2001/06/20 - PL. ÚS 14/01: CZECH NATIONAL BANK

HEADNOTES

In its judgment, the Constitutional Court ascertained that the interpretations of the Constitution upon which the government relies is not in harmony with the Constitution.

In particular, the government position deduces from an interpretation of an ordinary statute the conclusion that the President of the Republic has the authority to appoint three members ot the CNB Bank Council (the Governor and the Vice-Governors) only with the Prime Minister's assent (or that of the delegated minister) and that these three become Bank Council members directly by virtue of the Act on the CNB (without the President of the Republic appointing them Bank Council members). In addition, it infers that the President's authority to appoint Bank Council members without contrasignature, as laid down in Article 62, lit. k) of the Constitution,1) relates solely to the four remaining Bank Council members.

The Constitutional Court found this construction to be in conflict with the Constitution in both mentioned respects. Firstly, pursuant to Article 62, lit. k) of the Constitution, 1) the President appoints not merely four but all seven Bank Council members without the need for ministerial contrasignature. Limitations on the President's power of appointment to merely four of them cannot be attained merely by interpretation of an ordinary statute, as the Constitution may be modified solely by means of a constitutional act. Precisely in this respect must it be emphasized that, under the present Constitution, membership in the CNB Bank Council cannot arise other than by presidential appointment on the basis of Article 62, lit. k) of the Constitution. 1) If the Constitution founds membership in the Bank Council exclusively on the basis of appointment by the President, then pursuant to the Constitution nobody may become a Bank Council member merely ex lege, as asserted by the government. As a legal act of the highest legal force, the Constitution cannot be re-interpreted on the basis of an ordinary statute, rather an ordinary statute must always be interpreted in conformity with the Constitution.

The Constitutional Court further stated that a long-practiced constitutional course of action which corresponds to a specific value and institutional consensus on the part of constitutional bodies and which has repeatedly confirmed a certain interpretation of a constitutional provision, must be understood as a constitutional convention, which cannot be disregarded in construing the Constitution.

CZECH REPUBLIC
CONSTIRTUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court decided on 26 June 2001 in a proceeding pursuant to Art. 87 para. 1, lit. k) of the Czech Constitution 2) and § 120 of Act No. 182/1993 Coll., on the Constitutional Court, 3) as amended (hereinafter Court Act), on the proposal of the Prime Minister and the government of the Czech Republic seeking a judgment that the 29 November 2000 decision of the President of the Republic, in which he appointed Zdeněk Tůma Governor, and Luďek Niedermayer Vice-Governor, of the Czech National Bank, required for its validity the countersignature either of the Prime Minister or of a member of the government entrusted by him with that task, decided: The petition is rejected on the merits.

REASONING

On 20 April 2001, the Constitutional Court received a petition initiating a proceeding, in which the Prime Minister and the government of the Czech Republic sought a judgment declaring that the President's 29 November 2000 decision appointing the Governor and Vice-Governor of the Czech National Bank (hereinafter CNB) required for its validity the countersignature of the Prime Minister, or of a designated member of the government. By way of introduction, the petition stated that, by his 29 November 2000 decision, President Václav Havel appointed the Zdeněk Tůma Governor of the CNB and Luďek Niedermayer the CNB Vice Governor, without requesting that the Prime Minister countersign this decision, as meant in Art. 63 para. 3 of the Constitution, 4) and without previously recalling Zdeněk Tůma from the office of CNB Vice-Governor or Luďek Niedermayer from his office as a member of the CNB Bank Council ...

II.

...

The petition initiating the procedure rests upon arguments under four headings:

on an argument concerning „monocratic“ elements in the status of the CNB Governor

on a comparative interpretation of other appointment powers pursuant to Art. 62 of the Constitution

on the interpretation of intent of the constituent assembly or legislature and ties to the preceding legal régime

by reference to principles of the parliamentary democracy form of constitutional state.

1. The appointment of members of the Bank Council to the office of CNB Governor is effected by means of a single act of appointment. Even the petitioners proceed on the basis of this fact (p. 4 of the Reply), well aware of the unforeseeable complications and potential dysfunctional consequences which two separate and distinct acts of appointment would bring about, both to the members of the Bank Council and to the CNB Governor or Vice-Governors, even more so in the situation when no legal obligation is laid down – as is the case with the Constitutional Court – to select these three officials of the Bank Council from among the ranks of already appointed members of that Council. Despite the fact that an additional act of appointment is not concerned, and thus, in that sense, not even a separate power as meant by Art. 63 of the Constitution, 4) the petitioners nonetheless take the position that the status of the CNB Governor diverges from that of the other members of the Bank Council to such an extent, that the Governor's authority, which arises from statute, justifies the use of the appointment procedure pursuant to Art. 63 para. 2 4) and not that pursuant to Art. 62 of the Constitution.1)

According to the petitioners, although the statute (§ 5 of the Act on the CNB) acknowledges the position of the „the supreme directive body of the Czech National Bank", the Bank Council, its exclusive competence is, however, „defined merely by way of example, an enumeration of matters of basic significance. The Act on the CNB makes nearly no reference to the issue of who is authorized to act and take decisions in other matters" (p. 6 of the Petition) and according to the petitioners it is thus possible to judge that the supreme instance is precisely the Governor, who is a monocratic organ with independent competences and powers which significantly exceed the authorities and competences resulting from membership in the Bank Council, a collegial body (p. 4 of the Reply).

Neither assertion is, however, in accord with the facts. First of all, the Act on the CNB does not define the competences of the Bank Council „merely by way of example", rather § 5 para. 1 formulates the main function of the Bank Council; moreover it designates the Bank Council as a whole as the „Supreme directive organ of the CNB". The second paragraph then introduces the enumeration of a further set of Bank Council powers with the words „further in particular". These words were not intended to restrict the competence of the Bank Council, on the contrary they raised the possibility of including within its competencies also other, unenumerated matters. The purpose of this provision is thus not to restrict, rather to expand the scope of the Bank Council's decision-making capacity.

