours before elections begin and on election days election campaign for political parties, coalitions, and candidates is forbidden; it is forbidden to publish information which could damage a political party, coalition or candidate, in speech, in writing, sound or pictures in buildings where the district election commissions reside, and in their immediate surroundings. To publish the results of pre-election public opinion polls is permitted only up to the seventh day before election day. During the elections, any election poll in the building where the election room is located is forbidden.” Under para. 7 of this provision, “during elections, until the election rooms are closed, it is forbidden to publish results of election polls.”

b) From the wording of the Act - though not only from it - we can conclude certain basic facts. In the first place it is obvious (and in this the Constitutional Court considers the petitioner correct), the delineation of rules for conducting an election campaign, as indicated in § 16 of the Elections Act⁶), is not comprehensive, and that an election campaign is more or less governed by a whole range of provisions from other legal regulations (the Civil Code, the Criminal Code, the Act on Minor offences, etc.). Thus, § 16 of the Elections Act⁶) must also be understood to relate to other legal regulations and “emphasize” their importance- for understandable reasons - in the period just before elections.

It is also true that legal regulation of an election campaign is not and cannot be regulated exhaustively, as can be seen with comparable foreign legal regulations. For example, under § 32 of the German Elections Act (Bundeswahlgesetz, BGBl. I S. 1288 as amended by later regulations) only election propaganda in the immediate vicinity of election rooms and publishing public opinion results are expressly forbidden, and only in the election period. Under § 58 of the Austrian Elections Act (Nationalrats-Wahlordnung, BGBl. 1992/471) any election campaigning, particularly questioning voters, distributing election materials, holding assemblies and carrying weapons are forbidden in buildings where election rooms are located and in their vicinity on election days. Thus, rules for conducting election campaigns are and, per the nature of the matter, necessarily must be considerably general, and it is the task of judicial case law to shape them more precisely and make them more specific.

c) The argument contained, on the one hand, in the criticized decision of the Supreme Court of the CR and, on the other hand, in the appeal, concerning objective or subjective violation of the Elections Act (§ 16)⁶), is considerably deceptive. Generally speaking, the issue should not be exclusively whether the Elections Act was violated objectively or subjectively, but it is necessary to take into consideration the circumstances of a specific case and the intensity and manner of violation of the Elections Act. This idea must also be a starting point in the adjudicated matter. Thus, it cannot be generally stated that every violation of the Elections Act (if contested) results in the invalidity of the elections, nor that the penalty of invalidity of elections cannot be applied to violation of the Elections Act at all. Every case - as was already stated - must be judged and evaluated not formally, but materially: always individually and taking into account all the particular circumstances in the meaning stated above.

d) Thus, we cannot agree with the petitioner's opinion that violation of election campaign rules (§ 16 of the Elections Act)⁶) cannot lead to invalidity of elections at all. Therefore, it is not appropriate to cast doubt on the general conclusion of the Supreme Court CR, that violation of the Elections Act (election campaign rules) can lead to "making elections invalid".

e) Regarding the petitioner's opinion concerning the unconstitutionality of a possible judicial (Senate) decision on the termination of the senator's mandate due to Art. 25 of the Constitution - which does not address anything like that - it must be stated that this case is not about a decision on termination of the mandate with effects *ex nunc*, but about the invalidity of the senator's election with effects *ex tunc*. This means that if the election complaint is granted, the mandate was never created, and thus conflict with Art. 25 of the Constitution does not exist. In this case as well, the Constitutional Court begins with its settled case law, under which, in a situation when a certain provision of a legal regulation permits two various interpretations, and one is in accordance with constitutional laws and with international treaties under Art. 10 of the Constitution, all state bodies must interpret it in a manner which conforms to the Constitution (cf. e.g. decision Pl. ÚS 5/96, The Constitutional Court of the CR: Collection of Decisions, vol. 6, C. H. Beck, Prague, 1997, p. 203).

