

1997/04/02 - PL. ÚS 25/96: FIVE PERCENT ELECTORAL THRESHOLD

HEADNOTES

The requirement that elections be direct is fulfilled even if, on the basis of the five-percent clause, a particular party acquires the right to an additional seat or seats in excess of what strictly proportional representation would allow. Even in this case, however, seats must be filled by those candidates whom their political party duly inscribed on the list and who the voters could expect when voting might possibly gain a seat if the party, for which the candidates stood, acquires the right to an additional seat as a result of other parties' failure to meet the five-percent requirement. This manner of allocating seats cannot rightly be denominated as administrative, as it is not the product of a body's total discretion and decision, rather the direct result of the selection made by the voters under certain circumstances, under the conditions of the said clause, and with knowledge of the foreseeable results of the legally prescribed electoral system.

As regards a party's equal claim to be given commensurate (proportionate) consideration during the allocation of seats, a certain limitation upon the differentiation during seat allocation is inevitable and, therefore, permissible. While the purpose of voting is, undoubtedly, the differentiation of the voter corps, the aim of the elections is not a mere expression of political will by individual voters and the simple acquisition of a differentiated mirror image of the voters' political attitudes.

The principle of differentiation and the principle of integration must come into conflict at the stage of the electoral process where seats are allocated, if the elections are to result in an Assembly of Deputies the composition of which enables to attainment of a political majority capable of forming a government as well as of engaging in legislative activities, the tasks which the Constitution entrusts to the Assembly. Therefore, from the point of view the principle of representative democracy, it is acceptable to incorporate into the electoral mechanism itself certain integrative stimuli, where serious reasons for them exist, in particular, under the supposition that an unrestricted proportional system would result in the fragmentation of votes among a large number of political parties, the boundless "over-generation" of political parties, thereby threatening the parliamentary system's capacity to function and to adopt measures, as well as its continuity. On the other hand, it is not permitted, by raising the threshold of the limitation clause, to jeopardize the democratic substance of elections. It must always be gauged whether this limitation of the equal right to vote is the minimum measure necessary in order to muster the majority needed for the adoption of decisions and the formation of a government. The limitation clause is also subject to the principle of the minimum state interference in proportion to the prescribed goal.

Pursuant to § 86 of Act No 182/1993 Coll., an oral hearing shall always be held in a remedial action before the Constitutional Court against a decision certifying the election of a Deputy or Senator. The principle of personal participation, as well as of holding a public and oral hearing in a case, is guaranteed for a proceeding which, since

it is a proceeding on a remedial action, may not be separated from the contested matter and which is required to fulfil the constitutional guarantee of Article 96 para. 2 of the Constitution (proceedings before courts shall be oral and public). As a consequence thereof, it can be considered that the requirement of oral and public proceedings is preserved for this type of court proceeding in all cases where any of the parties would feel that the lack thereof in the proceeding before the Supreme Court is to his detriment.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE PLENUM OF THE CZECH REPUBLIC

of the Plenum of the Constitutional Court of 2 April 1997, sp. zn. Pl. ÚS 25/96, in the matter of the petition of the political party, DU, submitted in conjunction with its constitutional complaint, proposing the annulment of § 49 paras. 2, 3 & 4,3) a part of § 50 para. 1,4) and a part of § 51 para. 25) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic and on Amendment of and Supplements to some other Acts, and of the petition proposing the annulment of a part of § 200n, para. 16) of Act No. 99/1963 Coll., Civil Procedure Code, as subsequently amended (the judgment was published as No. 88/1997 Coll.)

STATEMENT

The petition is rejected on the merits.

REASONING

1. On 18 July 1996, the political party, DU, filed a constitutional complaint against the resolution of the Central Electoral Commission, dated 3 June 1996, whereby the Commission approved the Record on the Tabulation of Results of the Election to the Assembly of Deputies of the Czech Parliament, and against the ruling of the Supreme Court of the Czech Republic, ref. no. Ovs 5/96/Št-24, dated 12 June 1996, whereby that court rejected a complaint against the issuance of a certificate of election to the Assembly of Deputies, filed by the DU against the twelve Deputies of the Assembly of Deputies of the Czech Parliament who acquired seats in the “second scrutiny”.

A petition proposing the annulment of parts of §§ 49,3) 50,4) and 515) of Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic and on Amendment of and Supplement to some other Acts (hereinafter the "Electoral Act"), was filed in conjunction with the constitutional complaint. Therefore, the Panel of the Constitutional Court, in its ruling of 9 October 1996, suspended the proceeding and referred the petition to annul the cited provisions of the Electoral Act to the Constitutional Court Plenum for its decision.