This legal rule/regulation alone generally calls into question the status of the CNB Governor as a „monocratic organ with independent decision-making power". However, not even the petitioners' specific references to the statutory powers of the Governor, meant to substantiate the arguments in favor of his monocratic position, do not hold water.

If we proceed from the assumption that a monocratic organ is embodied by a person who himself or herself acts and takes decisions as an organ, while a representative of a collegial body acts only in the name of that body and is entirely bound by its decisions, that any effort to conceive of the CNB Governor as some sort of an independent, monocratic organ does not pass muster. The CNB Governor is one of the members of the Bank Council, as the CNB Act provides that the Bank Council is composed of the Governor, two Vice-Governors, and four additional leading CNB employees (§ 6 para. 1 of the CNB

Act) 5) By statute, the Bank Council acting as a collegiate body is the Bank's supreme directive body, thus individual Bank Council members are not endowed with decision-making power. As far as the Governor is concerned, his status differs from that of the other members by the fact that either he, himself, presides over the Bank Council, or the Vice-Governor designated by him (§ 7 of the CNB Act), further the CNB's external relations is conducted on its behalf, either by the Governor himself or the Vice-Governor he designates (§ 8), and he is authorized to participate, with the right to vote, in the government's consultative meetings (§ 11). Not even in this fact can one spot any component of a monocratic status vis-a-vis the Bank Council, if he is obliged to respect their views and convey their positions, s the fact that in this case decision-making power is not concerned, only a consultative function. Both the petitioners, as well as others, acknowledge to the Governor only the status within the Bank Council of the first among equals. As far as concerns additional powers of the Governor, in the whole of the CNB Act, one can find only § 50, which provides that, in the public interest, the Governor may relieve CNB employees of the duty to maintain confidentiality in official Bank matters. This provision is the sole exception in favor of the Governor, whereas the CNB Act contains a long series of provisions which conceive of that, which the petitioners designate "other matters", as powers of the Bank Council as as a collegiate body.

The petitioners further argue that, pursuant to § 4 of Act No. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties, the CNB Governor has the power to sign legal enactments issued by the CNB and promulgated in the Collection of Laws. Not even this power can be interpreted as an expression of the monocratic character of the CNB Governor's decision-making power, since, just as in the case of the promulgation of statutes, the Constitution prescribes the group of persons who are to sign statutes, in this case as well, the CNB Governor's signature has no constitutive significance. It is his duty to sign the promulgated norm, and his refusal to sign cannot be deemed as an obstacle to the norm's validity.

...
For the given reasons, the Constitutional Court cannot agree with the petitionors, for these statutes do not assign the President any further powers, nor do the positions of the Governor and Vice-Governors within the Bank Council exceed, in comparison to the other members, the framework of the Bank Council to such an extent that it would be possible to conceive of them as separate offices, requiring a separate appointment by the President. The CNB Act does not expand the President's right of appointment to include a new appointment power, for the Constitution provides that the President appoints all members of the Bank Council, without the Constitution specifying their particular designations. In contrast to other instances of appointment pursuant to Art. 62, the Constitution does not need to state in detail how many members there are and how they are designated. This is done only in the CNB Act, which provides that there shall be a Governor, two Vice-Governors, and four other members. Therefore, it specifies the composition of the Bank Council. Since the CNB Act was promulgated a mere day after the Constitution itself and its text was known at the time the Constitution was adopted, it can be presumed that those adopting the Constitution would have formulated Art. 62, lit. k) 1) in a different manner had they had in mind the introduction of a manner of appointing the Governor which diverged from that of the other members.

2. The Constitutional Court also made a comparison of the modes of appointment procedures in each case of the President's powers under Art. 62 of the Constitution. It did so in view of the petitioners' objection that, Art. 62 lit. k) of the Constitution1) provides merely that the President appoints members of the Bank Council, whereas under lit. e) of that Article it is stated that he appoints not only the Justices of the Constitutional Court, but also its Chairperson and Vice-Chairpersons, despite the fact that, in the latter case, the Chairperson and Vice-Chairpersons are also Justices, and thus also members of the Constitutional Court Plenum. According to the petitioners' conception, the Constitution so provides due to the fact that the Chairperson and Vice-Chairpersons have, in addition, further special competencies tied to their office (p. 4 of the Petition). The petition does not, however, indicate why the Constitution does not proceed in a similar fashion also in the case of the CNB Governor, to whom the petitioners also attribute further special competencies tied to his office. If that were truly the case, then, according to the petitioners' conceptions, the Constitution would, in this case as well, have had to mention explicitly the office of CNB Governor, which, however, it did not do.