f) Thus, in the adjudicated matter - in view of these general conclusions - the Constitutional Court concentrated on the questions (1.) whether the Elections Act was violated in this case, and (2.) if so, whether the intensity of the violation is so serious that in can lead to a decision that the elections were invalid.

g) In interpreting the provisions of § 16 of the Elections Act⁶) the Constitutional Court began first with their grammatical wording. First of all, it is no accident that the legislature used different terminology in the paragraphs of § 16 of the Elections Act⁶): while in para. 2 it works with the concept "election campaign," in para. 5 it speaks of "election campaigning." It is clear from the nature of the matter that in the "moratorium period" of 48 hours before elections begin and on election days it is not possible to completely forbid all kinds of election campaigns, as the consequences of such a ban would necessarily mean, e.g., removal of all election posters and billboards, which is technically very difficult to do. Para. 5 of the cited provision must therefore be interpreted rather restrictively, in that the legislature had in mind a ban on an active election campaign, i.e. intentional and targeted campaigning, purposefully directed for political parties, coalitions and candidates.

h) In the adjudicated matter the Constitutional Court found that the television clip aired on Česká televize in the program Jihomoravský večerník cannot be seen as violation of the rules for conducting an election campaign in the meaning of § 16 of the Elections Act⁶) in an intensity endangering the objectivity of elections. This newscasting clip also did not violate the ban on election campaigning, as it cannot be interpreted - in the above-mentioned meaning - as purposeful, intentional and active election campaigning for the candidate D. L. The television clip in question was only informative, and its authors evidently tried to provide room for various opinions in it. The Constitutional Court did not find violation of the Elections Act in such an extent as to cast doubt on the overall election results, nor did it find it in the two articles in the daily Lidové noviny.

The stated conclusions follow- among other things - from the fact that the Constitutional Court accented particularly material aspects, took into account the final result of the Senate elections in the particular election district and took into account the question of whether and to what extent the function of elections in a democratic society was endangered in the adjudicated matter. The official records of the Central Election Commission indicate that in the first round D. L. received 9,562 votes and V. B. 6,955 votes. In the second round of elections D. L. received 9,797 votes and V. Božek received 9,534 votes, i.e. the difference in votes was 263. It is clear that the difference in votes in the second round of Senate elections was very close, so that at first glance there could have been an election “upset” from a decision of only a small number of voters. Nonetheless, it cannot be overlooked that a comparison of the results of the first and second round of elections indicates that the number of votes for D. L. was relatively constant in both rounds, there was no significant increase (only 2.45 %), and, in contrast, it was V. Božek who received considerably more votes in the second round of elections than in the first round (by 37.08 %), which could be attributed to the campaign conducted for his benefit, which the election commission criticized and to which L. responded. Thus, we can judge that neither the articles nor the television clip fundamentally affected the second round of Senate elections, and they did not interfere with the function of elections in a democratic society.

i) The Constitutional Court also emphasizes that although proceedings about an appeal against a decision in the matter of certifying the election of a deputy or senator are special proceedings - whose primary task is protection of the function of elections in a democratic society in terms of “objective” constitutional law - protection of the fundamental rights and freedoms of natural persons and legal entities must also be observed in them. Thus, although the Elections Act forbids active election campaigning in the statutorily defined period, the aim of this restriction (i.e. protection of the subjective decision making of voters) cannot violate other fundamental rights and freedoms, in particular freedom of expression and the right to information. Thus, even in the statutorily protected period, the media have the right to provide information, and they may also present their own opinions; they are only forbidden from actively campaigning for any particular candidates. Therefore, the adjudicated matter must also be evaluated from this point of view. We cannot not see that freedom of expression and the right to information are among the main pillars of a democratic society, which the media, in particular, naturally use in their work. This fundamental right and its exercise necessarily form an essential condition for their free existence. Therefore, with each restriction of this fundamental right, it is necessary to proceed with extreme caution, and anxiously heed constitutional regulations, binding norms of international law (Art. 10 of the Constitution) and the case law of the European Court of Human Rights.

