

# 1999/10/13 - PL. ÚS 30/98: ELECTION CONTRIBUTION

## HEADNOTE

If modern representative democracy takes into account the functioning of the parliamentary system and, to a limited extent, accepts the integrative stimulus to a system of dividing mandates, this does not mean that integration view points may take precedents before the principle of free and, in principle, unrestricted election competition of elected parties. Free competition among them is a direct expression of the pluralistic nature of a democratic society, and it is precisely protection of pluralism in political life which has primary importance for the very existence of a democratic society. Therefore it is distinctively protected by Article 5 of the Constitution<sup>1)</sup> and Article 22 of the Charter of Fundamental Rights and Freedoms.<sup>2)</sup> Any direct or indirect restriction of the equality of parties in elections may not, individually or cumulatively through measures which differently afflict or give advantages to certain parties, a priori suppress the very participation of political parties in elections. Accumulation of financial support for only certain parties has the result of also being accumulation of de facto financial penalties for other parties. Therefore, it is necessary to consider carefully whether the purpose of such measures has not been exceeded. This purpose must be only the seriousness of the competing party's efforts, which are not aimed at goals other than participation in political representation and putting forth their own program. Integrative stimuli are permissible, to a limited extent, in a representative democracy, only after the process of free competition between legally equal political parties ends, i.e. after adding the votes for the parties, through a certain differentiation in dividing mandates, not, however, by a priori financial stimulation of certain parties and disadvantaging other parties, as this could lead to modification and stylization in the number of votes cast for political parties.

CZECH REPUBLIC  
CONSTITUTIONAL COURT  
JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

By its judgment of 13 October 1999, on the proposal of the complainant - the political party Democratic Union (Demokratická unie), filed together with a constitutional complaint for the annul of part of § 85 second sentence of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic and Amending and Supplementing Certain Other Acts,<sup>3)</sup> which reads: " ,which received in elections at least 3 % of the total number of valid votes," the Constitutional Court in the Plenum, decided as follows:

**The part of § 85 second sentence of no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic and Amending and Supplementing Certain Other Acts, which reads: "which acquired in elections at least three per cent of the total number of valid votes", is annulled.**

REASONING

I.

The complainant, i.e. the political party the Democratic Union (Demokratická unie), filed a constitutional complaint against a decision of the Ministry of Finance of the CR on non-payment of a contribution to cover election expenses of the Democratic Union in the amount of CZK 7,778,790. The Ministry of Finance announced its decision to the Democratic Union by letter of 19 August 1998, with reference to part of § 85 of Act no. 247/1995 Coll.,<sup>3)</sup> introducing a threshold for payment of the contribution, of three per cent of votes obtained from the total number of valid votes cast in elections. Under § 85 of Act no. 247/1995 Coll., on Elections to the Parliament of the Czech Republic (the "Election Act"), the Ministry of Finance of the Czech Republic is the body authorized to pay political parties a contribution to cover election expenses, in the amount of CZK 90 for each valid vote cast. In view of the fact that in this case payment of the election contribution to cover election expenses was refused with reference to provisions of the Act, the Democratic Union joined to its constitutional complaint a proposal to annul a part of § 85 of the cited Act,<sup>3)</sup> through application of which the circumstance arose which is the subject of the constitutional complaint.

The Democratic Union sees in the decision of the Ministry of Finance a violation of Article 22 of the Charter of Fundamental Rights and Freedoms,<sup>2)</sup> specifically interference by a public body in the free competition of political forces in a democratic society. According to the constitutional complaint, if every valid vote cast in elections is subsidized by an amount of CZK 90 for the appropriate political party, then any further conditions for paying this amount are interference in the free competition of political forces, as they