It is the Constitutional Court's view that the reason for the use of divergent appointing formula in Art. 62 must be looked for elsewhere. The reason why, in contrast to Art. 62, lit. k), 1) there are different rules for appointment in Art. 62, lit. e) 7) in the case of the Constitutional Court, as well as in Art. 62, lit. j) 7) in the case of the Supreme Auditing Office, and Art. 62, lit. a) 7) for the appointment of the Prime Minister and of the other members of the government, is found primarily in the fact that in all three of the above-mentioned cases it was necessary to designate specially the person appointed to be the head of that body, seeing as their appointment was governed by a method which differed from that of other members of that body. It must also be added that, in order to name the members of these bodies, the consenting actions of another body (Senate, Assembly of Deputies, Prime Minister) is also required. Thus, for example, in the case of lit. a), the rules for the appointment and recall of the Prime Minister and those for other members of the government differ. As regards the other members of the government, pursuant to Art. 68 para. 2 of the Constitution, 8) they may be appointed and recalled only on the proposal of the Prime Minister. The same applies in respect of the members of the Constitutional Court [lit. e)]: the Chairperson and Vice-Chairpersons are differentiated because – in contrast to the appointment of other Justices – their appointment from among the Justices of the Constitutional Court does not require the consent of the Senate (Art. 84 para. 2 of the Constitution). As concerns lit. j), it speaks explicitly of the President and Vice-President of the Supreme Auditing Office, since Art. 97 para. 2 states that these persons are appointed by the President of the Republic on the proposal of the Assembly of Deputies, whereas other members are elected by the Assembly of Deputies on the proposal of the President of the Supreme Auditing Office. It is precisely due to the fact that the manner of appointing the Governor and the Vice-Governors in no way differs from that of all members of the Bank Council, that the text of Art. 62, lit. k) 1) was limited to the brief formulation: „appoints the members of the Bank Council of the Czech National Bank."

In this connection, the Constitutional Court considers it necessary to emphasis that there is a basic difference between the way in which the Constitution regulates the appointment power of the President of the Republic in relation to the Chairperson and Vice-Chairpersons of the Constitutional Court and in relation to the Governor and Vice-

Governors of the CNB. The Constitution lays down that the consent of the Senate (Art. 84 para. 2) is a pre-condition to the appointment of all Justices of the Constitutional Court (thus, even those who are designated in Art. 62 as the Chairperson and Vice-Chairpersons). In this instance, the Constituent Assembly was aware that if, in that case, a differing rule is to be applied and the manner of appointment set down generally in Art. 62, lit. k) 1) is not to govern, the subsequent appointment of Chairpersons and Vice-Chairpersons from among the existing Justices of the Constitutional Court had to be laid down expressly in a constitutional act, and not in an ordinary statute.

In contrast to the Constitutional Court, in the case of the Bank Council, the Constitution makes no distinction among the individual members of the Bank Council. If in this case, the Constitution does not explicitly make a distinction between the manner of appointing the Governor and the Vice-Governor from the manner, which it itself lays down, for all members of the Bank Council, then unless the Constitution itself expressly so permits, a different means of appointment for some members of the Bank Council can not be deduced from the fact that the terms of an ordinary statute provide that, apart from other members of the Bank Council, the Governor and Vice-Governors are also members of the Bank Council.

In contrast to the Constitutional Court, where the President of the Republic selects the Chairperson and the Vice-Chairpersons from among the already appointed Justices of the Constitutional Court, in the case of the appointment of the CNB Governor and Vice-Governors, the President is not obliged to appoint these officers from among the existing members of the Bank Council. In contrast to its provisions governing the Constitutional Court, in this case the Constitution does not presume two different appointment regimes for the Governor and Vice-Governor on the one hand and for the other members of the Bank Council on the other. Even less can such a conclusion be deduced from an ordinary statute, not to mention the fact that this conclusion cannot be inferred from the mere enumeration (in § 6 of the CNB Act) of the Bank Council members.

In addition, there exist rational reasons, within the logic of the CNB Act, why the appointment of the Governor and Vice-Governors are dealt with in § 6 paras. 2 and 3, separately from the appointment of the other four Bank Council members. They consist in the fact that the two paragraphs contain differing conditions for appointment: in contrast to the Governor and Vice-Governors, the other four Bank Council members must be appointed „from the ranks of leading employees „ of the CNB (it must be noted that this constitutionally-questionable restrictive condition has not been contested). If the Constituent Assembly had intended that the Governor and Vice-Governors and the other four Bank Council members be appointed in two differing ways, or that the Governor and Vice-Governors be appointed only after they had been named to the Bank Council by a further appointment decision, making reference to their office in the Bank Council, it would have had to express this desire by differentiating in the Constitution, in the same way as in other cases of nomination under Art. 62 of the Constitution.

It is an elementary constitutional rule that, if two differing appointment regimes are to be introduced in an area of constitutionally defined exclusive presidential power, it is necessary that these two regimes be defined directly in the text of the Constitution. The fulfillment of this precondition is a „conditio sine qua non“.

The conclusion that there is only a single appointment decision in the case of all Bank Council members is evidenced by the fact that they all have a common six-year term of office (§ 6 para. 4 of the Act on the CNB), which is not altered even in the case that individual members have a change of status (for example, the subsequent assumption by a Bank Council member of the office of Governor). Should the President appoint the Bank Council members on a certain date, the fact that he subsequently appoints one of them the Governor does not cause that member's term of office to begin running anew.

In the view of the Constitutional Court, a comparison of the modes of appointment procedure pursuant to Art. 62 of the Constitution does not argue in favor of the government's petition either.

3. The petitioners also refer to the connections between the CNB Act and its predecessor legislation on the Czechoslovak State Bank, pursuant to which the President appointed the Governor on the proposal of the government, and the Vice-Governors on the proposal of the Governor, following consultation with the federal government. It is alleged that, in a great many respects, this act was the model for the CNB Act. In the petitioners' view, there are no grounds for presupposing that the Constitution and the CNB Act would be meant to diverge a statutory framework so recently preceding it to such an extent that the government would be entirely excluded from the process of appointing the Governor and Vice-Governors.