These general ideas are also the basis for interpretation of § 16 of the Elections Act⁶). The principle of honor and honesty of an election campaign and the ban on election campaigning in the period of 48 hours before elections and during them thus cannot be interpreted so widely as if the law created a social vacuum which does not permit the existence of freedom of expression and the right to information (in connection with elections). This is discussed in more detail in the next part of this decision (VII.).

VI.

As the Constitutional Court already stated, the substance of its arguments was concentrated on the question of whether “objective” constitutional law, specifically whether there was a violation of the Elections Act and whether the intensity of the violation was so serious that it should result in a decision that the elections were invalid. However, the Constitutional Court also considered the petitioner’s objection that - although proceedings about an appeal against a decision in the matter of certifying the election of a deputy or senator are special proceedings (compared to the institution of a constitutional complaint) - they too cannot abandon protection of the fundamental rights and freedoms of natural persons and legal entities, if they were (in connection with elections of deputies and senators) violated by interference of a public body. Therefore, the Constitutional Court also considered this aspect of the matter. In this regard we can rely on the Charter of Fundamental Rights and Freedoms (Art. 17 1)), the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 10) and the case law of the European Court of Human Rights that concerns the question of protection of the right to freedom of expression in the period of an election campaign (cf. the decision of the European Court for Human Rights of 19 February 1998 - Bowman, Great Britain, no. 141/1996/760/961).

Therefore, the Constitutional Court also considered whether the appealed decisions violated the fundamental right to freedom of expression and the right to information in the meaning of Art. 17 of the Charter¹⁾ and Art. 10 of the Convention.

The Constitutional Court reviewed the following questions:

1. Whether this right was interfered with and whether these articles of the Charter and the Convention can be applied

Under Art. 17 para. 1 - 3 of the Charter, freedom of expression and the right to information are guaranteed. Everyone has the right to express his views in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the state. Censorship is not permitted. Similar protection is also provided by Art. 10 of the Convention. This is a right which is one of the cornerstones of a democratic state, as only free information and its exchange and free discussion make a person a citizen of a democratic country. It is the press, radio and television which spread and provide the information; in this regard freedom of information has extraordinary importance. This is also confirmed by well-known case law of the European Commission for Human Rights and the European Court for Human Rights (cf. e.g. Sunday Times v. Great Britain (1978, A-30). Thus, if the press and television - even if in connection with the elections - provided the incriminated information, D.L. appeared on television, and as a result the elections were declared invalid and the mandate of D.L. was not certified, then there was undoubtedly interference in the right to freedom of expression and the right to information and both articles of the Charter and the Convention are applicable to the adjudicated matter.

2. However, these rights are not unlimited. Restrictions on them are provided in Art. 17 para. 4 of the Charter¹), under which freedom of expression and the right to seek out and spread information can be restricted by law, in the case of a measure which is, in a democratic society, necessary for protection of the rights and freedoms of others, national security, public safety, protection of public health and morals and Art. 10 para. 2 of the Convention, under which exercise of these freedoms, because it also includes obligations and responsibility, can be subject to such formalities, conditions, restrictions or sanctions as the law provides and which are necessary in a democratic society in the interest of national security, territorial integrity or public safety, prevention of unrest and crime, protection of health or morals, protection of the reputation or rights of others, preventing the escape of confidential information or preserving the authority and independence of the judicial power.

These restrictions have the character of exceptions to the fundamental right to freedom of expression and the right to information, and therefore they must be interpreted restrictively according to general principles. This is also the approach chosen by the Constitutional Court.

The cited articles of the Charter and the Convention indicate that a restriction of the cited fundamental right is subject to the following conditions: it must be provided by a law which has a legitimate purpose, and the restriction must be one that is necessary in a democratic society.