In its proposal for an appropriate judgment from the Constitutional Court, the DU specified its request as follows:

to annul § 49 (2), (3), and (4) of the Electoral Act;3)

(b) to annul the following phrase in § 50 (1)4): ". . . which have qualified for the first scrutiny, . . .";

(c) to annul § 51 (2),5) except for part of the last sentence, so that this section would read: "The list of candidates for the second scrutiny shall be drawn up by the Central Electoral Commission according to preference votes for individual candidates of this political party or coalition".

The petitioning party holds the view that the contested norms of the Electoral Act contravene Articles 187) and 198) of the Czech Constitution and likewise infringe the constitutionally guaranteed fundamental rights enshrined in Article 21 para. 4 and Article 21 para. 1 of the Charter of Fundamental Rights and Basic Freedoms.9) Article 187) incorporates the principle of a universal, equal, and direct right to vote by secret ballot and on the basis of proportional representation. Article 198) guarantees the equal right to stand for election to all citizens of the Czech Republic who have attained 21 years of age and have the right to vote. Pursuant to Article 21 para. 4 of the Charter of Fundamental Rights and Basic Freedoms,9) citizens have, under equal conditions, access to any elective or other public office and, on the basis of Article 21 para. 1 of the Charter of Fundamental Rights and Basic Freedoms, citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives.

The constitutional complaint also includes a petition to amend the procedure for complaints against the issuance of certificates of election by deleting the words "without a hearing by resolution" in § 200n para. 1 of Act No. 99/1963 Coll., the Civil Procedure Code,6) as amended, on the grounds that court decisions without a hearing by resolution is in contravention of Article 38 para. 2 of the Charter of Fundamental Rights and Basic Freedoms,10) pursuant to which everyone has the right to have her case considered in public, without unnecessary delay, and in her presence, as well as to express her view on all the admitted evidence.

In the reasoning of its constitutional complaint, the political party, DU, states that it was not allotted any seats in the most recent election, even though it received 169,796 votes and, according to the principle of proportional representation, it should have been represented by five deputies because each seat filled corresponded on average to 30,296 validly cast votes. The seats that were not allotted to DU were given by administrative allocation to other candidates, candidates for whom Czech citizens did not cast their votes in the elections. This impinged upon the fundamental right of DU candidates who, despite fulfilling the constitutionally prescribed requirements, were nonetheless not accorded

their right to stand for election pursuant to Article 21 of the Charter of Fundamental Rights and Basic Freedoms.⁹⁾ By the same token, this system also resulted in an impingement upon the voting rights of 169,796 citizens, DU's voters, who are not represented in the Assembly of Deputies by freely elected representatives.

DU further objects that direct election was de facto replaced by the administrative appointment of the Central Electoral Commission, which did not take into account the election results but only confirmed the wishes of the chairpersons of several political parties.

It is the understanding of the DU that the cited violations of fundamental rights are the result of the peculiar mechanism of the five-percent limitation clause, which violates the principle of equal voting right as guaranteed in Article 18 of the Czech Constitution.⁷⁾ Owing to this mechanism, a certain number of validly cast votes of some citizens but not of others was sufficient to obtain a seat. Clearly the requirement of equal conditions for access to elective office have been violated. In elections defined in this manner, as reasoned by the DU, what mattered was not the number of votes received but the nature of the list of candidates in relation to which the relevant number of votes was attained.

The Constitutional Court first verified whether the formal prerequisites and the conditions prescribed for petitions to annul provisions of a statute have been met. The Court concluded that the petition meets all formal requirements and fulfils the conditions of § 74 of Act No. 182/1993 Coll., on the Constitutional Court. Pursuant to this Act a complainant may submit, together with his constitutional complaint, a petition to annul a statute or some other enactment, or individual provisions thereof, the application of which resulted in the situation which is the subject of the constitutional complaint, if the complainant alleges it to be inconsistent with a constitutional act or an Article 10 Treaty,¹¹⁾ or with a statute, if the petition concerns some other enactment.

The fact that DU did not receive any seat in the Assembly of Deputies in the most recent election despite receiving 170,000 votes can undoubtedly be ascribed to the direct effect of the Electoral Act provision concerning the five-percent closing clause as a result of which the candidates from the lists of candidates who, having failed to receive at least five-percent of the overall vote lose the claim to act as a representative. Since neither the Central Electoral Commission nor the Czech Supreme Court could act in contravention of the Electoral Act's five-percent clause, the DU turned to the Constitutional Court, pursuant to § 64 para. 1, lit. d) of Act No. 182/1993 Coll., with its objection that the relevant provisions of the Electoral Act are unconstitutional.