Documents reflecting the genesis of the CNB Act are not, however, consistent with the petitioners' view. The Constitutional Court has ascertained that, in the course of drafting the CNB Act, the Czech National Council rejected the proposal for the reception of the preceding statutory scheme. As follows from the recording of the Czech National Council's 17 December 1992 session, at which the government bill on the CNB was debated, the assembly unanimously adopted the view of the Constitutional-Legal Committee, expressing the position that: „ ... in none of its provisions does the Constitution restrict the President's appointment power in any manner whatsoever" (Recording of the 11th Session CNC of its VIIth Electoral Term). In his reply to the petition initiating this conflict of competence proceeding, the President stated, in relation to this issue, that this opinion, expressed by the then competent constitutional officials, is supported even by current constitutional officials, and he refers, in this regard, to the speech of the current Deputy Prime Minister for Legislation made before the Plenum of the Senate on 7 August 2000, in which he characterized the appointment of Bank Council Members, i.e., the Governor, Vice-Governors, and other members, as the „exclusive competence of the President, unrestricted by the need for contrasignature" (stenographic record of the Senate for 7 August 2000).

As regards the issue of the connection to the previously existing rules, the Constitutional Court notes that, in drafting the Czech Act on the CNB, without doubt the legislature proceeded from a different constitutional situation, for the Act on the Czechoslovak State Bank was adopted previously as a kind of quasi-constitutional regulation, comparable to an organic law and above all in a federal state, in which the cooperation of a collegial body, i.e., a government formed from representatives of both the Czech and Slovak sides, represented an institutional counterweight to the appointment power of the President of the Republic, the sole independent (of party influence) person. When the CNB statute was

being drafted following the collapse of the federation, these considerations lost all significance, or at least were deprived of their original weight.

The interpretation of Art. 62, 1) to the effect that it grants the President of the Republic the right to appoint all members of the Bank Council without the need for contrasignature, has been respected and followed in practice without interruption since 1993 until the debate, in the year 2000, on the act amending the CNB Act. This interpretation has been confirmed, and is even gradually developing into a constitutional custom. It is well known that in a constitutional state constitutional customs – conventions – have great significance precisely due to the fact that they create from the constitution a functional whole and bridge the gap between the mere expression of constitutional principles and institutions and the variability of constitutional situations. In a democratic law-based state, it is scarcely imagineable to call into doubt, by the expedient of a distorted interpretation, the interpretation of the constitution and constitutional customs corresponding thereto, respected and uncontested the entire time from the inception of the Constitution, and with them the whole existing practice, including a host of decisions which had never until that time been attacked.

It is not essential to verify the extent to which the formal requirements for the formation of "constitutional customs" have been met, rather the mere circumstance that, for a period of more that eight years on the basis of a value and institutional consensus on the constitutional plane, one means of proceeding has been adopted in practice, which without the resistance of any of the constitutional bodies, has repeatedly and unequivocally confirmed that interpretation of Art. 62, lit. k) of the Constitution 1) which accords to the President the exclusive power to appoint the Governor and the Vice-Governors of the CNB, hence a power not requiring the Prime Minister's contrasignature.

Of no less importance is the circumstance that, in spite of the legal reservations to the procedure, which led the Prime Minister and the government to bring the matter to the Constitutional Court only on 20 December 2000, these institutions de facto recognized and at the present time continue to recognize a situation which is, according to their assertion, in conflict with the competencies laid down in the Constitution. This aspect is reflected in the fact that the petitioners contested only the appointment of the Governor and that of one of the Vice-Governors, while overlooking the appointment of the second Vice-Governor, and this despite the fact that his appointment, according to the petitioners' position, was also effected in a manner which they designate as unconstitutional and invalid. If then the government, by its other actions as well, acknowledged the contested appointments, which fact follows, for example, from the correspondence of the Prime Minister himself, of the deputy prime ministers, and of individual ministers, from invitations to take part in meetings of the government, as well as from further acts evincing agreement, an undesirable condition of uncertainty of legal relations arises, the risks of which, to a decisive degree, are not borne by the parties to this dispute, rather by individuals and legal persons whose rights have been affected by decisions, not to mention the uncertainty concerning the status of persons occupying particular offices to the domestic public in general, but especially in respect of foreign relations.

Despite the fact that the Prime Minister and 12 other members of the government unanimously decided, in Government Resolution No. 1210 of 28 November 2000, that "they do not consent to the Prime Minister contrasigning the President's decision appointing

Zdeněk Tůma Governor of the Czech National Bank and Lud'ek Niedermayer Vice-Governer of the Czech National Bank", the Prime Minister and the other members of the government continue to deal with Zdeněk Tůma as the CNB Governor. Thus, in his letter of 28 February 2001, for example, Prime Minister Miloš Zeman informed Governor Zdeněk Tůma that "as Governor of the Czech National Bank" he will be informed of meetings and invited to take part therein. From this follows as well the recognition of the Governor in certain of his duties, such as in relation to the CNB's emission duties, hence also Zdeněk Tůma's right to sign newly issued banknotes, even despite the fact that, by its refusal to consent to his appointment, the government has cast doubt upon the legal validity of that, as well as others of his acts, even in the case that the duty of contrasignature was recognized as constitutional.

Not only the practice up till then, but also the subsequent formulation of the amendment to the CNB Act, No. 442/2000 Coll., clearly testifies to the fact that the legislature was not proceeding from the assumption that the acts appointing the CNB Governor and Vice-Governors require contrasignature. The petitioners' argument that the President has a duty to submit the named appointment act to the Prime Minister for his contrasignature is substantiated by deducing that duty from the wording of § 6 para. 2 of the CNB Act, 5) which provides that the President appoints the CNB Governor and Vice-Governors. It must be pointed out that § 6 para. 2 of the amendment to the CNB Act 5) contained the exact same formulation, from which the government's interpretation would lead to the conclusion that the contrasignature requirement continues to apply pursuant to the new wording as well. On the other hand, however, in § 6 para. 3 5) as amended, the legislature newly provided that the government should propose the candidates for Governor and Vice-Governors. It is inconceivable that the legislature, while tying the President's decision to the government's preceding proposal, would still insist on the Prime Minister subsequently contrasigning the act of appointment, a conclusion which would necessarily follow from the government interpretation of § 6 para. 2. 5) It is thus clear that the legislature conceived and conceives of § 6 para. 2 5) merely as an enumeration and designation of the persons who are members of the Bank Council.