3. The Constitutional Court first reviewed whether restrictions in the sense of the cited articles are given by law. Generally speaking this is so, as these restrictions are established by §16 para. 2, § 16 para. 5 and § 16 para. 7 of the Elections Act⁶). However, the case law of the European Court requires that a restricting law also have certain qualities, i.e. that it be accessible and that its consequences be sufficiently foreseeable that a citizen can adapt his behavior with a view to them (cf. the already cited decision in the matter of the Sunday Times). In this regard the Constitutional Court determined the following: concerning the accessibility of the law, this condition has been met and no objections were raised; concerning the predictable consequences of the law, the question whether this requirement has been met is considerably more complicated.

a) According to the petitioner the law does not expressly set the penalty of invalidity for violation of § 16 para. 2 and 5 of the Elections Act⁶).

We can add that this penalty can be indirectly inferred only from § 79 of the Elections Act - which speaks about a court decision about the invalidity of an election in connection with § 88 para. 1 and 2 and with § 200n of the Civil Procedure Code. Nonetheless, it is true that this penalty is not expressly set for violation of § 16 para. 2 and 5 of the Elections Act⁶), and its applicability could, in eventum, arouse doubts. The predictability of this penalty is problematic particularly in view of the question of whether the penalty - i.e. invalidity of the election of the senator - arises each time anyone violates the cited provision in corresponding intensity or whether the condition for its application is violation of the cited provisions by the relevant candidate for the position of senator (deputy). Although we can agree that the purpose of the Act (§ 16 para. 2 and 5) ⁶) is protection of the cleanness and honor of an election campaign as such, it is necessary - in view of the relatively general

wording of the Act - to also review judicial case law, which brings the Act to life and on which the candidate should rightly rely.

Therefore, the Constitutional Court concentrated on the case law of the Supreme Court of the CR in matters of complaints against the issuance of certification of election as a deputy (senator) under §§ 88, 89 of the Elections Act and § 200n of the Civil Procedure Code.

In the adjudicated matter (as was already stated) the Supreme Court of the CR in the conclusion of the reasoning of the appealed decision stated: “There is no doubt about the fact that ... D. L. subjectively .. did not cause the violation of the rules of the election competition with the exception of the cited television appearance. There is no evidence that she instigated the cited articles and television program ... The Act is based on the principle that during an election campaign ... its provisions are supposed to be objective observed”

However, the Supreme Court of the CR chose a completely different viewpoint in its decision of 7 July 1998, file no. 11 Zp 22/98, in which it denied the complaint of the petitioner against issuance of certification about the election of Dr. V. as a deputy of the Chamber of Deputies and concluded that the forbidden election campaigning (... from which legal consequences can also be drawn in proceedings on a complaint against issuing certification of election as a deputy) means conducting active, targeted promotional activities of the candidate for deputy himself (political party, coalition), aimed at influencing voters, or performing such activity at their instruction, request, with their consent or with their knowledge, in the period of 48 hours before elections begin. The Supreme Court of the CR stated that in the adjudicated matter the petitioner’s claim had not been proved that there was, on the part of the respondent, or his political party, activity which would be violation of the ban on election campaigning under § 16 para. 5 of the Act6).

The Constitutional Court considers that even a mere comparison of the two cited decisions of the Supreme Court of the CR clearly documents that there has been a visible shift in its fundamental legal opinion. Whereas in the first decision of 7 July 1998 the Supreme Court of the CR required violation of the ban on election campaigning in the moratorium period by the candidate himself (or his political party), or with his consent or knowledge, in the appealed decision of 3 December 1998 it abandons the principle of the candidate’s (political party’s) subjective relationship to the violation of the statutory moratorium and emphasizes that the law stands on the principle of objective observance of its provisions, and that the question of the fault or participation of the candidate in the election campaigning (read, in the moratorium period) is not decisive. According to the Constitutional Court’s conviction, the two cases are comparable, as the distribution of a candidate’s publicity materials to the households of specific citizens can be, depending on the circumstances, just as effective, or even more effective, than an article in the press or a television clip, which is seen by an accidental reader or viewer.