After the Constitutional Court found that the constitutional complaint met the conditions prescribed by law, it requested a written statement of views from the Czech Parliament's Assembly of Deputies. The Assembly of Deputies' statement, dated 5 December 1996 and signed by its Chairman ing. M. Z., states that the Electoral Act was approved by the required majority of Deputies, signed by the appropriate constitutional officials, and duly promulgated in the conviction that it is in conformity with the constitutional order of the Czech Republic. As the contents of its statement makes clear, the Assembly of Deputies rejects the DU's petition with reference, in particular, to the following arguments:

First, in the Assembly of Deputies' opinion, the Constitution does not specify the form of the proportional system for elections to the Assembly of Deputies and provides the legislature with rather wide authority to designate in the Electoral Act both the number and size of electoral districts and the electoral method whereby the votes cast shall be converted into seats. Considering this broad authorization, therefore, it is also permitted, in the Electoral Act, to limit the principle of proportional representation by a "closing" clause, which should serve to avoid the presence in the Assembly of Deputies of many political parties with a very low number of seats, a situation which could considerably encumber its functioning and complicate the formation of a stable Government. Furthermore, in the Assembly of Deputies' view, the principle of the equal voting right is not violated, because that right consists in the fact that in elections every voter has one vote and that his vote has the same value as the votes of other voters. Seats are allocated to the electoral regions in accordance with the number of votes cast in each one of them. Neither does the closing clause violate citizens' constitutional right to participate in the administration of public affairs through the free election of their representatives. This right does not guarantee citizens that the candidates for whom they voted will, in fact, be elected. Nor has the citizens' right, guaranteed by the Constitution, to have access under equal conditions to elective office been breached, since this right does not guarantee every citizen the right to be elected. A citizen may be elected only if she has met all the conditions laid down in the Electoral Act, one of which is the requirement to gain a certain number of votes. According to the opinion of the Assembly of Deputies, the Electoral Act also does not violate the principle of the direct voting right, which means that a citizen elects her representatives directly and not through another person. The voter chooses the set of candidates included in the candidates' list, the order of which is determined by the political parties or coalitions of them. In this system, the voter must take into account the possibility that his vote may be credited as well to candidates other than those he chose, in the order known to the voter in advance. As to the objections against the procedure of the court while deciding on the complaint directed against the issuance of certificates of election as a Deputy or Senator, the Assembly of Deputies holds the view that the matter at issue is an exception to the principle that court hearings should be oral and public, which exception is justified by the need for a Deputy or Senator duly to perform her duties. An oral hearing on such complaints would unduly prolong the whole process, thus casting doubts on the validity of the Deputy's or Senator's election over an extended period of time.

2. It is clear from the DU petition that the Constitutional Court is called upon primarily to assess the constitutionality of the "five-percent" clause. As evidence the clause is unconstitutional, in the conclusion of its constitutional complaint, the DU compares the wording of § 8 of the Constitution of 1920 with Article 18 of the current Constitution.⁷⁾ Both texts are, in fact, identical, in declaring that elections to the Assembly of Deputies shall be held according to the principle of proportional representation, and neither contains any further specification. If the current Electoral Act introduces a limitation clause to the proportional system, in the view of DU, there is no support for it in the Constitution because, in harmony with the Constitution of the Czechoslovak First Republic, it enshrines the system of proportional representation without any limitations.

Undoubtedly, the electoral system to the First Republic's Assembly of Deputies was modeled on a purely proportional system which in fact did not contain any significant limitation besides a minor deformation of this principle due to the need for a second

scrutinium; a system of representation that attains absolutely pure proportionality is practically impossible since seats are indivisible.

Due to the manner in which the constitutional complaint is formulated, the Constitutional Court must first raise the issue as to whether the constitutional formulation of the proportional representation principle, which does not contain any language limiting this principle, entails an obligation that the implementing electoral law not contain any provisions limiting proportional representation in one way or another. As for the 1920 Constitution, one can scarcely deduce from it any binding consequences for the conception of the Electoral Act, issued on the basis of the Constitution of 1993. The period after the World War I was that of a victorious crusade for proportional representation across Europe. Only later did the European states gain experience with the character and function of proportional representation. At that time a limitation clause was neither conceived of in theory nor implemented in practice. Therefore the 1920 Constitution's formulation on proportional representation is, from this point of view, neutral and does not per definitionem contain a priori either a limitation clause or a prohibition thereof.