4. The government also made reference in its arguments to the principles of the law-based state, the principle that all state authority emanates from the people and that state authority is to serve all citizens, as well as to the conception of the Constitution grounded on the idea of parliamentary democracy. It argued that from these principles one must necessarily draw the conclusion that decision-making by state bodies that bear political responsibility should take priority over decision-making by state bodies that do not bear responsibility for their decisions. It further concludes that, in case a matter should be considered controversial, then preference should be given to the interpretation that the President's decision is one pursuant to Art. 63 of the Constitution 4) (p. 3 of the Petition).

As a general matter, these assertions can be agreed with. Nonetheless one cannot but object that, even in a democratic law-based state with a parliamentary form of government, the requirement of governmental contrasignature may be dispensed with in cases where special reasons justify the protection of an institution which, according to the Constitution, should, in the main lines of its activities, act independently of the government. Since the requirement of contrasignature would, at the least, enable the

government to decide on the composition of the Bank Council. One component of the guarantee of the CNB's independence is that the power of appointment is in the hands of a non-partisan President, although after consultation, but not directly dependent on the agreement of the government, formed of representatives of one or more political parties. The independence of the CNB is a constitutional value, one which follows both from Article 98 of the Constitution 6) („interventions into its affairs shall be permissible only on the basis of statute") and from its placement into the separate Chapter Six of the Constitution, as well as from Article 62, lit. k) of the Constitution 1) and from the Act on the CNB, above all from 9 para. 1 of this Act („in safeguarding its main goals, the CNB shall be independent of instructions from the government").

Without doubt it is possible, while keeping within the confines of a democratic, law-based State, to conceive even of such a formulation of the status of a central bank as would contain more elements of cooperation and coordination with the government (such as is the case with the German Federal Bank). Nonetheless, in each country it is a matter for the constituent assembly to consider the design of these relations in view of the situation and the needs of its country, and the interpretation of the act on the national bank must also be subordinate to such conception as is selected for the constitution. At the same time, in a constitutional state the canon applies that an ordinary statute may not be of greater force than the constitution. Should the constitution lay down a certain rule, exceptions to that rule are permitted only on the precondition that it is expressly permitted either by the constitution itself or by a subsequent constitutional act. It is not possible, on the basis of the provisions of an ordinary statute, to reinterpret the constitution to a form which it manifestly does not have. The interpretive process proceeds in the opposite direction, always from constitutional documents/instruments to statutes, unless the constitution itself expressly lays down an exception.

The Act on the CNB does not introduce any further presidential appointment power beyond that which is contained in Art. 62, lit. k) of the Constitution. 1) It merely declares the composition of the Bank Council as far as concerns the number and designation of its members. Since the government's interpretation does not deny the President's exclusive authority to appoint all members of the Bank Council, the recognition of the claim to contrasignature when the Governor and Vice-Governors are appointed would lead to the solution which would enable the head of State, on the one hand, to independently appoint all members of the Bank Council and then the Prime Minister, on the other hand, to refuse his consent to the Governor and Vice-Governor, moreover subsequently, which in and of itself contains a potential for dysfunction greater than, for example, any solution involving appointment on the proposal of the government, in which case prior discussion and agreement would be imperative. It must be borne in mind in this connection that, pursuant to Art. 62, lit. k) of the Constitution, 1) the President of the Republic appoints all members of the Bank Council, and, since pursuant to the Act on the CNB the Bank Council has seven members, that he thus appoints all seven Bank Council members, and that he is not restricted in this respect. Should the appointment of the Governor and Vice-Governors, to which § 6 para. 2 of the Act on the CNB 5) refers, be understood as appointments separate from that in Art. 62, lit. k) of the Constitution, 1) thus subject to Art. 63 of the Constitution, 4) it could occur that the government would refuse its consent to the appointment as Governor of certain of the seven Bank Council members or even the appointment as Governor of a person who is not a Bank Council member at all. Since,

however, in the petitions' conception, the Governor is a Bank Council member, in such a case, certain of the seven already appointed Bank Council members would have to leave their office, as, according to the Act, the Bank Council shall have seven members. Certainly such member could, if he himself wished, free up a place for the newly appointed Governor. He could be recalled, however, only if one of the conditions laid down therefore in § 6 para. 6 of the Act 10) on the CNB is met, which would not ordinarily occur.

The conception proposed by the government is, thus, unacceptable, not only in view of Art. 62, lit. k) of the Constitution, 1) which does not provide for separate appointment first as a member and then as Governor or Vice-Governor, but also in view of the fact that this is a solution which conflicts with the principle of proportionality of legal regulation and the principle of legal certainty and, that from the constitutional perspective, these provisions could, due to their schizoid components, be potentially dysfunctional.

Evidently the petitioners are aware of these circumstances, and they therefore wish to maintain their conception that the Governor and Vice-Governors, on the one hand, and the remaining members of the Bank Council on the other hand, are appointed in a divergent manner, while at the same time averting the obvious consequences thereof, the appointment of the Governor and Vice-Governors in a divided (double) manner, first to their office as the Governor and Vice-Governor and then as members of the Bank Council. They accomplish this aim, however, at the expense of an interpretation which is in conflict with the Constitution. In the petitioners' view, the Governor and Vice-Governors of the CNB should be appointed with the contrasignature of the Prime Minister (pursuant to Art. para. 3, 4 of the Constitution 4)) and that they become members of the Bank Council „directly on the basis of the statute (ex lege)", whereas the other four members of the Bank Council are appointed by the President of the Republic pursuant to Art. 62, lit. k 1)) (i.e., without contrasignature).

