2005/01/26 - PL. ÚS 73/04: ELECTION PUBLICATION

HEADNOTES

As regards the content of an election campaign, arguments are often presented to voters in a very emotional and heightened form, and are intended to influence their electoral behavior and their decision whom to vote for. However, the purpose of an election campaign in a pluralistic democracy is undoubtedly also to evaluate the most controversial issues in the programs of political parties and candidates generally, as well as their personal qualities and capability to hold elected public office. Only in that case will voters be able to make informed decisions, and only thus can the fundamental constitutional principle that the people are the source of all state power be fulfilled. Insofar as the Election Act speaks of the requirement for honorable and honest conduct of an election campaign, it means what was previously called the cleanness of elections (cf. § 56 par. 1 of Act no. 75/1919 Coll., The Election Code in Municipalities of the Czechoslovak Republic). However, these concepts can not be interpreted in terms of private law and general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes. Its negative effects can be regulated, but can not be ruled out by law. The lacking effective protection in the Election Act for the conduct of elections will always lead to an effort to resolve such disputes through election complains. However, the protection of personhood rights in these proceedings can only play a supporting role in terms of guaranteeing and observing the rules for the proper conduct of an election campaign.

The essence of proceedings before the Constitutional Court under Art. 87 par. 1, let. e) of the Constitution lies in guaranteeing protection for the fundamental provisions of the constitutional order, which give rise to the principle that the people are the source of all state power, and in this role, among other things, they share in establishing the state through free and democratic elections. The statutory framework for the election judiciary and verification of elections corresponds to this. In terms of the procedural regulation of the election judiciary and conduct of such proceedings, this gives rise to the rebuttable presumption that election results correspond to the will of the voters. Presenting evidence to rebut this presumption is the obligation of the person who claims that there was error in elections. Our election judiciary does not recognize absolute defects in election proceedings (so-called absolute confusion of election proceedings), i.e. such violation of a constitutional election regulation which would result in automatic annulment of elections, the election of a candidate, or voting. In this sense, all possible defects and doubts must be considered relative, and their significance must be measured by their effect on the results of elections to a representative body as such, or on the result of the election of a particular candidate, or on the result of voting, according to the proportionality principle. Proceedings are thus based on the constitutional principle of protection of a decision which resulted from the will of the majority manifested in free voting and taking into consideration the rights of the minority (Art. 6 of the Constitution), as the Constitutional Court has

already said in another context, in judgment file no. Pl. ÚS 5/02 (in the Constitutional Court of the Czech Republic: Collection of Decisions. Volume no. 28. judgment no. 117. p. 25.- no. 476/2002 Coll.). The framework for verifying elections is alternatively based on the prerequisite of an objective causal connection between an election defect and the composition of a representative body, or at least a possible causal connection (the principle of potential causality in the election judiciary). However, this possible causation, as established in § 87 of the Election Act, must not be interpreted as a mere abstract possibility. We can derive from Art. 21 par. 4 of the Charter the right of an elected candidate to uninterrupted exercise of his office during the specified period [cf. Constitutional Court judgment Pl. ÚS 30/95 (in the Constitutional Court of the Czech Republic: Collection of Decisions. Volume no. 5. judgment no. 3. p.17 – 31/1996 Coll.), which emphasized the right of candidates, if elected, to exercise these offices without obstacles]. From this we must conclude that the judicial branch can change the decision of the voters, as a sovereign, only in exceptional cases, where defects in the election process caused or could demonstrable cause that the voters would have decided differently and a different candidate would have been elected. However, the essential thing is that annulment of elections can not be taken as a punishment for violating election regulations, but as a means to ensure the legitimacy of an elected body. it is the probability of influence of an election defect of election offense (§ 177 Criminal Code, § 16 par. 5 and 7 of the Election Act) on the election result in particular elections with particular voters that is decisive. A mere abstract possible causal connection is not sufficient. In such a case the threat of annulling the result of elections as the only possible consequence is inconsistent with the constitutional principle of proportionality of interference by public authorities. This certainly does not rule out disqualifying a candidate who committed a serious election offense (e.g. fraud, bribery). In this regard the Constitutional Court is forced to say that, compared to other countries, the legal regulation of defects in the election process, election offenses, and the rules for conducting an election campaign in general, is, for one thing, very fragmentary, and for another, basically rooted in conditions which correspond to “elections” from the times of the previous regime. Therefore, the legislature will have to weigh whether the election culture of voters, candidates and public officials is on such a level that regulation of these issues is unnecessary, or whether it will guide electoral behavior through pre-set rules that will create a situation of legal certainty for the subjects of the election process and which will be at least a prerequisite for electoral economy.

The Constitutional Court concluded that neither an objective nor potential causal connection was proved between the content of the cited publications and their distribution among voters and the election of J. N. We must emphasize that the Supreme Administrative Court only considered the question of whether Ing. Z. could advance to the 2nd round of Senate elections. However, in terms of the abovementioned presumption that election results are valid, it was not proved that the elements of the fundamental substantive law of our election judiciary were present, i.e. whether under § 87 par. 4 of the Election Act the provisions of the Act were violated in a manner which could influence election results. Therefore, the data provided do not lead to any logically or statistically documentable conclusion that,

applying the principle of an absolute majority, there was a high degree of probability that anything would have change in the election results of the 2nd round and that J. N. would not have been elected senator. Therefore, the presumption that the voters' decision in an election is valid was not cast in doubt.

There is no dispute that the printed materials published as municipalities reporters, because they are in the hands of the public authorities, must remain correct and neutral. Elections can be annulled only as a result of fundamental and substantial violation of state neutrality in the course of elections. However, the adjudicated matter does not involve such a case.

CZECH REPUBLIC

CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Plenum of the Constitutional Court, composed of justices JUDr. PhDr. Stanislav Balík, JUDr. František Duchoň, JUDr. Vojen Güttler, JUDr. Pavel Holländer, JUDr. Ivana Janů, JUDr. Dagmar Lastovecká, JUDr. Jiří Mucha, JUDr. Jan Musil, JUDr. Jiří Nykodým, JUDr. Pavel Rychetský, JUDr. Miloslav Výborný, JUDr. Eliška Wagnerová a JUDr. Michaela Židlická, decided on an appeal under Art. 87 par. 1 let. e) of the Constitution, filed by the Civic Democratic Party, represented by prof. JUDr. A. G., CSc., attorney, with the participation of 1) the Senate and 2) the Supreme Administrative Court, as parties to the proceedings, and J. N., represented by prof. JUDr. A. G., CSc., attorney, as a secondary party to the proceedings, as follows:

J. N. was validly elected a senator in elections to the Senate held on 5 and 6 November 2004, and on 12 and 13 November 2004, in election district no. 19, Prague 11.

REASONING

I.

Proceedings before the Supreme Administrative Court

By resolution of 3 December 2004, file no. Vol 10/2004-24, the Supreme Administrative Court decided on a petition from Ing. A. Z., that the elections to the Senate, held in election district no. 19, Prague 11, on 5 and 6 November 2004, and on 12 and 13 November 2004, are invalid. It also decided that none of the parties to the proceedings are entitled to recovery of their costs.

In proceedings before the Supreme Administrative Court the petitioner Ing. A. Z. claimed that the election campaign in election district no. 19 was not conducted honorably and honestly because untrue information was repeatedly published about him in the local press. Thus, M.C., the mayor of the City District ("CD") Prague 22 Uhříněves, stated in the Uhříněves Reporter no. 10/2004, published by the CD, in a print run of 3,000 copies and distributed to approximately 3,000 households, among other things, that the characteristic of "consciously lying is not foreign to the petitioner." In addition, he referred to page 8 of the same publication where, without any other commentary whatsoever, he published the full-page text of an anonymous letter from 2001, addressed to the then Chairman of the KDU-ČSL party, JUDr. C. S. The letter is alleged to contain a number of incorrect pieces of information, which blackened the name of the petitioner. Specifically, he was accused of committing fraud with subsequent illegal enrichment by conducting a sophisticated multiple exchange of a state-owned apartment, and that he may have committed the same fraud on the order of millions of crowns by transferring to the civic association OPTIM-EKO, and thereby de facto to himself, parcels of land in the registration area Prague-Šeberov, that he took part under unusual circumstances in the removal of the unfinished "Křeslice sewerage system," and that he took part in "squandering millions." The anonymous letter incorrectly stated that in 1998 he ran for the position of "deputy to the Senate," and that he deceived voters by deceptive information on the candidate list. The conclusion of the letter states that the writers are primarily concerned that the petitioner not succeed in obtaining parliamentary immunity and thus escape investigation. The authors of the letter are said to be members of the representative body of the CD Prague-Petrovice. However, the author of the article made no attempt to determine the veracity of the letter, although the then mayor of the CD Prague-Petrovice, Mgr. M. L., confirmed by letter of 14 October 2001 that the anonymous letter had not been written by members of the representative body.

According to the petitioner, another untrue article was published in the Petrovice Reporter, published by the CD Prague-Petrovice, which published a special issue on 3 November 2004, in a print run of 50,000 copies, although the normal print run is 2,700 copies. On pages 8-10 it carried an interview by one of the editors and member of the Council of CD Prague-Petrovice, Ing. P. Ř. with JUDr. M. Č. in his opinion, this interview was intended to quite self-servingly and incorrectly create the impression that in his Senate election campaign he threatened the residents with building a road on the JVK route (the short version of the south-east by-pass highway). Specifically, he cited a

sentence from the answers of Dr. Červinka, who said about him, “Mr. Zápotocký incites fears among the residents of south-eastern Prague, in order to make tens of millions of crowns out of their fears about the health of their children. Today the JVK project would benefit only him.” The petitioner stated that from the beginning he has been fighting against building of the JVK road, so that, on the contrary, from the beginning he has rejected any possible profit connected with its construction. The petitioner also stated that in concluding the interview the editor, Ing. P. Ř., gave a summary in which he said: “Your words, which completely remove the halo from Mr. Z.’s head, will probably hurt many people, people who have believed in him until now and constantly emphasized that he was fighting selflessly against the highway for the good of us all. Unfortunately, in researching information about the highway we have found similar information about … human nature in other places as well. This is disillusionment for me too. I did not think that the JVK problem and people’s fears cold be used to make one’s own election program, while looking after one’s own money, and in addition Artificially keep this problem alive so that it would last for, ideally, several election terms. The disappointment is all the greater for me because I was (until today) a member of the civic association OPTIM-EKO, which Ing. Z. created and which he leads. There once really was a danger of a road being built in immediate proximity to our homes, and so, like other members and supporters, I believed that I was spending money, time and energy only for a good thing, and not for someone’s personal benefit. Let us wish that in the everything will go well for the residents of south-eastern Prague.” The petitioner deduces from that conclusion that Ing. Ř., on behalf of the Petrovice Reporter and the Petrovice town hall, agreed with the statements of JUDr. Č., joined in them, and thus gave his statements considerable gravity and importance.

In proceedings before the Supreme Administrative Court the petitioner maintained that these publications violated Act no. 247/1995 Coll., on Elections to Parliament, as amended by later regulations (the “Election Act”), which in § 16 par. 2 requires that an election campaign be conducted honorably and honestly. He stated that he failed to advance to the second round of Senate elections by a mere 325 votes. He was in 3rd place with 13.07% of votes cast, while the second advancing candidate, Ing. P. J., received 14.33% of votes cast. There were 102,236 voters registered in voting district no. 19, and if the special issue of the Petrovice Reporter were delivered to 50,000 households, and in each of them there was at least one registered voter, in his opinion it is highly probably that it influenced voters who had originally intended to vote for the petitioner in their decision not to vote at all, or in their choice of candidates. If that happened, then a mere 1% of voters thus influenced would be at least 500 people. On the basis of that calculation he then reached the above-mentioned conclusion.

The Supreme Administrative Court requested a statement from the State Election Commission, which referred to its statement in response to the filing by Ing. Zápotocký, in which it emphasized the text of § 16 of the Election Act, including issues of honorable and honest conduct of an election campaign. In the State Election Commission’s opinion this regulation must be understood as a kind of moral appeal to individual candidates, and the Act on Elections to Parliament does not provide any particular penalty for violating it. The

State Election Commission also instructed the petitioner on the options for seeking remedy under civil law or criminal law, and, in terms of the conduct of elections and their results, through the administrative judiciary, by a petition under § 87 of the Election Act.

The Supreme Administrative Court admitted as evidence the Uhříněves Reporter no. 10/2004 and the special issue of the Petrovice Reporter of 21 October 2004. It determined that the Uhříněves Reporter is published by the Office of CD Prague 22, and that it is registered by the department of mass media in the Ministry of Culture. The author is responsible for correct substantive content. As regards the Petrovice Reporter, the court determined that it is issued 5 times a year and is registered by the Ministry of Culture. Its publisher is the CD Prague-Petrovice, and the editor is Ing. P. Ř. The deadline for the special issue of October 2004 was 15 October 2004; it was sent to print on 22 October 2004, and came out on 3 November 2004 in a print run of 50,000 copies.

The Supreme Administrative Court also admitted as evidence a letter from the mayor of CD Prague-Petrovice, Mgr. M. L., dated 1 October 2001, file no. 245/2001/Star, in which she informs the then-Chairman of KDU ČSL, that she spoke with members of the representative body by telephone about the material (the anonymous proposal to KDU-ČSL to remove the petitioner), and based on that is fully authorized to state that members of the representative body of CDPrague-Petrovice are not the authors of the material. She announced the same statement to the daily Blesk, which was interested in the anonymous letter.

The Supreme Administrative Court verified from the permanent voter list of CD Prague-Křeslice that A. Z. is registered in the list under number 318, with the comment that he is permitted to vote. It also admitted as evidence a copy of the record of results of elections to the Senate in election district no. 19, Prague 11, held on 5 and 6 November 2004, according to which, in the first round, out of a total of 25,726 valid votes cast for all candidates, in first place, J. N. received 10,201 votes, or 39.65%, in second, P. J. received 3,689 votes, or 14.33%, and in third place, A. Z. received 3,364 votes, or 13.07 %. The other candidates received lower numbers of votes. Therefore, J. N. and P. J. advanced to the second round of elections.