As was already stated elsewhere, in considering the predictability of a law (its consequences), we cannot restrict ourselves only to its grammatical text. It is judicial decision making which - although it does not have the classical precedential character - interprets the law, or completes it, and its relative constancy guarantees legal certainty

and also ensures general confidence in the law. This applies particularly to the Supreme Court of the CR, which is the supreme judicial body in the general judiciary (cf. § 92 of the Constitution). Naturally, this does not deny that judicial case law can develop and change in view of a number of aspects, particularly with regard to changes in social conditions. However, this changes nothing about the fact that in the adjudicated matter the appealed decision of the Supreme Court of the CR principally diverged from the fundamental legal opinion which the same court expressed a mere 5 months before, and with which it gave content to § 16 para. 2 and 5 of the Elections Act⁶). That cannot be overlooked in this situation.

Therefore, the Constitutional Court reached the conclusion that the cited Act (its consequences) was not predictable in the adjudicated matter. The fundamental condition of restriction of the right to freedom of expression and the right to information, i.e. the existence of a law having the required features (predictable consequences), thus does not exist in the adjudicated matter.

For thoroughness, the Constitutional Court also considered other conditions for restricting the fundamental right to freedom of expression and the right to information, contained in Art. 17 of the Charter¹) and in Art. 10 of the Convention. As was already stated, these conditions are the legitimate aim of restricting a fundamental right and the necessity of such a restriction in a democratic society.

4. The “legitimate aims” (restriction of a fundamental right) are established practically identically, or very similarly, in Art. 17 para. 2 of the Charter and Art. 10 para. 2 of the Convention. They include, in particular, the interests of national security and public safety, preventing unrest and crime, protection of health and morals, preserving the authority and independence of the judicial power, and the interest in protection of the reputation or rights (and freedoms) of others. In the opinion of the Constitutional Court the cited provisions - with regard to their purpose - can also be applied to the adjudicated matter. This concerns, in particular, the interest in the protection of the rights (freedoms) of others, which could be affected by newspaper articles and television programs. Therefore the Constitutional Court considers that a “legitimate aim” (restriction of the fundamental right to freedom of expression and the right to information) existed in the adjudicated matter.

5. Finally, the Constitutional Court considered - even if only for completeness, as already stated - the question of whether the restriction of the fundamental right to freedom of expression and the right to information and the penalty of invalidity of the election were necessary in a democratic society.

a) The Constitutional Court recognizes that the purpose of § 16 para. 2 and 5 of the Elections Act⁶) is undoubtedly protection of the honorableness and honesty of elections, for which the law also selects certain restrictive means in the period of 48 hours before elections. We can agree that usually it would not be appropriate to concentrate exclusively on the question of whether it was only the candidate (the political party), who violated the cited provision. On the other hand, however, we can hardly comprehensively accept the strictly objective criterion which the Supreme Court of the CR chose in the adjudicated matter and ignore the fact that - as the Supreme Court of the CR itself stated - candidate D. L. did not subjectively cause the violation of the rules of election competition (with the

exception of the television appearance) and did not instigate the articles in Lidové noviny and the television appearance. The contrary interpretation would necessarily lead to a situation in which any entity (e.g. every media, including the tabloid press) could obtain the invalidity of the election of any candidate completely without his fault, which could - in eventum - significantly interfere with elections, or, taken to the logical consequences, ruin them. The legislature, naturally, did not intend such consequences.

We can not fail to see that the so-called moratorium in the period 48 hours before elections (nor the general principle of an honorable and honest election campaign) do not mean a statutorily created sterile environment which makes impossible any freedom of expression and right to information. Naturally, of course, by this interpretation the Constitutional Court absolutely does not intend to tolerate the possible practice of alternating attacks and counter-attacks violating the principles of an honorable and honest election campaign and observance of the election moratorium to the benefit or detriment of individual candidates. Things will, of course, always depend on the form and content of the public appearance in question and on the circumstances of the particular case.