However, seeing as how the Constitution provides that the President of the Republic appoints all members of the Bank Council without exception, moreover, in the manner laid down in Art. 62, lit. k), 1) the Governor is, in fact, not a member of the Bank Council directly on the basis of the Act on the CNB, but first and foremost and directly on the basis of the Constitution itself. Even if the Act on the CNB provides that the members of the Bank Council shall be the Governor, the Vice-Governors, and other members, this does not exclude the Governor and both Vice-Governors from the ambit of the President's appointment power as defined in the Constitution (such an exception cannot even be made by an ordinary law).

The truth of the matter is that the present Constitution makes no provision for membership in the Bank Council which would not arise on the strength of appointment by the President pursuant to Art. 62, lit. k) of the Constitution, 1) but solely and directly on the basis of law. It is precisely this conception which is unconstitutional, the conception according to which, as the petitioners assert in their reply, the President of the Republic appoints, on the basis of Art. 62, lit. k) 1) only the other (four) members of the Bank Council who „remain" following the appointment of the Governor and Vice-Governors. This conception is in conflict with the cited Art. 62, lit. k) of the Constitution1) according to which the President of the Republic appoint, without the need for contrasignature, not only some, but all, Bank Council members.

The petitioners interpret the appointment power laid down in the Constitution as being restricted in three cases, moreover by means of the interpretation of an ordinary statute which, in the petitioners' conception, renders Art. 62, lit. k) 1) inapplicable for the appointment of the Governor and Vice-Governors and applicable only for the „four other members of the Bank Council". It should be added in this regard that the spirit of Art. 63. para. 2 of the Constitution 4) is to provide for the possibility of, and lay down conditions for, the expansion of presidential powers, and not their restriction. This point is buttressed by the wording in the text concerning the right of the President to exercise "also" those, that is to say, further, new powers, which although not expressly stated in the text of the Constitution, are nonetheless introduced in a statute.

It should be added that Art. 98 para. 2 of the Constitution 6) also speaks against the petitioners' interpretation, since, as far as concerns the President's appointment power, it entrusts to an implementing statute on the CNB the regulation only of „additional details". Such „additional details" can be, for example, statutory provisions prescribing that the members of the Bank Council shall be the Governor, two Vice-Governors, and four other members. The introduction of the requirement that the Prime Minister give his contrasignature to the appointment of three of the seven Bank Council members can in no case be considered as details, rather as considerable restrictions on the constitutional prerogatives of the President, as guaranteed by Art. 62, lit. k) of the Constitution. 1) Since Art. 98 para. 2 of the Constitution 6) must, at the same time, be understood as the constitutionally prescribe framework which the implementing statute on the CNB may not overstep, the effort to deduce a contrasignature requirement from the text of the Act on the CNB can only be branded as unconstitutional for it does not concern details, rather a fundamental modification of constitutional dimension.

...

Neither does the Constitutional Court view as meritorious the objection that, prior to appointing them to the offices of Governor and Vice-Governor, the President should have recalled both members of the Bank Council from the positions in the Bank Council they held at the time. This shift in offices occurred during their six-year term as members of the Bank Council, yet none of the conditions laid down in § 6 para. 6 of the CNB Act10) were met, without which the recall procedure can in no case be validly employed. The entire conception of that Act confirms the Constitution's aim to establish the CNB as an institution independent of the government. Should the requirements for recall be extended also to the mentioned internal shift within the Bank Council, it would be subject to the government's consent and would, as a result, become an element threatening its independence from the government. Therefore, as the Constitution and laws stand at present, we cannot but agree with the manner in which, on 29 November 2000, the President appointed Zdeněk Tůma, „as a presently sitting member of the CNB Bank Council", as Governor with the proviso that „on the same day his current office as CNB Vice-Governor lapses". The appointment of Ľudek Niedermayer as Vice-Governor, without recalling him from his office as a Bank Council member, can equally be viewed as a solution that is entirely proportionate, both constitutionally and legally. Neither in his case did a new six-year term of office begin to run as a consequence of his appointment.

Art. 62 lit. k) of the Constitution1) is decisive for the determination of this issue in the sense that it defines the Bank Council as an undifferentiated collective of all its members,

without more precisely stating any differences in their status. It was only a norm of lower legal force, the CNB Act, that provides that all Bank Council members are appointed for a six-year term and that there are seven members: the Governor, two Vice-Governors, and „four additional members“. If the Act provides for appointment to office for a set period of time, i.e., six years altogether, this term cannot be exceeded. During this term of office, the Act draws no distinction among the Bank Council members. The Bank Council is a collegial governing body, which decides as a body and in which the Governor is merely „primus inter pares“. Should a person be appointed as Governor who is not as yet a Bank Council Member, this appointment results in a new, six-year term beginning to run; should, however, a person be elevated to the position of Governor who is already a Bank Council member and for whom a part of the six-year term as a member has already run, his appointment as Governor does not give rise to a claim to the running of a new, some sort of „gubernatorial“, six-year term of office nor to the possibility of formal recall in the sense of § 6 para. 6 of the CNB Act, 10) which exhaustively designates the circumstances in which a member can be recalled from office ...

In consideration of all the above-stated reasons, the Constitutional Court decided on the basis of § 124 para. 1 of Act No. 182/1993 Coll., on the Constitutional Court, to the effect that that the President is competent to issue the decision which he took in this matter, as stated in the petition initiating the procedure in this conflict of competence. Accordingly, it has rejected on the merits the petition of the Prime Minister and the government.

Brno, 20 June 2001

Dissenting Opinion

of Justices V. Güttler, M. Holeček, I. Janů, Z. Kessler and J. Malenovský

...