The Supreme Administrative Court granted the petition to annul the elections. It relied on its case law (see Collection of Decisions of the Supreme Administrative Court no. 10, year 2004, R 354), which, in order to grant a petition, requires 1) unlawfulness, i.e. violation of provisions of the Election Act; 2) a relationship between this unlawfulness and the election of the candidate whose election is contested by the election complaint, and 3) a fundamental intensity of that unlawfulness, the consequences of which must at least considerably cast doubt on the election of the candidate in question. It concluded that § 16 of the Election Act does not exhaustively regulate election campaigns, but applies only to their last, or “hot” phase. An election campaign is one of the forms of exercising

fundamental rights, such as, primarily, freedom of speech, the right to information, freedom of association, freedom of assembly, etc. The provision of § 16 of the Election Act makes concrete these fundamental rights and constitutional principles, above all the principle of free competition of political forces in a democratic society and the principle of equal need of the right to vote. Although § 16 par. 1 of the Election Act mentions only use of surfaces for posting election posters, in the Supreme Administrative Court's opinion it is clear, without any substantial doubts, in view of the cited constitutional principles, that this is only an example of a generally valid approach to the means of communication which a municipality has at its disposal. It follows that the principle of equality of candidates must be observed in the use of all means of communication owned by the municipality. In the instant matter however, the Supreme Court believes that this principle was not observed It was violated by publication of the Uhříněves Reporter no. 10/2004 and the special issue of the Petrovice Reporter directly before the first round of the Senate elections. In the Supreme Court's opinion the nature of the information published in these publications was such that it was capable of significantly harming the petitioner, Ing. A. Z., in the eyes of potential voters. The particular circumstances of the case, the publication of the reporters just before the elections, the clear one-sidedness of the opinions presented, the manner of distribution, the significantly higher print run of the special issue of the Petrovice Reporter, etc., persuasively show that this was the intent of the publisher of these periodicals.

The Supreme Administrative Court also concludes that the nature of the information published in these reporters does not meet the requirements for fairness in an election campaign formulated in § 16 par. 2 of the Election Act, whereby it has in mind specifically the printing of the anonymous letter from 2001, especially as it was presented without any commentary whatsoever as a letter from members of the representative body of CD Prague-Petrovice, although the authorship of these members was not verified. The Supreme Administrative Court also concluded that there was a relationship between the violation of the Election Act and the election of J. N. It relied on Constitutional Court judgment file no. I. ÚS 526/98, which indicates that in evaluating violation of the Election Act the point is not whether there was violation objectively or subjectively, but each case must be evaluated materially, in view of all the particular circumstances. Therefore it is not decisive whether the elected candidate took part in the violation of the Election Act in any way, whether directly or indirectly. What is important is that in the instant case the petitioner ended in third place in the Senate elections, by a margin of 325 votes behind the candidate who was in second place. In the Supreme Administrative Court's opinion, the narrow margin of votes, because of which the petitioner did not advance to the second round, could in fact have been caused by circumstances which the Supreme Administrative Court sees as violating the Election Act. If this unlawfulness had not occurred, the petitioner could realistically have advanced to the second round of elections, in which the possibility that he might have been elected could not be ruled out; therefore, a "certain relationship" exists between the violation of the Election Act and the election of the candidate.

Finally, the Supreme Administrative Court considered the issue of evaluating the intensity of the unlawfulness. It said that in a situation where the petitioner did not advance to the second round of Senate elections because of a relatively narrow margin of votes, the intensity of unlawfulness necessary for declaring the elections invalid is naturally lower than in a case with a large margin of votes.

II.

The Content of the Appeal

On 13 December 2004 the Constitutional Court received a filing from the Civic Democratic Party (the "petitioner"), titled "Appeal in the matter of confirming the election of a senator under Art. 87 par. 1 let. e) of the Constitution and § 85 et seq. of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations." This filing was then supplemented by a filing delivered on 20 December 2004, titled "Supplement to Appeal with New Facts." In it the petitioner says that on 14 December 2004 the Senate Mandate and Immunity Committee passed a resolution which said in point II. that it could not confirm the mandate for election district no. 19, Prague 11, in view of the fact that the Supreme Administrative Court decided by resolution file no. Vol 10/2004-24 that the elections in this district are invalid.

In the appeal the petitioner cast doubt on all the bases which the Supreme Administrative Court used for its decision. As regards unlawfulness, the petitioner especially objects to the expansive interpretation of § 16 par. 1 of the Election Act as it was understood by the Supreme Administrative Court. In § 16 par. 1 the Election Act mentions only surfaces for posting election posters. It is not clear from the text of the Act that this only serves as an example. Therefore, the conclusion that this provision applies to any means of communication that are at the municipality's disposal has no support in the statutory text. The cited provision must be interpreted in light of the principle enshrined in Art. 2 par. 4 of the Constitution and Art. 2 par. 2 (this should be Art. 2 par. 3) of the ChArter of Fundamental Rights and Freedoms (the "ChArter"), i.e. that everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law, and the principle enshrined in Art. 2 par. 3 of the Constitution of the Czech Republic (the "Constitution"), and Art. 2 par. 4 of the ChArter (should be Art. 2 par. 2 of the ChArter), i.e. that State authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law. Therefore, in the petitioner's opinion, the cited provision can not be interpreted in such a way that it would also affect periodicals published by municipalities.

The petitioner also disagrees with the Supreme Administrative Court's conclusion that there was violation of § 16 par. 2 of the Election Act, under which an election campaign must be conducted honorably and honestly, in particular, untrue information about election subjects may not be made public. In the petitioner's opinion, the criterion of honor and honesty is subjective to a certain degree, and therefore it must be evaluated in relation to the subject. It disagrees with the Supreme Administrative Court's conclusion that it is not decisive whether the elected candidate took part (even if indirectly) in the violation of the Election Act. In the petitioner's opinion, a completely opposite conclusion follows from the cited Constitutional Court judgment, file no. I. 526/98. However, it considers it fundamental that § 16 par. 2 of the Election Act indicates that only providing untrue information about candidates and political parties can be considered dishonorable and dishonest conduct. If the truthfulness of untruthfulness of the information was not proved in the proceedings, the court could not reach a conclusion about whether the hypothesis of the legal norm contained in § 16 par. 2 of the Election Act had been met. The petitioner also, with reference to the Constitutional Court judgment, emphasizes freedom of expression and the right to information, guaranteed in Art. 17 of the Charter of Fundamental Rights and Freedoms. It pointed out that the Election Act was amended and the ban on campaigning in the last 48 hours before elections contained in § 16 par. 5 was annulled, which further liberalized the election contest in favor of freedom of expression. In the petitioner's opinion the otherwise vague and unclear § 16 par. 2 of the Election Act must be interpreted considerably restrictively. A different interpretation would violate freedom of expression and the right to information, violation of a candidate's subjective right to be elected, and the right of the voters to be represented in a representative body by a candidate elected by them.

From a comparative viewpoint the petitioner pointed to the issue of violating election regulations in the Ukrainian presidential elections in November 2004 and to the decision of the German Constitutional Court (BVerfGE, vol. 103, p. 111n. of 8 February 2001), in which that court considered the consistency of Art. 78 par. 2 of the Constitution of Hesse with the Basic Law of Germany, and in that context gave a restrictive interpretation of the concept "acting in violation of good morals" that influences election results.

The petitioner also objects that the Supreme Administrative Court's decision is quite non-reviewable in the part where it evaluates the relationship between the unlawfulness the petitioner claims and the election of J. N. In the petitioner's opinion the conduct and election results in election district no. 19 lead to the conclusion that it is impossible for a relationship to exist between the claimed violation of the Election Act and the election results. The Supreme Administrative Court thus begins with an unsubstantiated belief that a narrow margin of votes could really have been caused by the cited unlawfulness, but does not argue whether it really was caused. The petitioner concludes that the election campaign must be understood as the period of 16 days before election day, not, for example, the entire term of office or the year before the elections. Yet the problem at issue has been discussed for several years, in a very sharp tone, and that includes the disputed materials. Therefore the likelihood that they had an effect on voters' behavior and opinions is negligible. Likewise, a different conclusion can not be drawn from the

election results, whether by comparing the results of the 1st and 2nd rounds of elections in district no. 19, or by comparing the results of KDU-ČSL in other senate districts in Prague, just as in the municipal elections in 2002. In this regard, in addition to legal arguments, the petitioner also argues factually, and questions the importance of the texts in the reporters. In particular, it emphasizes that both periodicals, whose content J. N. could not influence in any way, are a reaction to the first edition of the first issue of the South-eastern Prague Courier, published by CD Prague Křeslice, where Ing. A. Z. is mayor. This first issue was published on 29 September 2004 in a print run of 50,000 copies, and the very first page has an article with the title "What Are Mayors C., N. and Š. Not Saying?" The articles published in the Uhříněves Reporter and the Petrovice Reporter are only a reaction to this and other information which Ing. A. Z. provides. The petitioner suggests as evidence questioning the mayors of CD Uhříněves and CD Petrovice. It also says that the October issue of the Petrovice Reporter is not directly related to the elections. The declaration by the mayors only explains certain facts, and the petitioner emphasizes that Ing. Z. himself, in one of his flyers, dated 2 October 2004 (although according to the petitioner that should be 2 November 2004), entitled "The Rudeness of Attacks Against Me Increases," says that he would like to join the mayors' declarations. Yet it is evident that this is a subjective opinion of the mayors, not objective information. The high print run was agreed on by all the mayors, and the 50,000 copies correspond to the number of households in the municipalities (apparently should be CDs) whose mayors signed the declaration. As regards the material on pp. 8-10 of the Petrovice Reporter the petitioner proposed evidence which would prove the veracity of the claim in the interview by Ing. P. Ř. with JUDr. M. Č. The petitioner also pointed out that it was Ing. Z. who, in the second issue of the South-eastern Prague Courier (also a print run of 50,000 copies) clearly calls on the citizens to cast their votes for him. Thus, if there was violation of the law, it was on both sides, and under the principle nemo turpitudinem suam allegare potest (no one can base objections on his own dishonesty) the elections should not have been found invalid.

The petitioner also casts doubt on the criterion of intensity of unlawfulness which the Supreme Administrative Court used to justify its decision because it concluded that the intensity of unlawfulness necessary to find elections invalid is naturally lower when the election result is close than in the case of a wide margin of votes. In the petitioner's opinion this criterion does not provide a firm scale and especially does not at all arise from the law. In addition, the petitioner says that the Supreme Administrative Court acted inconsistently with this criterion, which it chose itself, when it defined it in such a way that the intensity of unlawfulness must be related to the candidate who was elected, yet the court itself related it to Ing. A. Z., i.e. the candidate who was not elected.

The petitioner also criticizes the Supreme Administrative Court on the grounds that it did not permit J. N. to participate in the proceedings. It sent the petition to declare the elections invalid and the call for a response to the address of the Senate. Thus, it happened that J. N. did not receive the petition to declare elections invalid until 7 December 2004, i.e., after the court had already decided in the matter. Thus, he did not have an opportunity to state his position on the matter. In connection with this circumstance, the petitioner, in the supplement to the appeal, points to the completely

different procedure followed by the Supreme Administrative Court in the proceedings which are contested by the appeal and in the proceedings where the court decided on a petition from the Communist Party of the Czech Lands and Moravia ("KSČM") to declare invalid elections held on 12 and 13 November in election district no. 31 (Ústí nad Labem). The petitioner sees the main inconsistency in the fact that in that case the Supreme Administrative Court conducted extensive presentation of evidence, whereas in the case of J. N. it did not even give him an opportunity to respond to the petition to declare the election invalid.

III.

Proceedings Before the Constitutional Court

The Constitutional Court requested statements from the parties and the secondary part to the proceedings, which are defined for this type of proceedings in the special provision § 88 of Act no. 182/1993 Coll., on the Constitutional Court (the "Act on the Constitutional Court").

The Chairman of the Senate, MUDr. P.S., provided a statement on its behalf. In the statement he briefly recapitulates the situation and the content of the appeal, which is directed against Supreme Administrative Court decision of 3 December 2004, which ruled that "elections to the Senate of the Parliament of the Czech Republic, held in election district no. 19 on 5 and 6 November 2004 and on 12 a 13 November 2004, are invalid." He describes the course of proceedings to confirm the disputed elections to the Senate. He stated that at the opening meeting in the fifth term, under the point "report of the Mandate and Immunity Committee on results of reviewing whether individual senators were validly elected," the Senate took cognizance of 54 votes of all the senators present from the Mandate and Immunity Committee no. 11, of 14 December 2004, on this issue. It thereby fully respected the Supreme Administrative Court's decision.

A statement was provided on behalf of the Supreme Administrative Court by its panel chairwoman JUDr. D. N. As regards the procedural aspect, she stated that the petition was filed prematurely, and therefore should have been denied under § 43 par. 1 let. e) of the Act on the Constitutional Court as impermissible. In her opinion this flaw was not removed by the supplemental filing of 20 December 2004, because this is not an expansion of the grounds in the original petition, but a completely new petition, which must be decided independently. However, it is in the competence of the Constitutional Court to decide how to proceed on that point. This was also evident in her closing proposal, where she no longer insists on denying the petition.

The chairwoman also clarified the reasons for delivering the petition to declare elections invalid to the elected senator J. N. at the address of the Senate. She stated that the Supreme Administrative Court did this because of its previous experience with delivering documents in similar matters, where this method had proved effective. The court was aware from its official activities that elected senators have an office in the Senate buildings as of the day election results are announced. At the hearing the Supreme Administrative Court emphasized that the mandate of a senator is acquired by election, and thus it is difficult to imagine that the elected senator would begin to exercise his office substantially later. In any case, however, this fact by itself can not be grounds for granting the appeal, in view of the appellate nature of proceedings before the Constitutional Court.