thus create unequal conditions for political parties' activities. This inequality of conditions is also further multiplied by the duty of competing political parties to pay a deposit in the amount of CZK 1,6 million. If certain parties then do not get this deposit back, nor receive a contribution for election expenses for each vote cast, there is economic discrimination by the state against newly arising political parties, whereby they are disadvantaged against established parties, which is in direct conflict with Article 5 of the Constitution of the Czech Republic,<sup>1)</sup> under which the political system is based on free competition of political parties. According to the Democratic Union, by this procedure the state requires a newly created political party to cross the three per cent threshold in the first elections after its creation, without any state financial resources, in competition with parties amply financed by the state. In addition, the constitutional complaint also sees clear discrimination from the point of view of a citizen, because the state has decided that one vote will have the value of CZK 90 and another will not. Finally, the constitutional complaint points to the fact that it is not possible to merely announce protection of political rights, and subsequently use economic instruments to perform the exact opposite. If truly free competition of political forces is to be preserved, this amount must also be paid for every vote cast, without further restrictive conditions.

## II.

The statement of the Chamber of Deputies of the Parliament of the Czech Republic, as a party to the proceedings, primarily objects that under Article 87 par. 1 letter j) of the Constitution and § 73 par. 1 of Act no. 182/1993 Coll., on the Constitutional Court, a political party may submit its proposal to the Constitutional Court only in the event of its dissolution of another decision by a public organ which affects its activities. According to the statement, current legal regulations do not recognize any other legal grounds for giving standing to a political party in proceedings under § 72 et seq. of the Act on the Constitutional Court.

In view of the objection of inadequate standing for a political party in proceedings under § 72 of the Act on the Constitutional Court, the Constitutional Court first had to review this reservation. After considering it, it concluded that the arguments of the Chamber of Deputies are based on an erroneous interpretation of the law, and are therefore not justified. Under § 72 par. 1 letter a) of the Act on the Constitutional Court, a constitutional complaint may be filed by both a natural person or legal entity under Article 87 par. 1 letter d) of the Constitution, against a decision which has gone into legal effect or other interference by a public body in constitutionally guaranteed rights and freedoms. A political party, which is a subject of rights and obligations as such, i.e. as an organization, is unquestionably also a legal entity.

The provision about the range of persons authorized to file a constitutional complaint is not affected but only supplemented by § 73 of the Act on the Constitutional Court, which governs the special case of dissolution of a political party or another decision by the state power which concerns the activities of a political party, e.g. a decision to refuse registration of a political party, or suspending the activities of a political party under § 14 of the Act on Association in Political Parties and Political Movements, no. 424/1991 Coll., as amended by later regulations, i.e. matters about which the Supreme Court of the CR

generally decides on the proposal of the government. In the case of § 73 a political party may file a “proposal” under Article 87 par. 1 letter j) of the Constitution, if it objects that a decision concerning its activities is not in accordance with constitutional or other laws. This does not restrict the right of a political party to also file, in addition to proposals under § 73, constitutional complaints under the conditions of § 72 of the Act on the Constitutional Court.

The Constitutional Court also considered the objection of the Ministry of Finance, which does not consider its announcement to be a decision of a state administration body. It stated that the argument that the announcement of the Ministry of Finance is not a formal decision of an administrative body will not hold. Under § 20a of the Act on Association in Political Parties and Movements, no. 424/1991 Coll., the Ministry of Finance pays the contribution at the request of a political party or movement. In this case, there is in fact rejection of a filed request, i.e. taking a position. In the Constitutional Court’s opinion, in this case it is not so significant whether there was a formal substantive rejection of an application or simply a “measure” or “other interference by a public body”. The fact remains that there was a negative reaction by a public body to a submitted claim, although with the reference that a provision of the law does not, in this case, permit payment of an election contribution.

### III.

After considering all the circumstances of the case, the Constitutional Court concluded that the proposal to annul that part of § 85 of the Election Act<sup>3)</sup> which conditions a state contribution for a party’s election expenses on obtaining at least three per cent of the total number of valid votes is justified.