It is the relations between the CNB and the government that are decisive. After all, in carrying out its duties, the CNB indirectly has some impact on the government's activities. The Constitutionimplicitly and the CNB Act explicitly (§§ 9-11) regulate the forms of cooperation between the government and the CNB. Thus, the government has legitimate interest in ensuring that its work with the CNB runs smoothly.

If follows from the constitutional idea of checks and balances between constitutional organs that, without more, one cannot deduce from the government's duty to cooperate with the CNB a further duty on the part of the governmment to accetp as the central partner in this cooperation just any person, thus even a person whom another constitutional body (the President of of the Republic) has unilaterally designated. In the absence of an explicit constitutional rule testifying to the contrary, a relation of inequality between two constitutional organs cannot be presumed.

It is not decisive that, in his relations to the government, the Governor is obliged to respect the Bank Council's views and "to convey its position" as is asserted in the opinion of the Court, but on the contrary, that the Governor is a person who enters into the realm of the government's reserved powers (he takes part in their meetings and has an advisory vote), and who would be imposed upon the government by unilateral decision of another constitutional organ.

From a certain point of view, the relations between the government and the President of the Republic are comparable to the relations between States. In the latter case, the subjects are in principle equal in the full sovereignty which appertains to them. In the former case, there are subjects which are in principle equal in the sense that each of them is exercising a part of the State's sovereign powers not derived from, and independently of, other subjects. A parallel can, thus, be drawn between these two types of relations, and an analogia iuris can be looked for. States which maintain between themselves diplomatic or consular relations (which work together in political or non-political fields) are not obliged to accept as the head of a diplomatic or consular mission (even if just one who conveys the attitude of the sending State) just any perons whom the sending State would impose upon it. The sending State is obliged to request separate agrément (exequatur), which the receiving state is entitled to refuse without communicating the reasons for its refusal. A person which enters directly into the of power of the second subject, is thus subjected to a special regime. This analogia iuris testifies to the presumption of the necessity for countersignature for the appointment of the CNB Governor (Vice-Governor). The presumption of equality could be overcome by an explicit provision, which, however, is not in the Constitution.

...

In view especially of the above state arguments, but also in view of the argument that the President of the Republic is not answerable for the performance of his duties (Art. 54 para. 3 of the Constitution), we consider that the President's appointment power under Art. 62 lit. k) 1) must be interpreted restrictively, thus, so as not to include the power to appoint the CNB Governor and Vice-Governor. This power is derived from the CNB Act and thus requires countersignature.

Naturely, the requirement that the Prime Minister countersign the act appointing the CNB Governor and Vice-Governors does not constitute an intervention into the CNB's independence in the exercise of its constitutional function as guaranteed by Art. 98 of the Constitution. 6) After all, the initiative for the appointment of the high officials of the Bank Council comes from the President, and not the Prime Minister. Thus, a government that is just entering into office, and having a different political orientation, is not competent to instigate a new appointment process.

Concurring Opinion

of Justices JUDr. Pavel Hollander and JUDr. Vladimir Jurka

...

Inasmuch as two interpretations of the pertinent (concrete) provisions of the Constitution vie with each other, each with its own ration and nether of which can be considered as contra constitutionem, clearly then it is appropriate to lean toward that interpretation which is supported by constitutional practice, in other words, to respect a constitutional tradition that has manifestly already been established in this way.

The Constitutional Court decided this case eight and one half years after the Constitution and the CNB Act came into effect. In this connection, one cannot overlook the fact that in all cases up till now the Governor has been appointed by the President without contra-signature, which was also the case (with two exceptions) for the appointment of all Vice-Governors. Further, one cannot ignore the fact that, in none of these instances did either the government (or the Prime Minister) submit to the Constitutional Court a petition initiating a conflict of competence proceeding against the President concerning the extent of his competence. Finally, neither can we disregard the fact that the sole reason for changing the rules for the appointment of the CNB Governor and Vice-Governors so as to make it on the proposal of the government, (as contained in the amended CNB Act and the amendments to the Constitution, submitted on 17 September 1999 to the Assembly of Deputies of the Czech Parliament by a group of Deputies - Ivan Langer, Petra Buzková, Eva Dundáčková, Zdeňek Jičínský, Jitka Kupčová, and Jan Zahradil) was the conviction, generally then shared by the Deputies voting on the amended CNB Act and the amendments to the Constitution, that such contra-signature was not required.

The issue which we considered fundamental is that whether, in a system of written constitutional law, constitutional customs praeter constitutionem can come into being and, if so, which conditions must be fulfilled in order to declare that they exist.

The Constitutional Court has already spoken on an issue related to the given problem in its judgment Pl. 33/97, in which it declared the following: "A modern, democratic, written constitution is a social contract, by which the people, representing the constituent power (pouvoir constituant), constitute themselves in one political (state) body and enshrine the relationship of the individual to the whole and the system of state institutions. A document institutionalizing the set of fundamental, generally-accepted values and molding the mechanism and process of the formation of legitimate power decisions cannot exist out of the context of publicly-accepted values, conceptions of justice, as well as conceptions of meaning, purpose, and the manner of functioning of democratic institutions. In other words, it cannot function without a minimum consensus with respect to values and institutions. The conclusion resulting therefrom for the field of law is that, even in a system of enacted law, basic legal principles and customs are also sources of general, as well as of constitutional, law. . . .The acceptance of further sources of law apart from written law (in particular, general principles of law) raises the issue of recognizing their existence. In other words, it raises the issue whether their formulation is an arbitrary matter or whether it is possible to lay down means of proceeding for their formulation which, to a certain degree, can be objective… A typical example of the definition of

unwritten legal rules of human conduct can be found in customary law. In order for a legal custom to arise, it is required that there be a general conviction of the need to observe the general rule of conduct (opinio necessitatis) and, in addition, its continuance over an extended period (usus longaevus, resp. longa consuetudo)."