The Supreme Administrative Court does not agree with the petitioner's claim that it unlawfully concluded that § 16 par. 1 of the Election Act applies not only to election posters but also to other means of communication held by a municipality. This is a constitutional interpretation based on the principle of political plurality enshrined in Art. 21 par. 4 a Art. 22 of the Charter, and respecting the hierarchical organization and internal harmony of the legal order, under which a statute only makes constitutional principles more specific. Thus, it called the interpretation of this statutory provision, as submitted by the petitioner, absurd and unconstitutional.

In its statement, which it supplemented by a presentation in the hearing, the court places primary emphasis on the neutrality of the state in elections, although in the reasoning of its decision it did not discuss this issue at all. The court considers a key point to be that this concerns public means financed by public funds, and one must insist that they provide objective reporting and give all candidates an opportunity to state their positions. Otherwise, there would be violation of the constitutional principle of the political neutrality of the state (Art. 2 par. 1 of the Charter). As regards § 16 par. 2 of the Election Act, the court considers the petitioner's interpretation to be an indirect denial of the election court's right to evaluate the correctness of the elections, which is also inconsistent with Art. 3.3 let. d) of the Codex of Good Election Practices, passed by the Venice Commission of the Council of Europe. It considers improper the view that applying this provision as grounds for declaring elections invalid may endanger the principle of free competition of political forces. On the contrary, it considers the decision of the German Constitutional Court (see above) cited by the petitioner, as well as other German case law in this matter, to be a confirmation of the legal bases on which its decision is based. The German Constitutional Court, in its decision, with reference to previous German case law in this matter, declared it constitutional for an election court to have the authority to declare elections invalid on the grounds of "errors in the election process and in criminal conduct or conduct damaging to good customs (morals) which influence the election result." German case law also indicates that the process of forming the will of the people must take place independently of the state, and the principle of free elections and the right of political parties to equal opportunity gives rise to a ban on the public work of the government influencing an election campaign. Otherwise, the validity of elections is endangered.

As regards the objection that the contested decision is non-reviewable, JUDr. N. stated that in Senate elections it is necessary to evaluate both rounds of elections independently. The Election Act distinguishes between a petition to declare elections invalid and a petition to declare the election of a candidate invalid. In the instant case it was primarily the invalidity of the first round of elections and its possible effect on the results of the second round that was evaluated. Thus, the invalidity of elections was evaluated not in relation to the elected candidate, but in relation to violation of the election process in a manner which could influence the overall results of the elections. The possible violation of the Election Act by Ing. A. Z. in his election campaign can have no effect at all on the matter.

Finally, in the conclusion, JUDr. N. deals with the objection of a different procedure in this matter compared with the procedure in the matter of the petition by the KSČM to declare invalid elections in election district no. 31 in Ústí nad Labem. Those proceedings reviewed the claimed violation of election regulations in the actual act of voting, which could not be verified otherwise than by hearing the persons present at that act. Therefore, in such a case it was appropriate to abandon the principle of not ordering a hearing under § 90 par. 3 of the Administrative Procedure Code. In conclusion, JUDr. N. proposed that the Constitutional Court deny the appeal.

The secondary party, J. N. also submitted a statement on the matter, through his attorney. He agreed with the petitioner's proposal and emphasized that he did not take part in publication of the materials (the Uhříněves Reporter and the Petrovice Reporter) which, in the Supreme Administrative Court's opinion, could have had an influence on the result of the elections. He relied on the opinion, expressed in Constitutional Court judgment file no. I. ÚS 526/98, that it is impossible not to take into account the degree of violation of the Election Act by a candidate whose election was declared invalid.

Ing. A. Z. also responded to the appeal, on his own as well as through his attorney. In view of the fact that the circle of parties to these special proceedings is exhaustively defined in the Act on the Constitutional Court (see point V.), he could not be treated as a party to the proceedings.

IV.

Presentation of Evidence Before the Constitutional Court

The Constitutional Court admitted as evidence the file of the Supreme Administrative Court, file no. Vol 10/2004, which includes documentary evidence referred to in that court's decision of 3 December 2004, file no. Vol 10/2004-24. From the documentary evidence presented in proceedings before the Supreme Administrative Court, it then introduced, beyond the framework of findings listed under point I. of this judgment, the content of an undated flyer entitled "Antonín Zápotocký: I must defend myself against insults!" in which Ing. Z. responded to the articles in the October issue of the Uhříněves Reporter, and the content of a flyer of 2 October 2004 entitled "Antonín Zápotocký: The Rudeness of Attacks Against Me Increases!" in which Ing. Z. responded to the articles in the special issue of the Petrovice Reporter.

The Constitutional Court determined from the resolution of the Mandate and Immunity Committee of the Senate, from its eleventh meeting, of 14 December 2004, that the mandate for the election district no. 19 Prague, 11, had not been confirmed, in view of the fact that the Supreme Administrative Court ruled in its decision file no. Vol 10/2004-24 that the elections in that district were invalid. Senator J. H. gave a report about that resolution at the first meeting of the Senate in its 5th term, held on 15 December 2004, and by Senate resolution it took cognizance of the report of the Mandate and Immunity Committee on the results of confirming the validity of election of senators. It was determined from a transcript of the 1st meeting of the 5th term of the Senate, held on 15 December 2004, that all 54 senators present voted in favor of the resolution.

The Constitutional Court determined from the envelopes submitted by the petitioner and from delivery receipts found in the Supreme Administrative Court file that the call from the Supreme Administrative Court for a response to the petition to declare invalid the Senate elections held in election district no. 19 on 5 and 6 November 2004, and on 12 and 13 November 2004 (Art. 10 NSS), was delivered to J. N. by registered mail to him personally, at the address "The Senate of the Parliament, personally to Mr. J. N." This letter was received by an employee of the Office of the Senate, Ms. Svobodová, on 23 November 2004. The decision of the Supreme Administrative Court of 3 December 2004, file no. Vol 10/2004-24, was delivered to J. N. by registered mail to the address "J. N., The Senate of the Parliament, Valdštejnské nám. 7/4, 118 01 Prague 1." Because the addressee was not present to receive it, the letter was held as of 6 December 2004, and J. N. picked it up on 9 December 2004.

It was determined from issue 1 year 1 of September 2004 and issue 2 year 1 of November 2004 of the periodical entitled South-eastern Prague Courier that they were published by the City District Prague-Křeslice, both in a print run of 50,000 copies. Three out of four pages of the periodicals contain various articles about the south-east ring road around Prague. In issue 1 these are a leader by Ing. J. Z. and an article by him, "Attention, the Ring Road Project continues," an article "What Aren't the Mayors C., N. and Š. Saying?" signed "members of the representative body of City District, Prague-Křeslice," an article "How the leadership of Prague City Hall keeps the Prague mayors obedient," signed "-am-

," an article "How the Prague Representative Body Discussed the Intersection" signed "v.k.," an article "What We Will Sacrifice for Hypermarkets in Šeberov," signed J. P., and an article "Store Chains versus Citizens," signed "a Petrovice resident." In issue 2 these are a leader by Ing. A. Z., unsigned articles "A Study of the Development of South-eastern Prague," "Information on the South-east Ring Road Route" and "B Makes Promises He Won't Fulfill!" an article "Ing. A. Z.: 'If I Become a Senator, My Voice for Saving South-east Prague Will Be Heard Much More," signed "A. M.," an article "Senators Must Not Be Afraid," signed "P. P.," and an article "Will the Botič and Pitkovice Stream Valleys Remain Open to the Public?" signed "Members of the Representative Body of CD Prague-Křeslice: Ing. F. P., CSc., V. K., K. Š., M. K., T. P., H. M.," which discusses, among other things, the purchase of land parcels by JUDr. Č. that are owned by the state and on which the City District Prague-Křeslice is said to plan planting a forest. The introduction to that issue also reports that the editorial staff had been informed that issue1 had not reached all readers. The bottom half of page one also contains the information that the Representative Body of City District Prague-Křeslice approved the publication of the South-east Prague Courier on the condition that the expenses will be covered by donations or advertising, and that during the course of the summer the necessary fund were gathered from a sponsor's targeted gift.

It was determined from a document tiled "Record of a meeting of mayors held on 19 October 2004" that the meeting was organized by the mayor of City District Prague-Petrovice, Doc. S., and it included discussion of the question of informing the residents about the highway ring road on the part of the mayor of City District Prague-Křeslice, Ing. Z., in the first issue of the periodical South-east Prague Courier. It was decided that all represented municipalities would share in the expenses for publishing the special issue of the periodical Petrovice Reporter, which was to be a response to a long-term campaign led by mayor Z., according to the number of issues normally published in their district. The record was made by Ing. A. S., secretary of the Office of City District Prague-Petrovice, and it bears three illegible signatures.

The Constitutional Court verified through an inquiry to the Ministry of Culture of the Czech Republic that the publisher of the Uhříněves Reporter is the Local Office of Prague 10-Uhříněves, the publisher of the Petrovice Reporter is the City District Prague-Petrovice, and the publisher of the South-east Prague Courier is City District Prague-Křeslice.

The Ministry of the Interior was asked for results of the Senate elections held in Prague on 5 and 6 November 2004, and 12 and 13 [November] 2004, as well as results of elections to the Representative Body of Prague, and to representative bodies of the city districts falling into election district no. 19, for elections to the Senate held on1 and 2 November 2002.

From the appendix to the decision of the State Election Commission of 8 November 2004, no. 41, the Constitutional Court determined that on 5 and 6 November 2004 (i.e., in the

first round of elections) Senate elections were held in Prague in election districts no. 19-Prague 11, no. 22-Prague 10, and no. 25-Prague 6, with the following results:

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

19 102,236 25,880 25,726

Candidate Representing Political Party Votes In %

Jan Nádvorník ODS 10,201 39.65

Ing. Petr Jirava SNK Independent Association 3,689 14.33

Ing. Antonín Zápotocký KDU-ČSL 3,364 13.07

Jaroslava Dlouhá KSČM 3,085 11.99

Mgr. Daniel Kroupa Path of Change 3,011 11.70

MUDr. Ivan David CSc. ČSSD 2,131 8.28

Ing. Petr Hoffmann INDEPENDENTS 245 0.95

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

22 95,177 29,048 28,890

Candidate Representing Political Party Votes In %

Ing. Jan Malypetr CSc. ODS 10,068 38.84

Jaromír Štětina Green Party 7,137 24.70

MUDr. Marie Alušíková CSc. ČSSD 3,425 11.85

RSDr. Karel Hošek KSČM 2,864 9.91

MUDr. Milan Kudyn European Democrats 2,383 8.24

Prof. Ing. Lubomír Mlčoch CSc. KDU-ČSL 1,811 6.26

Bc. Blanka Misconiová ODA 538 1.86

John Bok Balbín’s Poetic Party 429 1.48

Mgr. Antonín Gondolán INDEPENDENTS 191 0.66

Mgr. Jan Skácel Czech Movement for National Unity 44 0.15

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

25 90,499 31,945 31,763

Candidate Representing Political Party Votes In %

Karel Schwanzenberg US-DEU 10,547 33.20

Ing. Marie Kousalíková ODS 10,495 33.04

RNDr. Václav Exner CSc. KSČM 4,691 14.76

Doc. Jan Kačer KDU-ČSL 3,455 10.87

Ing. Jindřich Tomáš ČSSD 1,914 6.02

Zdislav Růžička Common Sense Party 447 1.40

Jiří Stanislav INDEPENDENTS 214 0.67

From the appendix to the decision of the State Election Commission of 15 November 2004, č. 42, the Constitutional Court determined that in the second round of Senate elections held in Prague the results were as follows.

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

19 102,149 19,003 18,907

Candidate Representing Political Party Votes In %

Jan Nádvorník ODS 10,407 55.04

Ing. Petr Jirava SNK Independent Association 8,500 44.95

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

22 95.189 24,105 24,031

Candidate Representing Political Party Votes In %

Jaromír Štětina Green Party 13,296 55.32

Ing. Jan Malypetr CSc. ODS 10,735 44.67

Election District no. Number of Registered Voters Number of Official Envelopes Delivered Number of Valid Votes

25 90,439 26,079 25,942

Candidate Representing Political Party Votes In %

Karel Schwanzenberg US-DEU 15,088 58.16

Ing. Marie Kousalíková ODS 10,854 41.83

From the appendix to the decision of the State Election Commission of 4 November 2002, no. 26, the Constitutional Court determined that in elections to the representative bodies of municipalities held on 1 and 2 November 2002 the results of the elections to the Representative Body of Prague were as follows:

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

70 984,932 346,723

Political Party Votes Cast in % Number of Representatives

ODS 35.54 30

Association of European Democrats, Independent Candidates 18.37 15

ČSSD 14.66 12

KSČM 10.83 8

US-DEU 5.64 2

Coalition of SNK, SZ, SOS 5.03 2

KDU-ČSL 4.56 1

The other 13 political parties did not receive a mandate.

The Constitutional Court determined that the results of elections to the representative bodies of city districts falling into election district no. 19 for Senate elections were as follows.

City District Prague 11

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

45 65,505 22,155

Political Party Votes Cast in % Number of Representatives

ODS 28.72 15

Independent Association 20.97 11

ČSSD 13.68 6

KSČM 12.95 6

Association of ED, NK 11.70 6

Association of Independent Candidates – Local Association 2.46 1

US-DEU 5.08 0

KDU-ČSL 4.07 0

The other two parties did not receive a mandate.

City District Prague-Benice

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

7 315 266

Political Party Votes Cast in % Number of Representatives

ODS 34.37 4

Miloslav Cubr

(independent candidate) 10.79 1

Karel Cibulka

(independent candidate) 9.58 1

Josef Luňák

(independent candidate) 9.47 1

The other 5 independent candidates did not receive a mandate.