It was only the experience of European parliaments before World War II, and after it as well, that led to the search for a system that would limit an excessive splintering of the political spectrum in Parliament. It was the experience not only of the Imperial Assembly of the Weimar Republic or of the Czechoslovak First Republic, but also of France, quite decidedly in the Fourth Republic (1946-1958), which confirmed that excessive diversification in the Assembly's composition and unrestricted proportional representation may become a tool of political de-stabilization and an element destructive of a constitutional state.

The theoretical re-evaluation of the proportional representation principle and a change in the political practice of contemporary representative democracies confirm the overwhelming opinion that, provided there are serious reasons therefor, the introduction of certain measures limiting the scope of the proportional representation principle is not in contradiction with the character of the electoral system, referred to in the Constitution or the Electoral Act, as one of proportional representation, if and to the extent that such provisions do not fundamentally limit proportional representation. Over time democratic states have introduced the proportional representation system, furnished with a five-percent or a three-percent clause, without considering that they thereby devalued the principle of proportional representation.

In this respect, the Constitution of the Czech Republic does not draw upon the 1920 Constitution; rather upon the theoretical foundation and institutional solution of contemporary democratic states which make use of proportional representation in a more or less limited form. Therefore, the mere comparison of the texts of both constitutions does not testify to the specific rules relating to proportional representation. The necessity to have an identical specification of legal provisions on the electoral system may not be deduced from two identical constitutional texts that were applicable in two different historical eras, with varying conceptions of representative democracy, and, in fact, in two different states.

The DU further objects that the administrative allocation of seats to candidates who gained them as a result of the five-percent clause, to the detriment of parties which were denied representative office, constitutes an impingement upon the right to vote and to stand for election and upon the principle of the right to elect directly (Article 18 of the Czech Constitution⁷)), as well as a violation of Article 19 para. 3 of the Constitution,⁸) pursuant to which a seat is gained by election. The DU draws the conclusion that, in the given case, seats were not gained by election, rather through administrative allocation; further, as a consequence of the limitation clause, a situation arose in which portion of the electorate was deprived of the right to vote and potential candidates were deprived of the right to stand for election.

According to DU, the requirement of direct election was violated by the allocation of seats to candidates of parties which did not gain the number of votes necessary for them to be elected. To determine this issue, it is necessary to elucidate the concept, "direct election". The principle that elections should be direct is meant to ensure a direct relation between the votes of the electorate and the resulting filling of seats, a relation excluding a further decision-maker that would select a Deputy at its discretion. An example of just such a decision-maker would, for example, be electors chosen by voters with the intention that an electoral college decide who should fill the elective function.

The principle of direct election ensures that the group of persons elected be directly and without mediation designated by the votes which the voters cast for them in the election. Therefore, the electoral procedure must be adjusted so that every vote cast may be ascribed to specific persons. The principle of direct election does not bar the election of one candidate dependant upon the co-election of other candidates, that is, it does not prohibit election on the basis of mass candidate lists on which the individual parties put forward at one time a number of persons listed in a certain order. An election employing candidate lists meets the requirements of direct election because, although the candidates for the upcoming elections are selected by another decision-making body (political party), this selection occurs prior to the elections themselves. Thus, the decision of political parties on the composition of candidate lists precedes the elections and can be understood as - sui generis - a choice offered to the voters. As far then as actual voting by the voters is concerned, for an election to be considered direct, it is sufficient if the stipulated order of candidates is known to the voters in advance and if each vote cast can be ascribed to specific, clearly identifiable persons, who are standing as candidates to the elected office. This condition is met even if, on the basis of the five-percent clause, a particular party acquires the right to an additional seat or seats in excess of what strictly proportional representation would allow. Even in this case, however, seats must be filled by those candidates whom their political party duly inscribed on the list and who the voters could expect when voting might possibly gain a seat if the party, for which the candidates stood, acquires the right to an additional seat as a result of other parties' failure to meet the five-percent requirement. This manner of allocating seats cannot rightly be denominated as administrative, as it is not the product of a body's total discretion and decision, rather the direct result of the selection made by the voters under certain circumstances, under the conditions of the said clause, and with knowledge of the foreseeable results of the legally-prescribed electoral system.