The Constitutional Court’s position is based on considering the basic question, the relationship between two conflicting aspects of election competition between political parties. The first of them is the requirement of free election competition of political parties under equal conditions providing political parties and equal chance in elections, and leading to such composition of the elected body, as best reflects the actual differentiation of the political will of voters. The second requirement is the legislative body’s ability to make decisions on the basis of formation of a political majority, i.e. to be not only a nominal legislative body, but also a functioning one. In countries with a relatively fragmented spectrum of political parties the principle of purposeful integration thus conflicts with the principle of natural differentiation, because the need for creation of a political majority, capable both of forming a government and of performing legislative activity, is also in the nature of a constitutional state. Both these requirements must be observed in a sensitive and balanced manner in the overall legal regulation of all elements of the election process and in regulating the status of political parties. Therefore, in terms of a representative democracy, it is permissible to include integrative stimuli in legal regulation where - and only where - there are serious reasons for it, in particular on the assumption that fragmentation of votes among a large number of political parties would lead to unbridled “overpopulation” of political parties, and thereby to endangerment of the functionality and ability to act, as well as the continuity of the parliamentary system. After bad experiences with excessive fragmentation of the parliamentary spectrum, European countries which apply a system of proportional representation in elections also

largely implemented integrative stimuli, particularly restrictive clauses, generally of five per cent. Such integrative interference by the legislature is generally considered constitutionally legitimate if it is implemented in an extent absolutely necessary for formation of the political will of the people, necessary for making decisions in the elected body, and if these adaptations, as a whole, do not excessively distort the actual picture of the political will of the voters expressed by their votes, because in case of conflict of these two requirements, the principle of free competition between political parties enjoys higher constitutional protection (Article 5 of the Constitution,1) Article 22 of the Charter of the Fundamental Rights and Freedoms)2).

The Constitutional Court has already concerned itself with integrative stimuli, particularly in two cases. The first (Pl. ÚS 25/96) concerned the 5% restrictive clause. The Constitutional Court then declared this clause to be constitutional, and found that a certain restriction of differentiation when dividing mandates is permissible if there is minimum interference which permits the creation of the chamber of deputies capable of performing its constitutional functions.

The second case was an application to cancel election deposits (Pl. ÚS 3/96), which was supported by a majority of the Constitutional Court judges, but not a two-thirds majority, so it was denied. That case concerned the cancellation of the duty of each of party or coalition in the chamber of deputies to link a deposit of CZK 200,000 in every election district in which it took part in the elections, and the returnability of this amount was tied to receiving at least 5 % of votes in the elections. As a consequence of this, this integrative stimulus also remained in effect, which imposes on even small parties the obligation to pay CZK 1,600,000 as a deposit for their participation in elections in all districts, with the provision that they use this amount, if they do not receive at least 5 % of votes in the elections (§ 35 par. 4 of the Election Act).

Both the 5% restrictive clause and this measure are justified by the need to provide excessive differentiation of the political spectrum and the existence of numerous small political parties. Section 85 of the Election Act3) is based on basically the same grounds; it tightens payment on the election contribution in the amount of CZK 90 for every vote cast for party or coalition to the condition of acquiring least 3 % of the total number of all votes cast.

Another reason for these restrictions is a fear of recurring self-serving activities by parties, linked primarily at acquiring state funds and increasing visibility of their candidates for reasons other than election reasons (e.g. gaining personal popularity, for reasons of company or business activities etc.).

The contribution for payment of election expenses, as provided in § 85 of the Election Act,3) is not, in and on itself, anything exceptional in European Union countries. Easier conditions for a payment of an election contribution are in effect in Germany, France, Italy and Denmark. Belgium and Spain condition the payment on receiving a parliamentary mandate; Greece on acquiring 3 % of votes in an election and on the party having candidates in at least two thirds of districts, Luxembourg on acquiring at least 5 % in the relevant district, and Great Britain, Ireland, the Netherlands and Portugal do not have direct financing of political parties by the state at all. In this regard the treatment of the Czech Election Act is not outside the European average.