We are of the view that the inception of constitutonal customs praeter constitutionem is a regular and natural part of the functioning of democratic constitutional systems within the European continental legal culture, that is within the tradition of written constitutions and written law. This phenomena has also been reflected in the jurisprudence of constitutional courts. An example that may be cited in this regard is the judgment of the German Federal Constitutional Court (BverfGE, 72, 189) in which the Court accepted the activism of the joint committee of the Bundestag and the Bundesrat praeter constitutionem, moreover acknowledging its status as a constitutional custom.

In the matter under consideration, it must be confirmed whether the constitutive elements of a constitutional custom, which are analogous to the constitutive elements of general legal customs, have been met. We consider that the general conviction (opinio necessitatis) concerning the President's authority to appoint the CNB Governor without contrasignature, can be demonstrated in part by the absence, in preceeding instances of appointments, of any attempt on the part of the government to bring before the Constitutional Court a conflict of competence against the President, and in part by the intention motivating the adoption of Act No. 442/2000 Coll., amending Act No. 6/1993 Coll., (similarly the intention behind the amendment to the Constitution submitted to the Assembly of Deputies of the Czech Parliament on 17 September 1999 . . . .). Sec. 6 para. 3 of the amended CNB Act 5) limited the President's power of appointing the CNB Governor and Vice-Governors which demonstrates that the act necessarily proceeded from the assumption that the President's exercise of this power is not subject to contra-signature.

In our view, long-term acceptance of a spontaneously formed rule (custom), i.e., the condition of longa consuetudo, is met in this case, not only due to the length of time the existing practice has persisted, but also due to the frequency with which appointments were made. The two exceptions (the two appointments of Vice-Governors) cannot change this reality. The fact that these constituted exceptions to the established practice demonstrates the general conviction reflected in the aim of the amendments adopted to the CNB Act, No. 442/2000 Coll.

Finally, two important matters must be mentioned in connection with the acknowledgement that constitutional customs can also be accorded the status of sources of constitutional law. The first is the immense responsibility of all constitutional bodies for their application of the constitution, the necessity for them to be aware of the consequences of their conduct, being cognizant not merely of the context in which a matter is decided at any given moment, but also in view of the formation of the country's constitutional system. The second is the boundary of acceptability of constitutional customs, which is in principle laid down by Article 9.2 of the Constitution. In that respect, it cannot be said in the case at hand that the formation of a constitutional custom in the course of appointment of the CNB Governor and Vice-Governors affects any of the essential requirements of a constitutional law-based state.

For the given reasons, we consider that, since the Constitution came into effect, in constitutional practice a constitutional custom has developed whereby the President appoints the CNB Governor and Vice-Governor's without the contra-signature of either the Prime Minister or his responsible minister. It is our opinion that, at this point, changes to the existing constitutional situation can be effected solely by decision of the Constitutent Assembly, that is, by amendment to the Constitution.

...

Pl. US 14/01

Overview of the most important legal regulations

1. Article 62 of the Constitution of the Czech Republic include the enumeration of presidential powers inclusive letter k) which stipulates that the President shall appoint members of the Banking council of the Czech National Bank.

2. Article 87 para. 1 of the Constitution of the Czech Republic stipulates under letter k) that the Constitutional Court has jurisdiction to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body.

3. Sections 120 - 125 of the Act 182/1993 Coll, on the Constitutional Court, regulates the procedural aspects related to the Proceedings on Jurisdictional disputes between State bodies and the Bodies of Self-Governing Regions.

4. Article 63 of the Constitution of the Czech Republic lists another presidential powers in addition to powers in the Article 62. Para. 2 of this Article stipulates that the President of the republic also possesses powers which are not explicitly enumerated in constitutional acts if a statute so provides. Under para. 3, in order to be valid, decisions of the President issued pursuant to paragraphs 1 and 2 require the countersignature of the Prime Minister or a member of the government designated by him. Para. 4 states that the government is responsible for the decisions of the President that require the countersignature of the Prime Minister or a member of the government designated by him.

5. Section 6 para. 1 of the Act 6/1993 Coll. stipulates that the Bank Council shall consist of seven members, comprising the CNB Governor, two Vice-Governers and four other Bank Council Members. Pursuant to para. 2, the Governer, Vice-Governors and other members shall be appointed and relieved by the President of the Republic. Para. 3 stipulated that the Governor, Vice-Governor and other members shall be proposed by the government; this paragraph was annulled on the day of announcement of the judgment Pl. US278/2000 in the Collection of Laws.

6. Article 98 para. 1 of the Constitution of the Czech Republic states that the Czech National Bank shall be the state central bank, its primary purpose shall be to maintain the stability of the currency and intervention into its affairs shall be permissible only on the basis of the statute. Under para. 2 the bank's status and powers, as well as more detailed provisions, shall be set down in a statute.

7. Pursuant to Article 62 letter a), the President of the Republic appoints and recalls the Prime Minister and other members of the government and accepts, letter e) appoints Justices of the Constitutional Court, its Chairpersons and Vice-Chairpersons, letter j) appoints the President and Vice-President of the supreme Auditing Office.

8. Article 68 para. 2 of the Constitution of the Czech Republic stipulates that the President shall appoint the Prime Minister and, on the basis of her proposal, the other members of the government and entrust them with the management of the ministries and other offices.

9. Article 84 para. 2 of the Constitution of the Czech Republic stipulates that the justices of the Constitutional Court shall be appointed by the President with the consent of the Senate.

10. Section 6 para. 6 of the Act 6/1993 Coll., in the wording of later regulations, enumerates list of exhaustive reasons for the remove of the Bank Council member, i.e. when he has been convicted of a crime, he fails to perform his duties according the Bank Council decision, on the basis of his own request delivered to the bank Council or he performs the office incompatible with the position of the Bank Council Member.