City District Prague-Dolní Měcholupy

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

9 943 553

Political Party Votes Cast in % Number of Representatives

ODS 65.14 7

ČSSD 13.42 1

KDU-ČSL 12.38 1

The other party did not receive a mandate.

City District Prague 15

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

25 22,659 7,275

Political Party Votes Cast in % Number of Representatives

ODS 43.08 11

Coalition of SZ, SNK 18.12 5

ČSSD 17.51 5

KSČM 9.7 2

US-DEU 7.76 2

KDU-ČSL 3.83 0

City District Prague-Kolovraty

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

13 1,493 900

Political Party Votes Cast in % Number of Representatives

ODS 78.43 11

KSČM 17.63 2

One independent candidate did not receive a mandate.

City District Prague-Královice

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

5 217 115

The Association of Independent Candidates in Prague-Královice, which was the only one to register candidates, received all the mandates.

City District Prague-Křeslice

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered

7 279 188

Political Party Votes Cast in % Number of Representatives

Association of KDU-ČSL, NK 52.41 4

Independent Association 22.41 2

Association of Křeslice residents

-Association NK 16.47 1

The other party and one independent candidate did not receive a mandate.

City District Prague-Nedvězí

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered
9 196 123

There were 7 independent candidates, all of whom were elected.

City District Prague-Petrovice

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered
15 4,664 1,973

Political Party Votes Cast in % Number of Representatives
Association of Petrovice residents 19.24 3
OPTIM-EKO 18.91 3
ODS 16.29 3
Independent Association 13.63 2
ČSSD 12.22 2
Citizens for Petroviče 7.92 1
KDU-ČSL and independent citizens of Petrovice 5.54 1

Two other parties did not receive a mandate.

City District Prague 22-Uhříněves

Number of Members Elected Number of Registered Voters Number of Envelopes Delivered
21 3,854 1,883

Political Party Votes Cast in % Number of Representatives

ODS 70.02 15

ČSSD 17.56 4

Independent Association 9.97 2

Two other parties did not receive a mandate.

The petitioner's petition to introduce documentary evidence, marked as "appendices A-D," was denied as superfluous, because in part this was merely a claim by the petitioner and in part this was not evidence relevant to the adjudicated matter.

V.

Evaluating Requirements for Proceedings Before the Constitutional Court

The Constitutional Court first evaluated whether the requirements for proceedings were met in order for it to consider and decide on an appeal against a decision in the matter of confirming the election of a deputy or senator, under the fourth division of part two of the Act on the Constitutional Court. The present substantive law and procedural law framework is unclear, because it is not unambiguously stated what the appeal is to be directed against. The provisions of Art. 87 par. 1 let. e) of the Constitution, and § 85 of the Act on the Constitutional Court correspond to the legal situation at the time when these legal regulations were passed. Under the then-valid § 47 of Czech National Council Act no. 54/1990 Coll., on Elections to the Czech National Council, the Supreme Court of the Czech Republic, on the basis of an election complaint, issued a decision giving only its position, which it was required to send to the Czech National Council. The Council's Mandate and Immunity Committee, under § 40 par. 1 let. a) of Czech National Council Act no. 35/1989 Coll., on the Rules of Order of the Czech National Council, on the basis of that position, reviewed whether individual deputies to the Czech National Council had been validly elected, and after that, upon its proposal under Art. 113 par. 2 of Constitutional Act no. 143/1968 Coll., on the Czechoslovak Feeration, the validity of the election of deputies was to be confirmed by the Czech National Council. In this legislative situation it was logical that an appeal was to be directed against a decision by the Czech National Council (i.e. the relevant body of the legislative assembly) for confirmation of election of its members.

The presently valid legal framework fundamentally strengthened the role of judicial review of elections, which is now entrusted to the Supreme Administrative Court. There is no

longer a position contained in a decision, but a decision which decides in the matter itself about the invalidity of elections, voting, or the election of a candidate (§ 90 par. 1 of the Administrative Procedure Code in connection with § 53 par. 1 of the Code). The Mandate and Immunity Committee of the relevant chamber of Parliament then also has an obligation, on the basis of the record of the State Election Commission, and any decision by the Supreme Administrative Court on the results of the elections, to review the validity of election of a candidate. At present, neither the rules of order of the chambers of Parliament, any other statute, nor the Constitution itself address who, in what manner, in what scope, and under what circumstances, verifies the election of a deputy or senator. This situation led to a practice where the chambers of Parliament merely take cognizance of the report from their mandate and immunity committees. Therefore, in this adjudicated case, similarly to the case which was decided by the Constitutional Court as file no. I. ÚS 526/98, the Senate did not decide that it did not confirm the election of the senator in question, but only took cognizance of the report by its Mandate and Immunity Committee, which states that the election could not be confirmed, in view of the court decision. However, purely formally (i.e. in view of the linguistic expression), a candidate's election is not confirmed by the decision of the Supreme Administrative Court, or the State Election Commission, or any other body.

For comparison, in the Czechoslovak Republic before the war, confirmation of the election of a deputy or senator by the relevant chamber was defined completely differently than under the most recent legislative framework. At that time, the Election Court defined confirmation thus: "verification of the election of a deputy is by its nature confirmation that the elected person meets the conditions of eligibility for election and that there are no grounds which would exclude him from eligibility" (Collection of Basic Decisions and Judgments of the Election Court. Part III., Prague 1925, res. no. 119, p. 52). Such a model would at present correspond to the verification of meeting the requirements in Art. 19 par. 2 of the Constitution, and § 57 of the Election Act. An analogous concept of confirmation by the relevant chamber of Parliament was also indicated by Constitutional Court judgment file no. I. ÚS 526/1998. In that case however, there would be two separate and legally different decisions, and likewise the legal proceedings preceding them would be different. Whereas in the case of confirmation there would be public law verification of the results of a decision by the people, or the voters of a given election district, which is valid unless proved otherwise (thus a new decision is possible on the basis of renewing proceedings), in the case of a decision on the validity of elections by the Supreme Administrative Court there is an individual legal act, which is subject to the principle res judicata. In the present legal framework these concepts are not sufficiently differentiated; moreover, it is problematic and quite unusual that decision making on this issue is entrusted to as many as three bodies (not counting the conclusions of the State Election Commission on the final results of elections), although usually the decision is made by one body (the Parliament or the Election Court), or by two bodies (first the Parliament, or a special body in it, and only then the court).

Under the relevant provision of the Act on the Constitutional Court, an appeal can be filed by a deputy, senator, or the political party which the deputy or senator represented,

against a decision that he was not validly elected, or it can by filed by a person whose election complaint under the Election Act was granted, against a decision by the relevant chamber of Parliament, or a body of it, confirming the validity of the election of a deputy or senator. Thus, there is not only an appeal against a decision by the relevant chamber of Parliament, but also an appeal against a decision that a deputy or senator was not validly elected. This can also be derived by a systematic interpretation of the entire division of the statute, because, under § 88 par. 1 of the Act on the Constitutional Court, the body which decided on the invalidity of election of a deputy or senator can also be a party to the proceedings. Under the current framework, the Supreme Administrative Court is authorized to make a decision that election of a candidate was invalid. It follows from this that an appeal is also directed against a decision by the Supreme Administrative Court. In any case, this interpretation can also be drawn from judgment file no. I. ÚS 526/98 (in Constitutional Court of the Czech Republic: Collection of Decisions. Volume no. 13. Judgment no. 27. pp. 203, no. 70/1999 Coll.), to the reasoning of which the Constitutional Court refers. Finally, the Constitutional Court concludes that the issue at hand must be interpreted so that persons entitled to file an appeal will not suffer detriment as a result of a problematic legal framework.

The appeal was filed by the Civic Democratic Party, which registered the secondary party, i.e. by a subject who has active standing to file the appeal. It was delivered to the Constitutional Court on 13 December 2004. The lack of clarity and unity of the present legal order is evident, among other things, also in the issue of timely filing of an appeal, as the Supreme Administrative Court also pointed out in its statement. The question is not only whether the period for filing begins to run upon the decision by the relevant chamber of Parliament or upon the decision by the Supreme Administrative Court in the matter. The problem is also that the circle of parties to proceedings before the Supreme Administrative Court is different from the circle of persons entitled to file an appeal (as will be discussed in more detail below). Whereas in proceedings before the Supreme Administrative Court the parties to the proceedings are the petitioner, the relevant election body, and the person whose election was contested, the persons entitled to file an appeal are the petitioner in proceedings before the Supreme Administrative Court, the person whose election was contested (or the deputy or senator), and, finally, the political party which he represented, as in the instant case. Given that the political party is not a party to proceedings before the Supreme Administrative Court, or a member of the relevant chamber of Parliament, then strictly speaking, it can not be given proper notice of either the Supreme Administrative Court decision or the decision by the relevant chamber of Parliament. Thus, thee Constitutional Court states that here too the legal framework has lagged behind the development of election law, and it can be considered unnecessarily complicated. In view of the above-mentioned position on the need to interpret unclear provisions so that persons entitled to file an appeal will not suffer detriment as a result of the lack of clarity, we can conclude that, in view of the date when the Supreme Administrative Court decision in this matter was issued (3 December 2004), the ten-day period must be considered to have expired no earlier than at the end of 13 December 2004. Therefore, the Constitutional Court states that the appeal was filed on time, and under no circumstances can the filing of the appeal be considered premature.

As regards the scope of review within the proceedings on an appeal, it was not necessary to address this question, in view of the fact that the appeal contested all the substantive grounds of the Supreme Administrative Court's decision (see below, part II).

Next, the circle of parties and secondary parties to the proceedings was evaluated. It is precisely specified for this type of proceeding in § 87 and § 88 of the Act on the Constitutional Court. That is a special provision in relation to the general provision of § 28 of the Act on the Constitutional Court. These provisions indicate that the person who filed a petition with the Supreme Administrative Court to have elections declared invalid, and whose petition was granted, is not a party to the proceedings or a secondary party to proceedings conducted under § 85 par. 1 let. a) of the Act on the Constitutional Court. That person's participation in the proceedings also can not be derived from Art. 36 par. 1 of the Charter, because that guarantees the protection of individual rights. The subject matter of proceedings on an appeal under division four of the Act is protection of the right to vote generally, primarily the election results which are legitimized by Parliament for the exercise of its jurisdiction in a composition which reflects the will of the voters. Therefore, the purpose of regulation of this part of the election judiciary is not primarily to protect the subjective rights of candidates and voters, but to protect election proceedings or the process as a whole, which corresponds to defining the circle of subjects with active standing to file a petition to the Supreme Administrative Court (§ 90 par. 1 of the Administrative Procedure Code). Protection of subjective rights in such proceedings is not ruled out, but it is only a reflex of the main function of the proceedings. The purpose of these special proceedings is to protect the election process and its result; subjective rights are protected by other procedural means of protecting rights, as foreseen by, e.g. the Civil Code, the Press Act, the Act on Radio and television Broadcasting, but also election regulations within "objection proceedings," all with the application of the principle vigilantibus, non dormientibus iura subveniunt [the law helps the vigilant, not those who sleep (Codex Iustinianus 7, 40 1)]. In this regard the law is unambiguous, and so there is no space for acting under § 28 par. 3 of the Act on the Constitutional Court. Nonetheless, Ing. A. Z. was permitted to view the Constitutional Court's file, in accordance with § 63 of the Act on the Constitutional Court, with the application of § 44 par. 2 of the Civil Procedure Code, because a serious reason for it was found to exist on his part.

Under § 15 par. 1 of the Act on the Constitutional Court panels of the Constitutional Court decide on matters under Art. 87 par. 1 and 2 of the Constitution that do not fall under the jurisdiction of the Plenum. The Plenum's jurisdiction is defined in § 11 par. 1 of the Act, and letter k) of that provision permits the Plenum of the Constitutional Court to reserve for itself matters other than those which are expressly set forth in § 11 par. 1 of the Act. The Plenum of the Constitutional Court made use of this authorization, and by resolution of 18 December 2003, published as no. 14/2004 Coll., it provided, among other things, that it reserves the right to decide on an appeal against a decision in the matter of confirming the election of a deputy or senator under Art. 87 par. 1 let. e) of the Constitution. Because

the petition came to the Constitutional Court during the time when this decision was valid, the Plenum of the Constitutional Court has jurisdiction to decide on the petition.

Therefore, the Plenum of the Constitutional Court states that the requirements for it to review and decide on the petition have been met. It only points out that the Constitutional Court has jurisdiction to decide in the scope defined by the Constitution and the Act on the Constitutional Court. Therefore, these proceedings can not replace criminal proceedings, misdemeanor proceedings, civil law proceedings, or proceedings in matters of the press law. Likewise, those proceedings [e.g. proceedings in matters of protection of personhood under § 11n. of Act no. 40/1964 Coll., of the Civil Code, as amended by later regulations (the "CC")] can not serve as a procedural means to contest the validity of elections.

VI.

Substantive Evaluation

As was already stated, the fundamental function of proceedings on an appeal against a decision in the matter of confirming the election of a deputy or senator is to ensure the proper conduct of elections. More specifically – elections are supposed to be conducted correctly at regular intervals ("genuine periodic elections," "d'elections périodiques, honnétes" -Art. 25 of the International Covenant on Civil and Political Rights; the old version spoke of the "cleanness" of elections) on the basis of the principle of by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. This is the basic reference point of the international standard of free and democratic elections. The role of the Constitutional Court in this particular case is not to evaluate whether our regulation of the election judiciary meets all the requirements of the constitutional order (in particular Art. 1 par. 1, Art. 2 par. 1, Art. 5, Art. 6, Art. 18 par. 2, Art. 19 par. 2 and 3 and Art. 20 of the Constitution, as well as Art. 2, Art. 17, Art. 21 par. 1, 3 and 4 and Art. 22 of the Charter), or the international obligations of the Czech Republic (in particular Art. 25 of the International Covenant on Civil and Political Rights, and Art. 3 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms). The essence of these proceedings is to ensure the observance of those rules, and the instigation to introduce inspection mechanisms can come not only from the person whose subjective right to vote has been violated, but from each of the affected subjects (§ 90 par. 1 of the Administrative Procedure Code). The subject matter of the proceedings in terms of substantive law is to evaluate whether the bodies competent to verify elections, or decide whether they are valid, acted within the bounds and according to the rules which are prescribed for them by the relevant constitutional and statutory regulations. Although the Constitutional Court is deciding on an appeal against a decision by the Supreme Administrative Court and the Senate, that does not mean that it is bound only by the bounds provided in § 87 par. 3 to 5 of the Election Act. Even in the position of the final level of the election judiciary it remains a

judicial body for the protection of constitutionality, and therefore the basic reference points for its decision making are the above-mentioned provisions of the constitutional order and of the Act on the Constitutional Court.