In the cited considerations, the Constitutional Court was also guided by its own existing case law, which clearly gives preference to permitting exercising of the election right. In its decision, file no. IV. ÚS 275/96, the Constitutional Court said: “If the purpose of the Elections Act is to implement and more closely regulate the fundamental political right to elect and be elected, then disputed provisions of this Act must be interpreted in the spirit of Art. 22 of the Charter of Fundamental Rights and Freedoms²). The Constitutional Court considers such an interpretation to be only an interpretation which is favorable to this fundamental right - i.e. such as permits one to elect and be elected, and not the contrary.” Although the cited decision concerned the question of registration of a candidate, the Constitutional Court is convinced that the statement of law can be used commensurately as a guideline for interpretation - depending on the circumstances - in other cases as well.

In connection with the issues discussed, we can also point to a historical comparison. The Supreme Administrative Court, in its decision of 8 November 1935 [BOH.12124 adm. (19224/35)] stated: Influencing a voter, as a violation of election freedom, can be recognized as a defect in election proceedings, or a reason for canceling elections, only if it happened through means and under circumstances which are, by their nature, capable of imposing another's will so that it is possible to conclude that the voter subjects himself to that will, and acted against his convictions. Thus, it is apparent, that even historical administrative case law, though from a time of different social-political conditions, in evaluating the freedom of elections as a defect in “election proceedings” began with a restrictive interpretation.

Therefore the Constitutional Court reached the conclusion that restriction of the fundamental right to freedom of expression and the right to information and the penalty of invalidity of the election of the candidate D. L. were not necessary in a democratic society under Art. 17 of the Charter¹) and Art. 10 para. 2 of the Convention.

6. Thus, these considerations indicate that the appealed decisions - in their consequences - violated the fundamental right of D. L. to freedom of expression and the right to

information. Therefore, the Constitutional Court granted the petitioner's appeal and in the verdict of the finding stated that D. L. was validly elected a senator.

I. ÚS 526/98

Overview of the most important legal regulations

1. Art. 17 of Act No. 2/1993 Coll., on the Declaration of the Charter of Fundamental Rights and Freedoms provides that freedom of expression and the right to information are guaranteed and that everyone has the right to express his views in speech, in writing, in the press, in pictures, or in any other form. Under Art. 17 para. 4 freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures that are necessary in a democratic society for protecting the rights and freedoms of others, the security of the state, public security, public health, or morals.

2. Art. 22 of Act No. 2/1993 Coll., on the Declaration of the Charter of Fundamental Rights and Freedoms,2) provides that statutory provisions relating to political rights and freedoms, as well as the interpretation and application of them, shall make possible and protect the free competition among political forces in a democratic society.

3. Art. 19 para. 2 of Act No. 1/1993 Coll., of the Constitution of the CR provides that any citizen of the Czech Republic who has the right to vote and has attained the age of 40 is eligible for election to the Senate.

4. Art. 87 para. 1 letter e) of Act No. 1/1993 Coll., of the Constitution of the CR provides that the Constitutional Court has jurisdiction over remedial actions from decisions concerning the certification of the election of a Deputy or Senator.

5. § 85 of Act no. 182/1993 Coll., on the Constitutional Court, provides who is entitled to file an appeal against a decision in the matter of certifying election of a deputy or senator.

6. § 16 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR and Amending and Supplementing Certain Acts regulates election campaigns. In para. 2 it provides that an election campaign must take place honorably and honestly, in particular, untrue information may be published about candidates and the political parties or coalitions on whose candidate lists they are listed; under para. 5 political campaigning is forbidden in the period of 48 hours before elections begin and on elections days, and under para. 7 it is forbidden to publish the results of election opinion polls during the course of elections.

7. § 19 para. 2 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR and Amending and Supplementing Certain Acts provides that an election campaign must take place honorably and honestly, in particular, untrue information may not be published about candidates and political parties or coalitions.

8. § 19 para. 5 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR and Amending and Supplementing Certain Acts provides that election campaigning for political parties, coalitions and candidates is forbidden in the period of 48 hours before elections begin and on election days.

9. § 200n of the Civil Procedure Code (Act no. 99/1963 Coll.) provides that a court shall decide on a complaint against the issuance of certification of election as a deputy or senator by a decision without court proceedings, within 10 days.