However, the Constitutional Court believes that objective evaluation of the Democratic Union application requires not only isolated evaluation of the contribution for payment of election expenses itself, but evaluation of it in the aggregate resulting effect of all these factors in our election system.

It is necessary to conceptually distinguish the function of the 5% restrictive clause from election deposits and the contribution for payment of election expenses. The restrictive 5% clause has its effect directly and primarily in the system of dividing mandates between individual political parties, i.e. only after voters have finished voting, and its effect on the entry of political parties into elections and on their participation in elections is only indirect, i.e. mediated by the consideration whether a party's chance of obtaining representation in the Parliament is or is not realistic. Although this consideration may deter certain parties from participating in elections, their freedom to participate in elections and compete with others in elections is not directly restricted by it.

In contrast, election deposits are primarily interference not in division of mandates, but directly sort of "in advance" in the freedom of entering elections and participation in elections, and clearly have an a priori effect on equality of chances in elections, by tying payment of CZK 1,600,000 which parties pay in advance for their full participation in elections, on the acquisition of at least 5 % of votes on a nation-wide scale.

In the Czech Republic, this "a priori integration tool", is also directly joined by restricting the contribution for payment of election expenses, which by its nature restricts small political parties by another, subsequent financial advantage in comparison with parties represented in the parliament. Thus, in the Czech Republic there is accumulation of economic barriers to develop participation of small parties in elections which has no analogy in any of the European Union countries with a proportional representation election system. These countries do not have even an indication of election deposits. Although election deposits do not exist, the very limit for providing contributions for payment of election expenses is also evaluated critically. Thus, for example in Germany, the level of 2,5 % of votes acquired is found to be unconstitutional by the Federal Constitutional Court, and in the new wording of §18 of the Act on Political Parties was lowered to 0,5 % for federal and 1 % of votes for state elections. In its decision (Entscheidungen volume no. 24, p. 300, 339 n.) the Federal Constitutional Court declared that although the legislature may make payment of an election contribution dependent on acquiring a certain minimum number of votes, it found to be limit of 2,5 % unconstitutional, as it is in conflict with the principle of equal chances for political parties in elections. Democracy is, in its foundations, aimed against privileges, therefore, in 1975, in a different matter, the same Constitutional Court found that "everyone should exercise his state-civil rights in terms of the form and manner with a maximum level of equality" and that „everyone must have an equal chance to become a member of Parliament, without regard to social differences, particularly his origin, nationality, education or property“ (ibid., volume 40, p. 317 - 318).

The principle of free competition between political parties conceptually includes the obligation of the state to observe equal opportunity of these parties in terms of legal regulation of conditions of competition and treatment of entitlements for its participants, as this is basically application of the general principle of equality, guaranteed by both constitutional and international acts. Any interference by the legislature in these conditions is interference by the state, and should be governed by the public interest. A

percentage restriction for payment of the contribution for payment of election expenses of political parties may not be the product of will or suitability evaluated only from the point of view of the interest of established parties.

Therefore, it is true for the Czech Republic as well, that the legislature, when regulating the field of creation of political will, must respect the fact that in this field it is given particularly narrow bounds, and it is denied any differentiated treatment of parties which is not based on exceptional serious grounds. In this regard we can point to the conclusion of the Federal Constitutional Court of Germany that: “when paying expenses for election competition, in which all parties which participated in the election competition must be taken into account, setting a minimum share of votes cannot be justified by pointing to the fact that the elections are supposed to create functional parliaments” (Entscheidungen, volume 24, p. 341). In the Czech Republic as well the criterion for this treatment must be different. This is not a tool of further integration, but simply determining whether proposals and programs submitted to election are meant seriously, whether they are oriented exclusively at success in elections and not at other aims. A purpose of an election contribution may not be restricting freedom of election competition, but securing its dignity. For example, the German Federal Constitutional Court expressly found that 0,5 % of votes is sufficient as proof of the seriousness of efforts in the election competition, and makes verification by other criteria unnecessary. The lower the threshold of election success, the more it is likely that election success matches the political significance of the party.