From the Constitutional Court's viewpoint, the essence of the adjudicated matter lies in guaranteeing protection for the fundamental provisions of the constitutional order, which give rise to the principle that the people are the source of all state power, and in this role, among other things, they share in establishing the state through free and democratic elections. The statutory framework for the election judiciary and verification of elections corresponds to this. In terms of the procedural regulation of the election judiciary and conduct of such proceedings, this gives rise to the rebuttable presumption that election results correspond to the will of the voters. Presenting evidence to rebut this presumption is the obligation of the person who claims that there was error in elections. In the course of the 20th century this viewpoint became practically generally accepted. The view of election theory and practice from the 19th century, that every illegality makes elections invalid unless the contrary is proved, has already been overcome. Therefore, it is not decisive whether a system of three steps is chosen for review, as the Supreme Administrative Court does, following the example of its pre-war predecessor, or a system of one, two or four steps (violation of the law – causation – gravity of the violation – effect on the composition of parliament), and what methods will be chosen. Our election judiciary does not recognize absolute defects in election proceedings (so-called absolute confusion of election proceedings), i.e. such violation of a constitutional election regulation which would result in automatic annulment of elections, the election of a candidate, or voting. In this sense, all possible defects and doubts must be considered relative, and their significance must be measured by their effect on the results of elections to a representative body as such, or on the result of the election of a particular candidate, or on the result of voting, according to the proportionality principle. The Election Act narrows possible election defects to violation of "this Act" – in the instant proceedings it was not necessary to consider the constitutionality of this narrowing. This process is based on the constitutional principle of protection of a decision which resulted from the will of the majority manifested in free voting and taking into consideration the rights of the minority (Art. 6 of the Constitution), as the Constitutional Court has already said in another context, in judgment file no. Pl. ÚS 5/02 (in the Constitutional Court of the Czech Republic: Collection of Decisions. Volume no. 28. judgment no. 117. p. 25.- no. 476/2002 Coll.). The framework for verifying elections is alternatively based on the prerequisite of an objective causal connection between an election defect and the composition of a representative body, or at least a possible causal connection (the principle of potential causality in the election judiciary). However, this possible causation, as established in § 87 of the Election Act, must not be interpreted as a mere abstract possibility. We can derive from Art. 21 par. 4 of the Charter the right of an elected candidate to uninterrupted exercise of his office during the specified period [cf. Constitutional Court judgment Pl. ÚS 30/95 (in the Constitutional Court of the Czech Republic: Collection of Decisions. Volume no. 5. judgment no. 3. p.17 – 31/1996 Coll.), which emphasized the right of candidates, if elected, to exercise these offices without obstacles]. From this we must conclude that the judicial branch can change the decision of the voters, as a sovereign, only in exceptional cases, where defects in the election process caused or could demonstrable cause that the

voters would have decided differently and a different candidate would have been elected. Therefore the subject matter of these proceedings is the invalidity of the election of J. Nádvorník, not the non-election of Ing. A. Zápotocký. Incidentally, German case law, to which the parties to the proceedings referred, takes as its starting point the authorization of a court to annul elections only in the case of a demonstrated causal connection between the determined election defects and the results of elections.

This is the basic constitutional basis which the Constitutional Court was guided by in deciding this matter. It was possible to limit the instant case to a constitutionally consistent interpretation of § 16 par. 1 a 2 of the Election Act, which led the Supreme Administrative Court to declare invalid the elections in senate election district no. 19. Those provisions read as follows:

"1) The mayor may reserve a surface for the posting of election posters for an election campaign, 16 days before election day. The opportunities for using it must conform to the principle of equality of campaigning political parties and coalitions, or candidates, in elections to the Senate.

2) An election campaign must be conducted honorably and honestly, in particular, untrue information may not be published about candidates and the political parties or coalitions on whose candidate lists they are listed."

An election campaign is one of the aspects of evaluating duly conducted free and democratic elections. As regards definition of it, which became the subject of dispute in the instant matter, the Constitutional Court points out that an election campaign is no longer expressly defined in the Election Act in terms of length and content. That is the substantial feature of our Election Act, unlike a number of other states, where often the question of, in particular, the means of campaigning and election materials, not to mention the inspection and restriction of expenses for an election campaign, is regulated in great detail. The time period for putting up posters is only a measure of maintaining order, which regulates the situation in the "hot" phase of an election campaign. However, logically and rationally speaking, an election campaign can be conducted from a normative point of view only if elections have been called (in terms of the subject matter) or candidate lists or candidates have already been registered (in terms of the subjects of law). Naturally, that does not mean that voters are not influenced by a number of other important long-term factors in terms of the algorithm – obtaining information for making a choice in elections – recognizing one's own interests – taking a position and evaluation – a decision to vote for a particular party or candidate. This is a long-term process of forming voting preferences. Therefore, the petitioner's view that an election campaign is only the last 16 days before election day can not be accepted.

Our election regulations have abandoned the definition of an election campaign as a certain period of time, as it was introduced by, e.g. § 27 par. 1 of Czech National Council Act no. 54/1990 Coll., on Elections to the Czech National Council. They thus avoid problems connected with accusations against political parties that they began their election campaigns prematurely, just like the limits that are represented here by freedom of speech and the right to information. In view of the removal of moratoria for election campaigning, there is no longer a need for such a definition. As regards local news media, originally it was possible to use them, but after problematic experiences an amendment to the Act on Elections to the Czech National Council (by Act no. 92/1992 Coll.) banned the use of local radio for election campaigning by political parties, with the exception of a mere announcement that election assemblies were being held. This regulation was also taken over by Act no. 247/1995 Coll., on Elections to Parliament. Act no. 204/2000 Coll. then deleted the regulation of use of local radio. Likewise, it has not reacted to developments in this field, as municipalities publish their own news bulletins, and apart from local radio they also have their own television broadcasting, teletext and websites.

VI. a

Under § 16 par. 1 a mayor may reserve surfaces for the posting of election posters, sixteen days before election day. The opportunity to use them must fundamentally correspond to the principle of equality of campaigning political parties, coalitions, or candidates in elections to the Senate. The Supreme Administrative Court concluded from expansive interpretation of this provision that this is only a "demonstrative indication of a generally valid approach to means of communication which the municipality has at its disposal." In the court's opinion, it follows from this that the principle of equality of campaigning entities must be respected during the use of all means of communication held by the municipality.

The Constitutional Court does not fully agree with this approach to interpreting § 16 par. 1 of the Election Act. First, it is not clear from the statutory provision what measures the mayor is to use to achieve equal use of the surfaces reserved for posting election posters by campaigning entities. In practice, each of them will have to be guaranteed access to these surfaces. Equality of access consists of an equal opportunity to use these surfaces, not in the fact of how they were used by campaigning entities. Therefore, the mere fact that some posted fewer posters on the designated surfaces than others, or that some did not put up any posters, can not be used to conclude that equal opportunity to use the surfaces was not preserved. Individual paragraphs of § 16 of the Election Act must be interpreted in the full context. Therefore, one can not overlook the fact that there are precisely defined conditions, not only for using the surfaces for putting up election posters, but also for using public media for an election campaign. Printed materials published by municipalities are by their nature closer to public media than to surfaces for putting up election posters. If the legislature wanted to provide rules for their use during

elections, it would have had to do so directly in a statute, as was done at the beginning of the 1990s.

The Election Act is a legal regulation which implements into practice one of the fundamental political rights, the right to vote and to be elected, expressed in Article 21 of the Charter. Under Article 21, par. 3, last sentence of the Charter, conditions for exercising the right to vote shall be provided for by law. If the law does not forbid using municipal periodical for an election campaign, then they can be used for an election campaign provided that equal access for political parties is maintained. Interpretation of a statute can not expand a statute where there is no support for it in the statute, particularly where it does not concern the exercise of sovereign authorizations of a municipality as a public corporation. The formulation of § 16 par. 1 of the Election Act is unambiguous insofar as it concerns only surfaces for putting of election posters. The purpose of this provision is not primarily a rule for conducting an election campaign, but an authorization for a mayor in the field of public order and preventive protection of property from "wild" putting up of posters long before actual voting. The obligation to provide equal access then follows from the abovementioned constitutional principles. In the instant case, the issue was not whether Ing. Z. had access to these media, but whether publication of the cited materials was violation of the rules of conducting an election campaign, as set forth by § 16 par. 2 of the Election Act. In terms of Art. 5 of the Constitution and Art. 22 of the Charter there is no dispute about observing equal access for political parties to media published by a public corporation.

VI. b.

Therefore, the fundamental problem in the instant matter is not violation of § 16 par. 1 of the Election Act, which could hypothetically be derived only by expansive interpretation, and only in the event that political parties had not been given access to the cited media. The Supreme Administrative Court sees as the fundamental prerequisite for its verdict the violation of the principle of honorable and honest conduct of an election campaign, as defined by § 16 par. 2 of the Election Act. In its opinion, this requirement was met when the cited articles and declarations against Ing. Z. were published. The Supreme Administrative Court finds violation of the principle of equality among candidates in the fact that shortly before the elections two periodicals published by municipalities printed two articles containing criticism of one of the election candidates, criticism which, in its opinion, was incorrect and unfair. Even if the Supreme Administrative Court's conclusion, with which the Constitutional Court disagrees, that these publications are the same as a surface designated by a mayor for putting up posters, were valid, this would not be violation of the principle of equality as it is meant by § 16 par. 1 of the Election Act. The issue is the right of equal access, not an obligation on all election candidates to put up a certain number of posters, the same number for all. In this sense, therefore, it would be possible to speak or inequality only if, for example, Ing. Z. sent an election article to both

periodicals by their deadline, and they refused to print it. However, the Supreme Administrative Court made no such determination.

The provision of § 16 par. 2 of the Election Act is basically the result of unwillingness by contestants in an election campaign to conclude pre-election agreements on the rules of the election contest, setting a "referee" who would decide whether obligations from that agreement have been met "honorably and honestly." This phrase is aimed toward such rules, and it can not be given the meaning, e.g. of good morals under § 3 par. 1 of the Civil Code. Likewise, the legislature itself was not willing to prepare an ethical codex for the elections, just like affidavits on the conduct of an election campaign which must be signed by those who want to run. It was up to the legislature to newly regulate the nature of election bodies. However, as a consequence there is no longer any election body which would at least supervise the observance of legal regulations on elections and flexibly draw conclusions which an election campaign was still going on.

There is no doubt that the media which are at the disposal of local governments, even though they are not official bulletins, to which the Print Act does not apply, are subject to stricter rules, in terms of being used in an election campaign, than is the case with publishers who are private law entities. Although this does not mean that they have an obligation to guarantee the same mechanical space for individual candidate parties and person, they too are subject to the rule of equal "access." Different conduct would be inconsistent with the rules of free competition between political parties under Art. 5 of the Constitution, and the free competition among political forces under Art. 22 of the Charter. If the legislature does not yet forbid the use of such media, their use for election campaigning must be measured by the rules of equal opportunity, and the publisher or operator of such media must weight whether it can guarantee that this principle will be respected. However, we can not agree with the petitioner, who claims that the rule of Art. 2 par. 3 of the Charter applies, that what is not forbidden is permitted. These periodicals, in the event that they are made available to political parties, are subject to the principle of equal opportunity, which flows from the principle of free competition among political parties and political forces (Art. 5 of the Constitution, Art. 22 of the Charter), as the Supreme Administrative Court correctly concluded. A different approach could suggest to voters that the municipality, as a public corporation, prefers only certain political parties.

There is no dispute that the printed materials published as municipalities reporters, because they are in the hands of the public authorities, must remain correct and neutral. In the position of a mayor, a candidate must observe certain rules, because in that position he is a public official, and thus does not have the general freedom of expression as ordinary citizens. In short, he can not use his position as mayor to benefit his election campaign, or someone else's campaign. The submitted materials indicate that the campaigning by the mayors against Ing. A. Z., whether direct or indirect, was not consistent with the requirements of honest and honorable conduct of an election campaign (especially the misuse of an anonymous letter), as can be concluded from § 16 par. 2 of

the Election Act. In the articles which the Supreme Administrative Court took into consideration exclusively did not concern a conflict between candidates for a senate seat, but a dispute between mayors who had different opinions on investments which affected their city districts in various degrees and who took advantage of the more vulnerable position of their opponent to make a more effective attack on his person. During an election campaign this must be seen as an attempt to influence the results of elections, although the Constitutional Court determined that otherwise this was a matter which had continued for a longer period of time, and the instant case involved a reaction to the position of someone who supported a different position, who was simultaneously running for the Senate .