A common denominator of DU's objections, and at the same time its most serious objection, is the reference to the violation of Article 21 para. 4 of the Charter of Fundamental Rights and Basic Freedoms,⁹⁾ pursuant to which citizens have access, under equal conditions, to any elective or other public office, and the reference to the violation of Article 18 para. 1 of the Czech Constitution,⁷⁾ pursuant to which the elections to the Assembly of Deputies are held on the basis of the principle of equality of the voting right.

The principle of the equality of the voting right can be considered from two basic perspectives: the first consists in the comparison of the numerical weight of individual votes, that is, the weight of individual votes during the count and in voting results. The equality of the voting right requires that in the count all the votes are of equal value, that is, of the same numerical weight (quantitative equality) and consequence, so that the count would enable an exact numerical differentiation of the electorate, that is, an exact numerical "identification" of support given to individual candidate lists.

The second perspective on the equality of the voting right conceives of the equality of votes in light of the democratic principle, that is, from the perspective of the claim of votes cast in favor of various candidate lists to such degree of electoral success as is commensurate with the numerical values which these candidate lists achieved in the election. It is a claim to such evaluation of the voting results as is based on an equal approach to the evaluation of the claim to victory of parties putting up candidates, thus, a claim to a proportionate number of seats, that is one corresponding to the proportion of votes cast.

The Constitutional Court grasps the weightiness of DU's arguments and is aware that DU's objections are substantively well-founded in respect of DU's assertion that, in the last elections to the Assembly of Deputies, it did not obtain any seats despite receiving 169,796 valid votes, which number, from the perspective of proportional representation, gives rise to the claim to 5 seats, since on average the parties represented in the Assembly of Deputies need only 30,296 votes to obtain one seat. This is a true disproportion which is not, in and of itself, just and is inconsistent with the exact equality of the voting right.

As this disproportion results from the five-percent limitation clause, affecting small political parties, the question remains whether and to what extent the five-percent clause is constitutionally authorized, or to what extent it is compatible with the general principle of the equality of voting rights.

It is a more complicated task to judge this issue than it would be to judge the first aspect of equality of voting rights, where it is unequivocally the case that, when counting votes and ascertaining the numerical election results, the entirely strict equality of votes applies and that any differentiation in numerical evaluation of votes cast is impermissible and unconstitutional.

As regards a party's equal claim to be given commensurate (proportionate) consideration during the allocation of seats, a certain limitation upon the differentiation during seat allocation is inevitable and, therefore, permissible. Such limitation results, above all, from the practical impossibility of appropriately expressing an exact proportion owing to, for

instance, the fact that the technical aspects of electoral representation do not allow for an "appropriate" split of seats.

Nevertheless, there may exist other significant grounds for placing restrictions upon equality which are found in the purpose and function of elections in a democratic society. While the purpose of voting is, undoubtedly, to differentiate the electorate, the objective of elections is not, however, to obtain a mere expression of political preference by individual voters and a mere differentiated mirror image of opinion streams and the voters' political positions. Since it is the people who exercise state power, mainly via parliament, and since the exercise of state power presupposes the capacity to adopt decisions, elections and the electoral system must have regard to the capacity to adopt such decisions on the basis of the majority's will. To base the composition of the Assembly of Deputies on a strict proportional image of voting results might give rise to a political representation fragmented into a large number of small groups promoting diverse interests, which would make the formation of a majority much more difficult if not entirely impossible.

The principle of differentiation and the principle of integration must come into conflict at the stage of the electoral process where seats are allocated, since the elections are meant to result in an Assembly of Deputies the composition of which enables to attainment of a political majority capable of forming a government as well as of engaging in legislative activities, the tasks which the Constitution entrusts to the Assembly.

Therefore, from the perspective of the principle of representative democracy, it is acceptable to incorporate into the electoral mechanism itself certain integrative stimuli, where serious reasons for them exist, in particular, under the supposition that an unrestricted proportional system would result in the fragmentation of votes among a large number of political parties, the boundless "over-generation" of political parties, thereby threatening the parliamentary system's capacity to function and to adopt measures, as well as its continuity.