If modern representative democracy takes into account the functionality of the parliamentary system and to a limited extent accepts the integrative stimulus into a system of dividing mandates, this does not mean that integrative points of view may take precedence before the principle of free and fundamentally unrestricted election competition among election parties. Their free competition is a direct expression of the pluralistic nature of a democratic society, and it is precisely protection of pluralism in political life which has primary significance for the very existence of a democratic society. That is why it is distinctively protected by Article 5 of the Constitution<sup>1)</sup> and Article 22 of the Charter of Fundamental Rights and Freedoms.<sup>2)</sup> Any direct or indirect restriction of the equality of parties in election competition may not individually or cumulatively, in provisions which differentiate the detriment or advantages a particular party, a priori suppress the very participation of political parties in election competition. The accumulation of financial support for only certain parties is, in its consequences, also an accumulation of de facto financial sanctions for other parties. Therefore, it is necessary to consider carefully whether the purpose of such measures has not been exceeded. This purpose must be only the seriousness of the efforts of the competing parties, which is not aimed at goals other than participation in political representation and promotion of their own program in it. In a representative democracy, integrative stimuli are permissible in a limited extent only after the end of the process of free competition between legally equal political parties, i.e., after adding the votes for the parties, in a certain differentiation in dividing mandates, not, however, by a priori financial stimulation of certain parties and disadvantaging of other parties, as this would lead to modification and stylization in a number of votes cast for political parties.

In 1990 the French Conseil Constitutionnel (decision no. 89-271 DC) also declared tying an election contribution to acquiring more than 5% of votes in individual districts to be unconstitutional and contrary to the principle of equality, so that at present half of the total amount of election contributions is divided proportionally between parties according to the number of members of Parliament, but the second half is divided among all parties who took part in elections, proportionally according to the number of votes received, without setting a percentage limit. In Denmark receiving 1 000 votes cast in the last parliamentary elections is sufficient to receive a contribution.

In its judgment on financing of political parties (file no. Pl. ÚS 26/94), the Constitutional Court recognized the permissibility of a state financial contribution to political parties, in view of their irreplaceable functions in the constitutional form of government in a representative democracy. The Constitution of the Czech Republic in Article 51) is based on the idea that the formation of political will and the formation of state power are the result of free competition of political parties within a democratic legal state. The result of this competition is a certain political profile of the elected bodies of state power. Therefore, interference by state bodies back into the life of political parties is not desirable when they could restrict free and unrestricted competition of parties. Likewise, Article 22 of the Charter of Fundamental Rights and Freedoms<sup>2)</sup> provides that statutory treatment of all political rights and freedoms and its interpretation and use must permit and protect free competition of political parties in a democratic society.

At the present time material stimuli exist for elections to the chamber of deputies of the Parliament of the CR which institute abstention from elections by small parties which must, through non-returnable election deposits, “pay” the state for the fact that they do not reach the limits set at 5 % of valid cast votes, and thus also pay a kind of “fine” in the amount of CZK 1,600,000 for their mere participation in election competition. In addition, however, there is a number of restrictions, which completely eliminate financial claims in the opposite direction, i.e., claims of political parties toward the state, despite the fact that these parties perform their role in election competition in the general interest, just like parties established in Parliament. However, those parties, in addition to the contribution for the payment of election expenses, enjoy a number of material advantages: they are entitled to a permanent contribution to a political party or movement, a minimum of CZK 3,000,000 each year, if they receive at least 3 % of votes (§ 20 par. 4 and par. 6 of the Act on Association of Political Parties and Movements). This amount is increased annually by CZK 100,000 for each additional tenth of a percent of votes or part of a tenth of a percent of votes. They are also entitled to a contribution for each individual mandate under par. 7 of the same provision in the amount of CZK 500,000 per mandate, and finally, they receive financial compensation from the state in connection with performance of parliamentary functions and activities of the parliamentary club. In contrast, in Germany for example, there is only an election contribution paid to all parties which receive at least 0,5 % of votes.