A different question is then the appearances by mayors and other municipal government officials in media such as in this case. Here it is not a question of equal opportunity for the political parties for which they were elected, but a question of their appearance as public officials, representing the interests of municipalities and their residents, as follows from the text of their oath of office, in which they undertake, on their honor and conscious, to perform their office conscientiously, in the interests of the municipality (city) and its residents, and be guided by the Constitution and laws of the Czech Republic (cf. § 69 par. 2 of the Municipal Establishment Act). In such a case it can not be claimed that they can make appearances, on the basis of their office, in an election campaign to the benefit of a particular party, and claim, as public officers and official persons (and not as individuals) freedom of expression under Art. 17 of the Charter. However, this does not mean that they can not make appearances or even campaign in an election as party functionaries or as individuals; likewise, nothing prevents them from identifying their office in such an appearance. The fact that a mayor speaks in a political or other dispute as a politician (not as an official), does not mean that he can not state a fact which is familiar generally notoriously familiar to the citizens of the municipality. It would be absurd to deny mayors and other public officials and official persons to take part in an election campaign. That too would be a violation of equal opportunity of such officials as candidates and of their parties and violation of the constitutional principle of free competition, which logically requires the possibility for participation by competing parties. Therefore, the distinguishing criterion can be only the fact that a mayor, as an official person and municipal official, on the basis of his office, may use facilities which another citizen can not use (budget funds, a telephone, computer, official automobile, official bulletin board in the municipal office, speeches connected with his office, printed materials with the letterhead of the municipality of municipal office, giving his expression the flavor of being official, etc., which could influence older voters in particular). The use of such means is impermissible in an election campaign. However, the Supreme Administrative Court passed over this question. In this regard it is also necessary to emphasize that German case law, which the Supreme Administrative Court cited in this connection, identifies as election error a situation where there are numerous and massive violations of the ban on using the public media in an election campaign, or where state bodies influence the election of their bodies in a significant degree. One can conclude from this that elections can be annulled only as a result of fundamental and substantial violation of state neutrality in the course of elections. However, the adjudicated matter does not involve such a case.

Likewise, the proceedings were objectively marked by the fact that, until the proceedings before the Constitutional Court, the secondary party did not have an opportunity to point to other circumstances of the polemics which arose on the basis of the first issue of the South-east Prague Courier published by the City District Prague-Křeslice. These circumstances put the articles in the Uhříněves Reporter and the Petrovice Reporter into a somewhat different context than was conceived in the reasoning of the decision by the Supreme Administrative Court, but this could not in any way affect the negative evaluation fo the fact that one issue misused an anonymous, unverified text. On this point the Constitutional Court agrees with the evaluation of the Supreme Administrative Court; however, it differs in what conclusions can be drawn from it under the principles provided in § 87 of the Election Act.

As regards the content of an election campaign, the Constitutional Court is aware that during the course of one arguments are often presented to voters in a very emotional and heightened form, and are intended to influence their electoral behavior and their decision whom to vote for. However, the purpose of an election campaign in a pluralistic democracy is undoubtedly also to evaluate the most controversial issues in the programs of political parties and candidates generally, as well as their personal qualities and capability to hold elected public office. Only in that case will voters be able to make informed decisions, and only thus can the fundamental constitutional principle that the people are the source of all state power be fulfilled. Insofar as the Election Act speaks of the requirement for honorable and honest conduct of an election campaign, it means what was previously called the cleanness of elections (cf. § 56 par. 1 of Act no. 75/1919 Coll., The Election Code in Municipalities of the Czechoslovak Republic). However, these concepts can not be interpreted in terms of private law and general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes. Its negative effects can be regulated, but can not be ruled out by law.

In this connection, the Constitutional Court considers it instructive to discuss the judgment of the Election Court of 23 April 1926 (Collection of Fundamental Decisions of the Election Court. Part IV., Prague 1928, no. 183, p. 58), in which the court said, in a similar context, that the required "serious violation of free and clean elections is of course also impermissible campaigning, which degenerates into terror, whereby physical and psychic pressure is applied to the free decision of voters to such a degree that even the secret ballot is not able to ensure a voter's free decision. However, if campaigning did not exceed this boundary, it can not be seen as violating free and clean elections, even if it came from official persons." Although today's legal framework and legal awareness has shifted markedly, nevertheless it characterizes the necessary public law manner of viewing the present issue, as it was presented to the Supreme Administrative Court by Ing. A. Z., and which is in essence more a civil law problem. The lacking effective protection in this regard will always lead to an effort to resolve such disputes through election complains. However, the protection of personhood rights in these proceedings can only play a

supporting role in terms of guaranteeing and observing the rules for the proper conduct of an election campaign.

Therefore the Constitutional Court concluded that neither an objective nor potential causal connection was proved between the content of the cited publications and their distribution among voters and the election of J. N. We must emphasize that the Supreme Administrative Court only considered the question of whether Ing. Z. could advance to the 2nd round of Senate elections. However, in terms of the abovementioned presumption that election results are valid, it was not proved that the elements of the fundamental substantive law of our election judiciary were present, i.e. whether under § 87 par. 4 of the Election Act the provisions of the Act were violated in a manner which could influence election results. It can not be required, as the petitioner urges, and it is clear from that substantive law provision, that the violation in fact have an influence on elections results. The Supreme Administrative Court did not consider the question which the Constitutional Court considers significant in terms of meeting § 87 par. 4 of the Election Act, that is, whether it can be claimed with sufficient probability that J. N. would not be elected senator in the 2nd round of elections as a result of Ing. Z. hypothetically advancing to the second round. However, the Supreme Administrative Court completely overlooked this question, although without answering it one can not conclude that the election results were influenced, as is required by § 87 par. 4 of the Election Act in order for them to be violated. Instead, it focused only on evaluating the results of voting in the 1st round of elections in relation to the candidates Ing. A. Z. and P. J. However, violation of § 16 par. 2 of the Election Act can not by itself, without further proof, lead to the conclusion that Ing. A. Z. could have advanced to the 2nd round.

The reason for declaring the election invalid could also been the conclusion which better corresponds to § 87 par. 5 of the Election Act, that in that case there is a high degree of probability that Jan Nádvorník would not have been elected a senator. However, this can not in any way be concluded form the abovementioned data on the results of the 1st and 2nd round of elections, from the voter participation in those elections, or from the support for the party for which Ing. Z. was a candidate in the district. Here we must point to the election results as they are stated in part IV. Against consideration of a different possible result, it is enough to state that in all three Prague Senate elections ODS candidates received a virtually identical number of votes in the 1st and 2nd rounds of elections. Yet, in the 2nd round of elections voter participation declined by an equal ration, which is typical generally, not only in Prague. Therefore, one can not even hypothetically conclude that, with the given level of voter participation in the 19th election district, out of 18,907 votes cast, J. N. would not have received precisely the same 10,407 votes as he actually did. Likewise, there is no probable reason to claim that if Ing. A. Z. had advanced to the 2nd round approximately 21 thousand voters would have come and, in addition to those 10,407 voters, all of them would have voted for Ing. A. Z. Basically, that candidate would have had to receive the votes of all voters who were willing to come to vote in the 1st round for his opponents from the Association of Independent Candidates, the KSČM (Communist Party), the Path of Change, and ČSSD (the Social Democrats). Likewise, the voting in Prague and related city districts in 2002 does not permit reaching a different

conclusion with a higher degree of probability. In elections in CD Prague-Křeslice KDU-ČSL did receive 52 % of votes, but with 188 voters participating (i.e. 67% participation versus 25% participation in the 1st round of Senate elections). One could also speculate that, if Ing. A. Z. had advanced to the 2nd round, voter participation might have been even lower, in view of his party profile compared to the candidate for the Association of Independent Candidates, and thus the change for a change in the election results would likewise have been even lower. Therefore, the data provided do not lead to any logically or statistically documentable conclusion that, applying the principle of an absolute majority, there was a high degree of probability that anything would have change in the election results of the 2nd round and that J. N. would not have been elected senator. Therefore, the presumption that the voters' decision in an election is valid was not cast in doubt in such a manner that the Constitutional Court could agree with the Supreme Administrative Court's conclusion as regards the validity of the election of J. N.

If the legislature will not be able to distinguish the special features of review of elections that are valid, either in the case of the entire Chamber of Deputies, or a third of Senators in the case of elections in one election region or a Senate election district v případě jejich platnosti v případě celé Poslanecké sněmovny nebo třetiny senátorů v případě voleb v jednom volebním kraji nebo jednom senátním volebním obvodu (cf. in terms of linguistic interpretation "results" and "result" of elections), such problems of interpretation will continue to arise. The purpose of elections in election district no. 19 was undoubtedly to elect a senator, not to advance to the 2nd round of elections. Therefore, the results of these elections can only be the election of a senator. Therefore, in this case application of § 87 par. 5 appears more fitting, even though it can not repair the shortcomings in formulation and stArting points of that provision. The Supreme Administrative Court itself posed as steps in evaluation the requirement that 2) the relationship between this illegality and the election of the candidate whose election is contested by an election complaint, and 3) the fundamental intensity of this illegality, the consequences of which must at a minimum cast considerable doubt on the election of the candidate in question. In reality, however, in practice it concentrated only on meeting requirement 1), i.e. violation of the Election Act in both publications, and in fact in this regard it completely passed over the issue of the election of J. N. being cast into considerable doubt, and concentrated only on considering the possibility of the influence of two problematic publications on the possible advancement of Ing. A. Z. to the 2nd round.

In this regard, without regard to the circumstances of delivering the petition to open proceedings before the Supreme Administrative Court, we can not overlook the fact that its conclusions are necessarily marked by the fact that the elected candidate in question, whether through someone's fault or not, could not present his arguments to the court. However, the Supreme Administrative Court can not be criticized for annulling the elections in their entirety (of course, only in one election district). The Election Act does not give it any other option. This shortcoming is inconsistent with the principle of proportionality of interference by the state authorities, but the primary subject matter of this type of proceedings, is not review of the constitutionality of the Election Act, just as it is not protection of subjective rights.

In light of the foregoing, it was not necessary to consider in more detail the issue of the petitioner's objection that the of the Supreme Administrative Court's conclusions regarding the intensity of unlawfulness were incorrect and illogical. Nonetheless, the Constitutional Court could not agree with its view that the Supreme Administrative Court's consideration is quite incorrect and illogical on this point, even though the issue is certainly not the intensity of unlawfulness (either the law is broken or it is not), but the gravity of the influence of this unlawfulness on the composition of a representative body. it is natural that in terms of a voter's election decision the more serious violations of election campaign rules are those which happened during the time of that decision making, which, in the case of undecided voters, is precisely in the last days of an election campaign. This conclusion of the Supreme Administrative Court flows from long-term settled case law in election matters in this country (in times of free elections) and abroad. However, the essential thing is that annulment of elections can not be taken as a punishment for violating election regulations, but as a means to ensure the legitimacy of an elected body. It is the probability of influence of an election defect of election offense (§ 177 Criminal Code, § 16 par. 5 and 7 of the Election Act) on the election result in particular elections with particular voters that is decisive. A mere abstract possible causal connection is not sufficient. The situation would be different in the case of an election campaign clearly being conducted in an unfair manner, inconsistently with the requirement of proper conduct of elections and election competition, which could, with a high degree of probability, lead to an opposite election result than was assumed, for example, according to correctly conducted pre-election polls. It would have to be proved that, with a high degree of probability, without the cited publications the result of the Senate elections in the given district would have been different, which the abovementioned conclusions do not prove.

The Constitutional Court is aware of the complexity of the adjudicated matter, and especially of the shortcomings and gaps in the legal framework in this area. Therefore, it expects that the legislature will weigh, on the basis of information obtained, both substantive law and procedural law questions concerning the review of validity of elections and their verification , so that it will not evoke unnecessary problems and be internally consistent (cf. the analysis in Filip, J., Holländer, P., Šimíček, V.: The Act on the Constitutional Court. Commentary. C. H. Beck, Prague 2001, pp. 405-411). Likewise it is necessary to weight the system of means for protection elections and the right to vote, just like other subjective rights in the course of an election campaign (e.g. abbreviated proceedings on printed corrections of errors and apologies), so that the person who caused violation of such rules can be penalized. In such a case the threat of annulling the result of elections as the only possible consequence is inconsistent with the constitutional principle of proportionality of interference by public authorities. This certainly does not rule out disqualifying a candidate who committed a serious election offense (e.g. fraud, bribery). In this regard the Constitutional Court is forced to say that, compared to other countries, the legal regulation of defects in the election process, election offenses, and the rules for conducting an election campaign in general, is, for one thing, very fragmentary, and for another, basically rooted in conditions which correspond to "elections" from the times of

the previous regime. Therefore, the legislature will have to weigh whether the election culture of voters, candidates and public officials is on such a level that regulation of these issues is unnecessary, or whether it will guide electoral behavior through pre-set rules that will create a situation of legal certainty for the subjects of the election process and which will be at least a prerequisite for electoral economy.

Therefore, on the abovementioned grounds, the Constitutional Court concluded that the secondary party to these proceedings, J. N., was validly elected a senator in elections to the Senate of the Parliament held on 5 and 6 November 2004, and on 12 and 13 November 2004, in election district no. 19, Prague 11.

Therefore, under § 91 par. 3 of the Act on the Constitutional Court all decisions of other bodies which conflict with this judgment lose their effect, i.e., especially:

a) decision of the Supreme Administrative Court of 3 December 2004, file no. Vol 10/2004-24,

b) decision of the Mandate and Immunity Committee of the Senate of the Parliament, no. 11 of 14 December 2004, which states that the committee could not confirm the mandate for election district no. 19, Prague 11, in view of the fact that the Supreme Administrative Court decided by its resolution no. Vol 10/2004-24, that elections in that district were invalid,

c) decision of the Senate of the Parliament, no. [___], from the 1st session of 15 December 2004, in which the Senate "takes cognizance" of point II. of the report from the Mandate and Immunity Committee on the results of confirming the validity of election as a senator,

d) decision of the president, no . 653/2004 Coll., on calling repeat elections to the Senate of the Parliament.

Notice: Decisions of the Constitutional Court can not be appealed.

Brno, 26 January 2005

Dissenting Opinion of justice JUDr. Eliška Wagnerová, Ph. D.

My dissenting opinion is based on the following considerations:

1. The justification of judicializing purely political processes 2. A liberal constitutional democracy versus a democracy without attributes 3. Genuine elections

Re 1.