After the bad experiences with the excessive fragmentation of parliamentary composition, the European states, when applying proportional representation, adopted as well integrative stimuli, in particular, the limitation clause, which in most cases is five percent. It is generally recognized that the legislature has the right to make rules for the differentiation of the claim of votes to successful representation in a proportional election and, in this way, to treat political parties in a disparate manner, if such is absolutely necessary to ensure integration character of elections in the formation of the people's political will, in the interest of the unity of the entire electoral system and so as to ensure the state's political objectives pursued in the parliamentary elections. The existence of the limitation clause must, in any case, be made conditional on there being serious grounds therefor, while an increase in the threshold of the limitation clause is justifiable only if there are especially momentous reasons therefor. It must be noted that any increase in the threshold of the limitation clause cannot be unlimited, so that, for example, a ten-percent clause could already be considered such an intrusion upon the proportional system as to threaten its democratic substance. Therefore, it is always necessary to gauge whether such limitation of the equality of the voting right is the minimum measure necessary to ensure such a degree of integration of political representation as is necessary for the legislative body to form a majority (or majorities)

required for the adoption of decisions and formation of a government which enjoys the confidence of parliament. Consequently, the principle of minimal intervention of the state in proportion to the prescribed objective applies to the limitation clause too. For this reason, even the need for electoral limitation must be construed strictly.

From this perspective, no fixed value may be assigned to the threshold of the limitation clause, rather it is relative and always must depend on the specific proportion of forces in the country and on the structure in which they are differentiated. In Germany, for instance, some authors have asserted that, due to stability which the country has reached over time, the right of smaller, especially new, parties to obtain seats in the Assembly is threatened by the clause, to the degree that it has already lost its indispensable character. In contrast to that, the proponents of the clause, who are in the majority, object that the danger of fragmentation is still very real because the current stabilized system is, in the final analysis, also a result of the clause and that it is not possible to foresee the consequences that might come about were the threshold of the limitation clause to be lowered from five percent to, for example, three percent.

A comparison of the limitation clause with the majority system speaks in favor of the limitation clause. Constitutional courts unconditionally conceive of the majority electoral system as democratic, despite the fact that the political views of a large percent of the voters are not represented in the parliament at all or not represented in proportion to the strength of those voters. In reality, the very nature of the majority electoral system gives rise to a limitation clause of a sort which is far higher than is usual in the proportional electoral system. It follows from this that solely the votes cast for the winning candidate represent success whereas the other votes "fall out of the picture". In the final effect of the elections, this significant differentiation in the composition of the elected ensemble is more or less balanced out by the diversification of results in individual districts such that the inequalities in particular districts are balanced out by the reverse inequalities in other districts. While in the majority electoral system the equality of votes is fully maintained as far as concerns their numerical weight, however, the claim of individual votes to success is sharply diversified: votes given in favor of a successful candidate concentrate a 100% share in the success, other votes concentrate no share.

The following conclusion can be drawn from what was stated above: the five-percent limitation clause may not a limine be rejected as an unconstitutional limitation of the equal right to vote. Since in judging this issue the principle of diversification comes into conflict with the principle of integration, what remains to be considered is whether in the case of the Czech Republic the five-percent clause is the minimal measure which is necessary for the formation of an Assembly of Deputies which is capable of debating, adopting decisions, and fulfilling its legal functions, as well as of forming a majority, from which the government can draw political support, or whether the extent of intrusion into the principle of proportional representation is so high as to jeopardize the democratic nature of the elections.

As is well known, the political spectrum of the Czech Republic is the result of a relatively short development and is not as yet quite clearly structured or visibly stabilized. A characteristic feature of all Czech parliamentary elections so far, but also of the first election to the Assembly of Deputies of the Czech Parliament in 1996, has been the marked splintering of political forces into a large number of political parties competing to

obtain seats in the Assembly. Even though the number of the parties and movements which competed in the most recent election to the Assembly of Deputies fell to 20, the election results demonstrate that, were proportional representation to be respected in full, at least three other political parties would have had to join the three presently-governing coalition parties in order to form a governing coalition representing even a frail majority. Nevertheless, a coalition with a different composition and hue would not be faced with lesser problems. Experience with similar coalitions, in particular, in the fourth French Republic justify fears and skepticism. Therefore, if a certain distortion of proportionality in political representation, resulting from the five-percent clause, does not in its overall effect constitute a disproportion which would justify doubts about the democratic nature of the political representation, the Constitutional Court has no choice but to reject DU's objections.

In addition to the limitation clause, DU also proposed the annulment of the words "without a hearing by resolution" in § 200n (1) of Act No. 99/1963 Coll.,⁶⁾ so as to read: "The court shall decide within ten days on a complaint against the issuance of a certificate of election as a Deputy or Senator. "

The Constitutional Court carefully examined the arguments in favor of and against annulling the words "without a hearing by resolution". Undoubtedly, in court decisions the principle that everyone has the right to have her case considered in public and in her presence, as well as and to express her views on all the admitted evidence (Article 38 para. 2 of the Charter of Fundamental Rights and Basic Freedoms¹⁰⁾) is of the utmost importance. The significance of this principle is undeniable despite the fact that it applies *cum grano salis* - with a grain of salt, because Article 96 para. 2 of the Czech Constitution²⁾ provides that exceptions to this principle may be introduced by statute.