The accumulation of a number of financial burdens on small parties (and thus financial advantages for larger parties) is presently so extensive that there is a priori “suffocation” of these small parties which do not have sufficient financial resources to conduct an election campaign and pay deposits. With awareness of that, potential voters for these parties in actual voting turn their votes otherwise if “their” party does not have enough

funds to make itself visible in competition with others. The higher the limit for small parties, the less number of votes cast for them express their true significance and the weaker the reliability of election results. However, voters' votes are supposed to be an expression of free decision in free competition among parties and the integrative factor is supposed to have an effect only after completion of free election competition.

The disproportionate accumulation of material sanctions has contra-productive consequences, as it afflicts only those democratic political parties which do not have a large number of abandoned sponsorship gifts at their disposal and for whom the accumulation of financial sanctions makes it impossible to conduct an appropriate election campaign or enter the election competition at all. On the other hand, other, also small political parties may have at their disposal sufficient financial means from influential sponsors which connect them to political promotion of their own interests.

In view of all those circumstances, the Constitutional Court reached the conclusion that tying the contribution for payment of election expenses to receiving at least 3 % of the total number of valid votes in elections to the chamber of deputies of the Parliament of the CR, by its extent and particularly in view of other restrictions which afflict political parties which obtain less than 5 or 3 % respectively of votes, exceeds the necessary extent for determining the seriousness of election intentions of parties and interferes in the equality of opportunity of political parties in election competition. Given the aggregate financial burdens, participation in elections becomes, for some of them, a luxury which is impossible to finance.

Therefore, the Constitutional Court cancelled the relevant provision on the Election Act with effect as of the promulgation of the judgment, due to conflict with Article 5 of the Constitution of the Czech Republic<sup>1)</sup> and with Article 22 of the Charter of Fundamental Rights and Freedoms.<sup>2)</sup> It is a matter for the consideration of the Parliament of the Czech Republic whether, for elections to the chamber of deputies, given the existence of election deposits, a certain limit should be maintained - let us say around 1 % - of votes received as evidence of the seriousness of election intentions of parties and thus also a condition for payment of the contribution to cover election expenses.

The first Panel of the Constitutional Court shall decide on the constitutional complaint itself, consisting of the request of the Democratic Union for payment of the contribution to cover election expenses in the amount of CZK 7,778,790, raised in connection with the last elections to the chamber of deputies, held in 1998, as soon as this judgment of the Constitutional Court's Plenum becomes enforceable.

### **Overview of the most important related legal regulations**

1. Article 5 of Act No. 1/1993 Coll., the Constitution of the CR provides, that the political system is based on the free and voluntary formation of and free competition among those political parties which respect the fundamental democratic principles and which renounce force as a means of promoting their interests.
2. Article 22 of Act No. 2 /1993 Coll., which introduces the Charter of Fundamental Rights and Freedoms, provides that the statutory provisions relating to political rights and freedoms, as well as the interpretation and application of them, shall make possible and protect the free competition among political forces in a democratic society.
3. Section 85 of Act No. 247/1995 Coll., on elections to the Parliament of the CR and amending and supplementing certain other acts, as amended by later regulations, provides that the contribution to cover election expenses is provided only for the results of elections to the chamber of deputies, and a political party or coalition will receive CZK 90 from the state budget for each individual vote cast provided it will acquire at least three per cent of the total number of valid votes in elections. (Note: The condition that a political party or coalition has to acquire at least 3 % of the total number of valid votes for purposes of payment of the contribution was cancelled by amendment of the Election Act No. 243/1999 Coll.)