Democracy in the legal sense must be applied to "already existing legal norms, other norms and institutions," which control the process of collective decision making in a democratic political society. The judicialization of this sphere creates the possibility that "in the name of liberal constitutionalism one can, through objective judicial review, deny the most important right available to citizens in liberal democracies, i.e the right to participate in public affairs." (S. Issacharoff et al., The Law of Democracy, 1998).

Many authors and schools of thought believe that the judiciary applying the law should maintain a respectful distance from purely political processes, which are supposed to produce judicially incontestable solutions, and there is an equal number of opposite theories. A general response to this dilemma is not possible. Even the most entrenched educated opponents of judicialization recognize that its scope and depth depends on the particular historical situation (see, e.g., R. A. Miller, Lords of Democracy: The Judicialization of "Pure Politics" in the US and Germany, 61 Wash. and Lee L. Rev. 587, Spring 2004). They conclude that the judicialization of "pure politics" (the term is an obvious allusion to Kelsen's pure legal learning) is a reaction by constitutions against the shock of a preceding dictatorship, that is, a response to the misuse of purely political processes by previous political regimes. This experience contributed to the identification and recognition of the constitutional principle called "militant democracy" (streitbare Demokratie, see, e.g., decision BVerfG z 24. 3. 2001, 1 BvQ 13/01), which is the concept of a democracy which is entitled, required, to protect itself from threats from within. Therefore, the political will formed in political processes is reviewable by courts, and in the final instance by the Constitutional Court.

The Czech Constitution took over this concept, being formed on the basis of essentially similar experience as that from which the German fundamental law (Grundgesetz) arose. Likewise the concept of the Czech Constitutional Court and its areas of jurisdiction (in particular review of norms, but also others, including jurisdiction over elections) indicate acceptance of this doctrine.

Ad 2.

Democracy, whose most distinctive external manifestation are elections, has many definitions. Nevertheless, since antiquity democracy has been described as government by the people, finding its expression in elections (and referenda). The Czech Constitution, however, has not adopted this simplistic and formal essence of democracy (which, if practiced as such, can in formally regular elections bring to power racists, fascists, proponents of class hatred and other political forces that deny the fundamental rights and freedoms). It ties democracy to substantively understood legal statehood (Art. 1 par. 1 of the Constitution), and places the fundamental rights and freedoms under the protection of the judicial branch (Art. 4 of the Constitution). This concept of democracy has also been confirmed in the Constitutional Court's case law (Pl. ÚS 19/93). In other words: The Czech Republic has signed on to democracy with the attribute "liberal," more precisely, to constitutional liberal democracy. Such a democracy includes not only formally understood elections, but elections which must comply with certain minimum requirements (see below), as well as the rule of law, separation of powers, and respect for and protection of the fundamental rights and freedoms. What deep conflicts can arise between democracies without qualifiers on one side and constitutional liberal democracies on the other side, are powerfully described – documented by experience from the whole world – by F. Zakaria (Budoucnost svobody [The Future of Freedom], Academia, Prague, 2004).

I base my dissent from the majority opinion on the accent of the abovementioned postulates.

Re 3.

If I begin with the foregoing, I can not understand genuine elections to be merely a process which will be subject to review only within the scope of the election act itself, that is, the only thing which will be examined is whether the bodies competent to verify elections, or competent to decide if they are valid, acted within the bounds and according to the rules which are expressly set forth for them by the relevant constitutional and statutory provisions (the manner accepted by the majority opinion). On the contrary, in my view it is necessary to interpret even a flawed legal framework in terms of the abovementioned positions, which give rise to other principles immanently present in the Constitution, even if not explicitly spoken.

Thus, I consider quite fundamental the principle that the total "pureness" of elections can be concluded only on the assumption that the will of the voters is created without guidance or instructions or influence by the state power. I understand this principle to be one of the fundamental structural principles of the Czech Constitution. All state bodies

created by elections must be the result of the actually authentic will of the members of a civil society, that is of the voters, not the product of a process which was manipulated by the state power, regardless of whether successfully or less so. The failure to respect this principle, taken to the extreme (or better said, to a perverse degree) led to the election results which we were faced with before 1989.

There is no dispute about the fact that in election district no. 19, Prague 11 the public authorities interfered in the election process. This interference was of two kinds. The constitutionally unacceptable, but simple form, was committed by the Křeslice Reporter no. 2, which contained campaign material in favor of A. Z., though it was issued with the help of funds gathered precisely for that purpose (see the title page of the periodical). However, the municipal publications, the Uhříněves Reporter no. 10/2004 and the special issue of the Petrovice Reporter, published on 3 November 2004 (both periodicals financed by public funds), committed much more intensive interference by the public authorities in the election process because in a very coarsely defamatory manner (publishing an anonymous letter in context with a leader by the mayor of Uhříněves, or interview with a member of the municipal council with JUDr. Č. together with defamatory evaluation of A. Z. in the Petrovice Reporter) liquidated, or at least attempted to, the senate candidate from a rival political party.

I conclude from this: the case of the simple election campaigning conducted by misuse of the municipal publication, but published with money collected for that purpose, can be considered conduct which is ultra vires in relation to the municipal jurisdiction, and which seriously violates the purity of the election process. Nevertheless, in weighing that defect on the one hand and the importance of the elections themselves on the other, one can conclude that this defect need not result in an invalid election. This is because the intensity of that violation affects the structural principle of the Constitution (see above), but does not violate substantive constitutional principles (see below). This defect could in future be addressed by a penalty, which the Election Act should anticipate, as the majority opinion says, in a call upon the legislature, with which I fully agree. However, I can not reach the same conclusion in the second case of violation of the election process.

For me, defamation of an individual, committee by the public power with the use of public resources (a public publication) and public funds, is literally abuse of public power for a constitutionally completely unacceptable purpose (weakening a political opponent's chances in an election by attacking his dignity), which, in my eyes, removes the "pureness" of the election process so that it can no longer be called genuine elections. My (and I hope not only my) memory of history, and experience from the present day, do not permit me to tolerate such excesses of public power, because this is no longer a case of simple acting ultra vires. In relation to an individual, this can be completely destructive conduct through abuse of public power. In such cases, a civil law complaint for protection of personhood appears to me to be a completely inadequate remedy, not to mention the fact that the impermissibility of such conduct reaches considerably beyond the interests of

the individual, and I do not hesitate to say that such conduct by the public power "unglues" the very foundations of our constitutional and political system. Constitutionally normatively, that system is founded on the public power's respect for the dignity of the individual, and no breach of this fundamental substantive constitutional principle can be tolerated, because it is interference in the very fundamental requirements of a democratic law based state, viewed substantively (Art. 9 par. 2 of the Constitution).

In other words: defamation of a candidate or political party by the public power in an election campaign deprives the election itself of the attribute "genuine." Such a process, cloaking itself formally in the garb of elections, is not, constitutionally substantively speaking, an election, and therefore the formal elections must be declared invalid, as the Supreme Administrative Court correctly did.

Conclusion

I can not agree with the majority opinion in other aspects as well. Primarily, I consider the method of examining a causal connection between violation of the Act and the results of the election to be misleading and unproductive. I do not agree with the statement that the law either is or is not violated, i.e. that the intensity of violation of the normative framework of the election process is irrelevant. On the contrary, I believe that the Constitutional Court should always examine whether a particular violation of the election process still permits describing the elections as genuine, and which one does not, and then make its verdict accordingly to that determination. Examining the causal connection between violation of the law and of the Constitution and the result of elections, regardless of how deep in the constitutional foundations of the state the interference is aimed, will always be on the level of non-documentable speculation. The conclusions which the majority drew from the materials from the State Election Commission are unconvincing in my eyes. That they are unconvincing is proved by the victory in election district no. 22 of J. Š., who, in the second round, virtually doubled the number of votes he received, although the Green Party, similarly to KDU-ČSL, is not a favorite in Prague election districts. This example documents the fact that the method chosen by the majority in addressing this case is not suitable; in contrast to that the abovementioned method of interpreting what, in terms of the Constitution can still be considered genuine elections (i.e. constitutional evaluation of the intensity of interference) is a procedure which can be expected from the Constitutional Court, because it thereby interprets, or makes more specific, the Constitution and the constitutional order.

Further, in my eyes the majority opinion does not sufficiently reflect the purpose of judicial review of the political process which elections are, as I indicated above. This is evidently because it takes the incorrect stArting point that elections are to be an expression of the constitutional maxim that the people are the source of all state power. However, this repeated statement overlooks the classic (Sieyés) separation of powers into

the constituitive power, which really does belong exclusively to the people (the people are the source of power) and all institutions, including the Constitutional Court, bow before it, and constituted power, which is exercised within the framework of the Constitution. Elections, as a means provided by the Constitution, are, of course, an exercise of the constituted power [see, e.g., V. Klokočka, Ústavní systémy evropských států [The Constitutional Systems of European States], Linde, Prague, 1996, p. 102: "Even in the exercise of the right to vote (...) the group of citizens-voters moves within (...) the constituted power. In this case too the people are the exercisers of power." In addition, see, for example, the Constitution of Germany, which provides in Art. 20 that all state power arises from the people (a characteristic of the constitutive power) and is exercised by the people through elections and voting and through legislative, executive, and judicial bodies (constituted power) and a wealth of other foreign literature]. And it is precisely the Constitutional Court which is called upon through its jurisdiction to review the acts and processes of the constituted power, regardless of who performs them. The Constitutional Court has this duty even if the constituted power is exercised by the voters (i.e. definitely not by the people) in elections. In that case too the Constitutional Court can not rid itself of the duty to determine whether the constituted power was exercised in a constitutional manner, or in a constitutionally consistent process.

In other words (to paraphrase K. Thein, Mladá Fronta Dnes 8 January 2005, E-III): the Election Act (like every statute) is a text with one wording, and an endless number of ways to circumvent that wording. In the environment of the Constitution, democracy, as a mocked and misused quantity, is constantly on the edge of dysfunction. To contribute to the functionality of a constitutional liberal democracy is a task worthy of the Constitutional Court.

Brno, 26 January 2005

Dissenting Opinion of JUDr. František Duchoň

Act no. 247/1995 Coll., on Elections to Parliament (the "Election Act"), provides in § 16 par. 2 that n election campaign must be conducted honorably and honestly, in particular, untrue information may not be published about candidates and the political parties or coalitions on whose candidate lists they are listed.

In proceedings before the Constitutional Court it was proved that the election campaign in election district no. 19, Prague 11 was not conducted in accordance with that provision. During that election campaign publications published as municipal reporters and financed from public funds were used. These reporters published materials which did not serve to inform the citizens of these localities, but were a negative pre- an election campaign against one of the candidates in Senate elections in that election district. Thus, this concerned not freedom of expression and the right to information, but an election campaign, moreover one led in a negative spirit. This is especially evidenced by publication of the anonymous letter, about which it has been known for at least 3 years that it was not written by members of the representative body of City District Prague-Petrovice, as it stated.

This not only violated the abovementioned provision of the Election Act, but at the constitutional law level it violated Art. 5 of the Constitution of the CR, under which the political system is founded 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. This also violated Art. 22 of the Charter, under which Any 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.

Free competition can not exist if certain subjects in that competition are advantaged by having at their disposal and using resources which are supposed to serve completely different purposes (municipal reporters and other material resources which city halls and municipal mayors have at their disposal), as happened in this case. Thus, these resources – in this particular case municipal reporters, published with public funds – were misused for purposes of the election campaigns of municipal politicians. That also violated the principle of neutrality of the public power in a pre-election campaign, which arises from Article 2 par. 1 of the Constitution ČR, under which all state authority emanates from the people; they exercise it through the legislative, executive, and judicial bodies.

The process of forming the will of the people takes place primarily in elections The honorable and honest conduct of elections is a value which can not be abandoned.

Elections are the substance and foundation of democracy; the bodies of state power are created on the basis of election results (see Article 2 par.1 of the Constitution ČR). Elections are always a selection of particular people. We can conclude that to a certain degree the relationship is – how the election campaign goes determines how the elections go; how the elections go determines what the bodies of state power are like.

I can not agree with the judgment's relativization of the concept of an honorable and honest conduct of an election campaign: "these concepts can not be interpreted in terms of private law and general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes." Here the Constitutional Court showed that it distinguished honor and honestly in the areas of private and public law, and that in each area these values mean something different. In practice it thus abandoned the value of honor and honesty in the area of "a fight for voters' votes." There should not be different rules of honor and honesty for relationships between individuals and for the election process, which is the foundation of representative democracy, from which the bodies of state power arise.

Insofar as the Constitutional Court was deciding in a situation where, in the Czech legal order, the only consequence of violating of the principle of an honorable and honest election campaign is the non-election of a candidate, it should have gone in that direction. It would have been very harsh and unfair vis-à-vis the candidate who did not take part in the negative election campaign at all, but on the other hand the Constitutional Court would have made clear that it would not in future tolerate flagrant violation of the rules of an honorable and honest election campaign. At the same time, it would have forced the legislature to make a more suitable statutory framework for the election process. Honorable and honest election campaigns should be in the interest and to the benefit of all parties taking part in electoral jousting. The entire election process, i.e. an election campaign and the elections themselves, can be considered the foundation of democratic organization of society. Elections are not only the method whereby candidates receive their mandates, i.e. the relevant position in the hierarchy of elected bodies, but is also a process in which a number of fundamental rights and freedoms are implemented. The protection of this process can not be abandoned by tolerating dishonorable and dishonest conduct, or relativizing it, because that depends citizens' disgust with politics and is dangerous for democracy.

In this regard, I consider it superfluous to examine in detail the causal connection between violation of honorable and honest conduct of an election campaign and the results of elections. I rely on the text of § 87 par. 2, 4 of the Election Act, where a subject named in the second paragraph has active standing to file a petition to declare elections invalid if he believes that provisions of the Act were violated in a manner which could influence the results of elections. In my opinion, in this particular case the appeal could be granted only on the assumption that the cited violations of the Election Act could not influence the results of the elections under any circumstances.