The Constitutional Court also takes as its assumption that a Deputy or Senator can consider the proceedings on the complaint against the issuance of a certificate of election as "her case" in the sense meant by Article 38 of the Charter of Fundamental Rights and Basic Freedoms.¹⁰⁾ In this respect, the Court refers to the reasoning in the Constitutional Court's judgment dated 10 January 1996 and published in the Collection of Laws as No. 31/1996, whereby the second paragraph of § 200l of the Civil Procedure Code¹²⁾ was annulled. The Court's experience with complaints of this kind has so far revealed that such complaints, to a large extent, relate to the personal behavior, actions, or characteristics of the elected persons rather than with the lack of order in the organization of the elections. This fact is also corroborated by the right of persons whose election is contested to express their views on the objections in oral proceedings.

On the other hand, the Constitutional Court also considered the arguments for retaining the current provisions of the Civil Procedure Code. The Constitutional Court's decision concerning § 200l of the Civil Procedure Code¹²⁾ itself contains elements which testify against deleting the words "without a hearing by resolution" from § 200n of the Civil Procedure Code.⁶⁾ Thus, the Constitutional Court annulled only paragraph 2 of § 200l, which stipulated that only the petitioner, that is the person who filed the complaint, is a party to the proceedings. The Court referred to the provision of § 200n of the Civil Procedure Code,⁶⁾ pursuant to which in similar proceedings the person whose election is contested (the Deputy or Senator) is also a party to the proceeding. The current provisions

of § 200l12) authorizes a regional court to decide on a complaint without an oral hearing and without permitting an appeal against it.

From the perspective of constitutional law, it is a completely different matter in the case of § 200n of the Civil Procedure Code.⁶⁾ The Constitution introduced the Constitutional Court into the procedure on the certification of a Deputy or a Senator's election and understands its role in matters under Article 87 para. 1, lit. e)¹³⁾ - as well as § 85 of the Act on the Constitutional Court¹⁴⁾ - is conceived of as a decision in a remedial action against a decision on the certification of the election of a Deputy or Senator. A remedial action may be filed by the Deputy or Senator, or the party for which he stood as a candidate in the elections, against a decision that he was not validly elected, and further by a person whose electoral complaint pursuant to the Electoral Act was granted, against the decision of the relevant chamber of the Parliament or one of its bodies certifying the validity of the Deputy or Senator's election. From the perspective of the Constitution, a Supreme Court decision on a complaint against the issuance of a certificate of election as a Deputy can also be considered a matter which relates to the certification of a Deputy's election. According to § 86 of Act No 182/1993 Coll., on the Constitutional Court,¹⁾ an oral hearing shall always be held in such remedial actions. The principle of personal participation, as well as of holding a public and oral hearing in a case, is guaranteed for proceedings before the Constitutional Court which, since it is a proceeding on a remedial action, may not be separated from the contested matter and which is required to fulfil the constitutional guarantee of Article 96 para. 2 of the Constitution²⁾ (proceedings before courts shall be oral and public). As a consequence thereof, it can be considered that the requirement of oral and public proceedings is preserved for this type of court proceeding in all cases where any of the parties would feel that the lack thereof in the proceeding before the Supreme Court is to his detriment.

If the requirement of oral, public hearings already before the Supreme Court had been introduced, it can be expected that the proceedings would be substantially slowed down. The DU petition would leave the Supreme Court a ten day period in which to decide on a complaint. It appears to the Constitutional Court that, should it adopt this proposed solution, the time-limit could not be adhered to. The DU probably did not take into consideration the time required for individual tasks related to an oral hearing. The fact that the said time-limit cannot be adhered to would introduce into the proceedings itself an element of legal uncertainty, in the awareness that *ultra vires nemo posse tenetur* [Translator's note: what is beyond possibility cannot exist]. In addition, it can be presumed, with a probability bordering on certainty, that Deputies and Senators, against the election of whom a complaint was successfully lodged before the Supreme Court, would undoubtedly bring their case to the Constitutional Court. All this justifies the conclusion that the whole proceeding would become disproportionately drawn out. It would give rise to some sort of a "three-instance" procedure: certification of election by the Assembly of Deputies, proceedings before the Supreme Court, including a full oral hearing, and similarly even proceedings before the Constitutional Court. In comparable European states with a parliamentary system and a constitutional court (Germany and Austria), the certification of election is a matter for the assembly, and a complaint is admissible to one court only, to wit the constitutional court. In such cases in Germany, the Constitutional Court does not even have to hold an oral hearing in every case.

After having compared the arguments for and against, the current statutory provisions appear to the Constitutional Court to be more suitable. Since the Constitutional Court has found that the provisions contravene neither Article 96 of the Constitution,²⁾ nor Article 38 para. 2 of the Charter of Fundamental Rights and Basic Freedoms, nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 para. 1), it does not see any grounds for changing § 200n (1) of Act No. 99/1963 Coll., as amended. Therefore, the Constitutional Court has rejected on the merits this petition from DU as well.

Pl. ÚS 25/96

Overview of the most important legal regulations

1. § 86 of Act no. 182/1993 Coll., on the Constitutional Court, provides that the Constitutional Court shall always conduct oral proceedings on an appeal under § 85 (i.e. against a decision in the matter of certifying the election of a deputy or senator).
2. Art. 96 of Act no. 1/1993 Coll., the Constitution of the CR, provides in par. 1, that all parties to a proceeding have equal rights before the court, in par. 2, that proceedings before courts shall be oral and public; exceptions to this principle shall be provided for by statute. Judgments shall always be pronounced publicly.
3. § 49 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR, provides the advancement of political parties, political movements and coalitions into scrutiny. Par. 1 provides that on the basis of a record of the results of elections in the regions the Czech Statistical Office shall determine how many valid votes in total were cast for each political party, each political movement and each coalition, and which political parties or political movements received less than five percent and which coalitions, composed of two, three or four and more political parties received less than 10, 15 or 20 percent of the total number of valid votes. Par. 2 provides that these political parties, movements and coalitions are not taken into account in the further determination of election results and allocation of mandates. Par. 3 governs the procedure of the Czech Statistical Office which, if it determines that the specified number of coalitions, parties or movements did not advance into the scrutiny (e.g. at least 2 coalitions or 1 coalition and 1 political party or political movement ...), shall lower the required percentage share to a threshold specified by the Act. Par. 4 provides that mandates for political parties, political movements and coalitions which advanced into the scrutiny are distributed in the framework or election regions.
4. § 50 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR, regulates the scrutiny and provides, how the number of valid votes for each political party, political movement or coalition are divided in order to obtain the number of mandates allocated to the election region.
5. § 51 of Act no. 247/1995 Coll., on Elections to the Parliament of the CR, regulated the procedure in the second scrutiny. Note: The text of § 51 was amended by Act no. 204/2000 Coll.

6. § 200n par. 1 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, provides that the court shall decide on a complaint against issuance of certification of election as a deputy or senator by a resolution without proceedings, within 10 days.
7. Art. 18 par. 1 of Act no. 1/1993 Coll., the Constitution of the CR, provides that elections to the Assembly of Deputies shall be held by secret ballot on the basis of a universal, equal, and direct right to vote, according to the principle of proportional representation.
8. Art. 19 of Act no. 1/1993 Coll., the Constitution of the CR, provides in par. 1 that every citizen of the Czech Republic who has the right to vote and has attained the age of 40 [should be 21] is eligible for election to the Assembly of Deputies. Par. 3 provides that Deputies and Senators gain their mandate by their election.
9. Art. 21 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides in par. 1 that citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives. Par. 4 provides that citizens shall have access, on an equal basis, to any elective and other public office.
10. Art. 38 par. 2 of Act no. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms, provides that everyone has the right to have his case considered in public, without unnecessary delay, and in his presence, as well as to express her views on all of the admitted evidence. The public may be excluded only in cases specified by law.
11. Art. 10 of Act no. 1/1993 Coll., the Constitution of the CR, provides that international treaties concerning human rights and fundamental freedoms which have been duly ratified and promulgated and by which the Czech Republic is bound are directly applicable and take precedence over statutes.
12. § 200l of Act no. 99/1963 Coll., the Civil Procedure Code,
13. Art. 87 par. 1 letter e) of Act no. 1/1993 Coll., provides that the Constitutional Court has jurisdiction over remedial actions from decisions concerning the certification of the election of a Deputy or Senator.
14. § 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 the election of a deputy or senator.