It is true that the result of the elections in this case was the election of a senator, but Senate elections have two rounds. If the difference in the first round between the second candidate to advance to the second round and the third candidate, who did not advance, where a negative election campaign was led against him, was a mere 325 votes, one can consider that the negative election campaign led against the non-advancing candidate may have influenced the results for advancing to the second round. The candidate who did not advance lost the chance to fight in the second round of Senate elections, which decides between only the two advancing candidates. Voter participation, their behavior, preferences, and tactics, are substantially different than in the first round. Arguments based on statistical data or pre-election polls are speculative to a certain degree, and only completes the de facto abandonment of protecting the honor and honesty of an election campaign in the abovementioned sense.

For all the foregoing reasons I am of the opinion that the petitioner's appeal, decided by the Constitutional Court in proceedings under § 85 of Act no. 182/1993 Coll., should have been denied.

Brno, 26 January 2005

Dissenting Opinion of Justice JUDr. Miloslav Výborný

In the adjudicated case the Constitutional Court determined beyond all doubt that the election campaign preceding elections to the Senate of the Parliament of the CR in election district no. 19 in Prague 11 was conducted in a completely unacceptable manner.

The municipal publications which were presented in evidence did not maintain correctness and neutrality; the campaigning against one of the candidate quite exceeded even minimal standards of decency. Even in an election campaign, not everything can be permitted; I deeply disagree with the thesis expressed in the reasoning of the judgment that these concepts (that is, honorable and honest conduct of an election campaign) can not be interpreted in terms of general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes; quite the contrary – these concepts can only be measured according to general morality, because, in my judgment, we can not accept that in addition to general morality there is an additional, pre-election morality, apparently a more benevolent one. The fight for voters' votes also has and must have its rules; those rules are set at both constitutional and statutory levels. Even if the Election Act did not contain § 16 par. 2 on the mandatory honesty and honor of an election campaign, that would change nothing about the fact that a dishonest and dishonorable campaign (of course if of a serious intensity) would as a consequence breach the freedom and objectivity of elections.

It is also important what media - financed by whom -an election campaign is conducted. I fully agree with the majority opinion's conclusions that, in terms Article 5 of the Constitution and Art. 22 of the Charter there is no dispute about the observance of equal access for political parties to media which are published by a public law corporation, that the rule of equal "access" must be applied here because a different approach would be inconsistent with the rules of free competition among political parties under Art. 5 of the Constitution and free competition of political forces under Art. 22 of the Charter, and that these publications, if they give access to political parties, are subject to the principle of equal opportunity which flows from the principle of free competition among political parties and political forces, and that a different approach could indicate to voters that the municipality, as a public law corporation, prefers only certain political parties.

In the adjudicated matter the Constitutional Court reliably determined that an election campaign was conducted in media published by the Municipal Office of Prague 10-Uhříněves, City District Prague-Petrovice and City District Prague-Křeslice, and that equal access for parties or candidates running for election to the Senate did not exist. If the majority therefore concludes in the reasoning of the judgment that this violated the principle enshrined in Art. 5 of the Constitution and Art. 22 of the Charter (with which I have no reason to argue),that determination itself is sufficient to conclude that the election campaign was conducted not only unlawfully (i.e. dishonorably and dishonestly,

which the majority opinion also, in agreement with my opinion, emphasizes), but also unconstitutionally. The only logical consequence should have been denial of the appeal.

If the majority legal opinion argues on the grounds of the absence of even potential causality between the content of the cited publications and the election of J. N., then in my opinion it would be possible to also argue the contrary. Deliberations regarding the extent to which, in a particular case, violation of the Election Act can influence the results of elections can always only be estimates. The majority opinion uses the scale of the so-called sufficiently large degree of probability, and relies on statistical data, which allegedly do not give rise to any logically or statistically documentable conclusion that, upon application of the principle of an absolute majority, there was a great degree of probability that anything would have changed in the results of the second round of elections and that J. N. would not have been elected senator. In my opinion one can reason this way only with certain reservations, because pre-election polls provide a more or less qualified estimate of the results of future elections, and they can not be used to evaluate missteps in an election campaign; post-election statistical data are the results of a possible “darkening” of the election result as a consequence of the cited unlawful and unconstitutional conduct of an election campaign.

Brno, 26 January 2005

Dissenting Opinion of JUDr. Ivana Janů

I criticize the majority opinion of the Plenum of the Constitutional Court primarily because, although in its substantive evaluation it reached the correct factual evaluation in many regards, it did not, in my opinion, draw the correct legal conclusions from that.

The substantive determinations are as follows:

1. The fundamental role of proceedings on an appeal against a decision on verifying the election of a deputy or senator is to guarantee the proper conduct of elections.

The Constitutional Court is ruling on an appeal against a decision by the Supreme Administrative Court and the Senate, but that does not mean that it is bound only by the bounds of § 87 par. 3 to 5 of the Election Act. In the position of a final appeal court in the election judiciary it still remains a judicial body for protection of constitutionality, and the fundamental measure for its decision making are the principles contained in the constitutional order and in the Act on the Constitutional Court. Our election judiciary does not recognize an absolute defect in election proceedings, that is, such violation of an election regulation which would result in automatic annulment of elections. In this regard all potential defects and doubts must be considered relative, and their significance must be measured by their effect on the result of elections, according to the principle of proportionality.

This process is based on the constitutional principle of protection of decisions emerging from the will of the majority manifested in free voting and taking into considerations the rights of minorities (Art. 6 of the Constitution).

2. An election campaign is one of the aspects of evaluation of properly conducted free and democratic elections. If the law does not forbid the use of municipal periodicals in an election campaign, then they can be used for an election campaign only if equal access for the political parties is preserved.

The obligation to guarantee equal access arises from Art. 21 par. 3 of the Charter.

In this case the issue was not whether Ing. Zápotocký had access to these media, but whether publication of the materials in question violated the rules of an election campaign, as provided by § 16 par. 2 of the Election Act.

3. There is no doubt that the media which are at the disposal of local self-governing units must apply the rule of equal "access."

A different approach would be inconsistent with the rules of free competition among political parties under Art. 5 of the Constitution and free competition among political forces under Art. 22 of the Charter. The use of municipal media must be measured for purposes of election campaigning by equal opportunity, and the publisher or operator of such media must weight it is able to guarantee that this principle will be observed. A different approach could suggest to voters that the municipality, as a public corporation, prefers only certain political parties.

There is no dispute that the printed materials published as municipal reporters, because they are in the hands of the public authorities, must remain correct and neutral. In the position of a mayor, a candidate must observe certain rules, because in that position he is a public official, and thus does not have the general freedom of expression as ordinary citizens. In short, he can not use his position as mayor to benefit his election campaign, or someone else's campaign. The submitted materials indicate that the campaigning by the mayors against Ing. A. Z., whether direct or indirect, was not consistent with the requirements of honest and honorable conduct of an election campaign (especially the misuse of an anonymous letter), as can be concluded from § 16 par. 2 of the Election Act.

I agree with these selected theses of the opinion of the Plenum of the Constitutional Court; on the basis of these, and in the context of the full presentation of evidence before the Constitutional Court, I reach the following different conclusions:

I.

The Election Act, § 16 par. 2, provides:

An election campaign must be conducted honorably and honestly, in particular, untrue information may not be published about candidates and the political parties or coalitions on whose candidate lists they are listed.

In this case it is evident that the relevant issues of the Uhříněves Reporter and the Petrovice Reporter contain a strikingly negative campaign aimed at damaging and discrediting one of the candidates in Senate elections. In both cases this campaign involves representatives of state power, mayor J. C., who deals with a three year old anonymous letter (published in the same reporter) as if it were a relevant, signed and correct information. In the second case, a member of the council of City District Petrovice, Ing. P. Ř., conducts an interview with JUDr. M. Č., and the reader learns, to his surprise, what the true face of one of the Senate candidates is. Both cases involve a municipal publication financed from municipal funds, published directly before the elections, and one of them even with a higher print run.

In my opinion the question "who started" this campaign (which the Plenum's majority opinion asks) is not relevant and does not excuse anything. If the principles of honor and honesty of an election campaign were really violated by all the entities involved, that would not produce some hypothetical balanced situation, but the effects of such unlawfulness would be much more intensive, and the election result would be even more deformed. In other words, the effects of unlawful conduct of an election campaign by the competing candidates on the deformation of election results are not "reduced," do not fail to "disturb," but are "added." A dishonorably and dishonestly conducted election campaign in addition to causing the desired shift of election preferences, may have considerable influence on voter participation, an important factor which affects the outcomes of elections.

II.

Another point where I disagree with the Plenum's majority opinion is its concept of honor and honesty in an election campaign, which is expressed in the Plenum's majority opinion as follows: "These concepts can not be interpreted in terms of private law and general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes."

I consider this blessing of dual morality by the Constitutional Court to be unfortunate. In my opinion, decency and honesty are the basis of morality, which is the same in all areas of life. We learn it in the family, we should improve in it in school, and as adults we transfer it to public life. Morality anchors the law in society, and in the interest of protecting morality, if other conditions are met, many of an individual's fundamental rights may be restricted. I grant that it is difficult to define both terms positively, but virtually everyone knows what is impolite and dishonest in a certain situation, both in the private sphere and in public life.

III.

The last point where I dissent is the evaluation of fulfillment of the elements in § 87 par. 4 of the Election Act. The provision of § 87 par. 4 states: A petition to declare elections invalid may be filed by a petitioner if he believes that provisions of this Act were violated in a manner which could influence the results of elections. It is evident that the legislature does not consider a violation of elections other than one which could influence the results of elections to be capable of causing elections to be invalid. Thus, under this provision, a necessary condition for elections to be invalid, is violation of a provision of the Election Act and simultaneously the fact that such violation of the Election Act could influence the results of elections. The Act speaks of the possibility of influencing election results, not the situation that election results were demonstrably influenced. Thus, even the mere possibility that results could be influenced based on a specific violation of the Act is grounds to declare elections invalid under § 87 par. 4 and § 88 par. 2 of the Election Act. The principle of proportionality does not permit discussion of a purely theoretical possibility, but of capacity to influence election results on the basis of a specific violation of the Election Act and related circumstances. A court decision will always be based on the specific circumstance sin a given matter, and it must examine both violation of the Election Act (in this case the provisions concerning election campaigns), and whether it is possible for such violation of the Act to cause election results to be different than if the violation of the Act had not occurred (that is, whether J. N. would have won the elections). Thus, I believe that if election results could have been influenced by the specific violation of the Election Act, it is not realistic, in my opinion, to draw conclusions as to what the results of the second round of elections would have been, had J. N. competed in it with a different candidate, who did not advance to the second round by a small difference in votes, which could have been caused by an unfair election campaign against him. The Act does not impose such an obligation on the election court. In this regard the formulation of the Act is logical, because in the case of elections it is not always possible to conclude what led to election results and what the considerations were that led voters to give their votes to a particular candidate, and what did or did not influence them. Such information is non-verifiable, and so merely speculative.

The foregoing applies all the more so because Senate elections are conducted in a two-round majority elections system. In the first round each voter can cast his vote for the candidate he prefers. Only the two most successful candidates advance to the second round. In the second round, a no longer negligible number of voters decide between two candidates whom they did not vote for in the first round, or perhaps do not take part in the second round at all. In Senate elections, based on election results until now, it is not an unusual event that the victor in the 1st round is then defeated by the second candidate, who is more acceptable to voters, a better compromise, or less unacceptable. (A similar general conclusion from experience with the two-round majority system in other countries is provided by Sartori G.: Srovnávací ústavní inženýrství [Comparative Constitutional Engineering], SLON Publishers, Prague 2001, p. 75 et seq.). In the present matter, this effect is evidenced by the considerable increase in support for the candidate J. J. in the second round, compared to the first round where J. N. won by a much more distinctive

margin. For these reasons, one simply can not predict the results of the 2nd round by reference to the long-term distribution of support for political parties by the electorate. Likewise, one can not argue by using statistics and pre-election polls conducted before the 1st round of elections. The two-round majority system of Senate elections is aimed at the personality of a candidate in an incomparably higher degree than the system of proportional representation, which is aimed at political parties and their programs.

Insofar as the majority opinion states that "the judicial branch can change the decision of the voters, as a sovereign, only in exceptional cases, where defects in the election process caused or could demonstrable cause that the voters would have decided differently and a different candidate would have been elected," I believe that the adjudicated matter is precisely such a case of violation of the Election Act which could influence election results. For these reasons, in my opinion, the elections in election district no. 19 Prague 11 must be considered invalid (as the Supreme Administrative Court declared them). Logically, invalid elections can not produce a validly elected candidate.

IV.

From a comparative viewpoint, my opinion is supported by conclusions in decisions by German courts concerning election matters. For example, the decision of the State Court in Bremen of 7 October 1979 [BremStGHE 4, 111], which declared the obligation of the state (the public power) to maintain neutrality in elections. The German Federal Constitutional Court addressed the issue of conduct inconsistent with good morals in its decision of 8 February 2001 [BverfGe 103, 111], which confirms the competence of an election court to declare elections invalid if it finds that there has been violation of the rules of an election campaign. The same approach is presented in the well-known decision of the Constitutional Court in Hamburg, no. 3/93 of 3 May 1993.

V.

In conclusion, I must emphasize that the fundamental role of the Constitutional Court is to protect democracy. Elections are a process in which democracy is renewed at regular intervals. They are a process where the people (the electorate), as the sovereign, as the constitutive power, gets to speak, in order to create a new governing majority (the constituted power) or change the existing majority, or re-confirm (give a new mandate to) the existing public power. The principle that the rule of the majority takes into consideration protection of the rights of minorities (Art. 6 of the Constitution), expresses the situation that exists during times of elections, where a minority must have a realistic opportunity to become a majority, it the sovereign – the people – so decides. The principle

of strict neutrality of the governing public power is therefore a fundamental requirement on free democratic elections, on which a law-based state is founded.

For all the foregoing reasons I maintain the opinion that the petitioner's appeal, on which the Constitutional Court decided in proceedings under § 85 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, should have been denied.