

## FORMAL AND INFORMAL CONSTITUTIONAL AMENDMENT IN THE CZECH REPUBLIC

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**Abstract:** *The paper, a substantially shortened version of the national report prepared for the congress of the International Academy of Comparative Law in 2018, analyses processes of formal and informal constitutional amendment in the Czech Republic. After outlining the basic relevant characteristics of the Czech constitution (poly-legality, rigidity, etc.), the paper examines procedural issues of formal constitutional amendment and studies further requirements regarding such constitutional changes, esp. the role of Art. 9 of the Constitution. Several varieties of informal constitutional changes are then briefly presented. The paper assesses the current situation regarding processes of both formal and informal constitutional changes, finding the formal requirements prescribed for a constitutional amendment as sufficient for the relative stability of the constitutional system, being neither extremely strict nor benevolent. The paper also points out several open questions regarding the practical application of the unamendability provision of Art. 9(2) of the Constitution in relation to potential constitutional amendments adopted through a constitutional referendum. Finally, the paper deals with the issue of how formal constitutional amendments can impact upon informal constitutional changes, using the example of the introduction of the direct election of the President of the Republic in 2012.*

**Keywords:** *Constitution, formal amendment, informal amendment, unamendability, the Melčák case*

### INTRODUCTION

Debates about practical and theoretical aspects of formal and informal constitutional amendment occupy a central point in today's global but also national constitutional discourse. In the Czech Republic, this phenomenon is related to at least several specific circumstances.

The Czech Republic's Constitution came into force on 1 January 1993 and its period of operation thus currently reaches 25 years. This provokes assessment as to its effectiveness, successes and shortcomings. Moreover, in 2018 we celebrate 100 years since the establishment of Czechoslovakia, a country whose territory consisted throughout its history of, *inter alia*, the Czech historical lands, a country with the law of which the Czech Republic's legal system has declared principal continuity and also a country with which many Czechs mentally identify as with their true constitutional predecessor.<sup>2</sup>

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<sup>1</sup> The paper is a substantially shortened part of the report on processes of formal and informal constitutional amendment in the Czech Republic prepared for the 20<sup>th</sup> Congress of the International Academy of Comparative Law in Fukuoka, Japan in July 2018. Its contents correspond to the specific questions put to national rapporteurs by the general rapporteur on these processes, Prof. Mortimer Sellers. The paper was supported by the Charles University research grant Progres No. Q04 Právo v měnícím se světě (Law in the Changing World).

<sup>2</sup> For a concise overview of the Czechoslovak constitutional and political history, changes in the form of the government and of political regime, as well as of the process of the break-up of real socialism and the restoration of pluralistic democracy, see, e.g., PAVLÍČEK, V., KINDLOVÁ, M. The Czech Republic. In: L. Besselnik – P. Boven-dert – H. Broeksteeg – R. de Lange – W. Voermans (eds.). *Constitutional Law of the EU Member States*. Deventer: Kluwer, 2014.

It is pointed out frequently, sometimes with a hint of uncertainty as to the future, that the democratic system of the Czech Republic exists now for a period longer than the period of the so-called First Czechoslovak Republic (1918–1938), which is considered to be the most democratic era of Czechoslovakia, followed by the totality of, first, Nazism, and, later (with a short break after the end of the Second World War), Communism up until 1989.

At the same time, there are discussions held in the political arena about the possibility of introducing constitutional amendments concerning, for instance, instruments of direct democracy (esp. referenda and recalls). And finally, there is also a debate as to whether the Czech Republic, the constitutional system of which is based, at least to a large extent, on the principles of a parliamentary republic, is in fact moving towards a semi-presidential republic with a considerably strengthened position of the President of the Republic. These debates have recently intensified especially in connection with the introduction of the direct election of the President of the Republic (since 2013) and the way the current President of the Republic exercises some of his powers.<sup>3</sup>

In light of these circumstances, the issue of both formal and informal constitutional amendment in the Czech Republic is very topical. The paper will analyze the topic in the following way. First, it will describe the basic formal characteristics of the Czech constitution, i.e. its poly-legality and rigidity. Then, the process of formal constitutional amendment will be described, as well as further constitutional limitations on amendments. Afterwards, informal varieties of constitutional change will be discussed. The last chapter will be devoted to the assessment of the current situation regarding both formal and informal constitutional amendment in the Czech Republic.

## 1. BASIC CONSTITUTIONAL FRAMEWORK

In continuity with Czechoslovak and Austro-Hungarian constitutional tradition, the Czech Republic has a poly-legal and rigid constitution. Its poly-legality flows juristically from Art. 112(1) of the Constitution<sup>4</sup> (further referred to as “the Constitution”), which defines the content of the so-called “Constitutional Order”, containing sources of law of supreme legal force. Pursuant to that provision, the Constitutional Order consists of the Constitution, the Charter of Fundamental Rights and Freedoms (further also referred to as “the Charter”)<sup>5</sup>, constitutional acts of the former Czechoslovak and Czech

<sup>3</sup> The characteristics of the Czech Republic as a parliamentary republic is, however, accepted with caution by some constitutional scholars who point out that there have always been some, and not irrelevant, modifications from the parliamentary model since the original version of the Constitution (cf. GERLOCH, A. *Ústava a ústavnost v České republice po dvaceti letech* [The Constitution and Constitutionality in the Czech Republic After Twenty Years]. In: A. Gerloch – J. Kysela. (eds.). *20 let Ústavy České republiky (Ohlédnutí zpět a pohled vpřed)* [20 Years of the Constitution of the Czech Republic (A Retrospective and A Perspective)]. Plzeň: Aleš Čeněk, 2013, pp. 25–26).

<sup>4</sup> Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, adopted by the Czech National Council on 16 December 1992.

<sup>5</sup> The Charter was adopted by the Federal Assembly of the Czech and Slovak Federative Republic in 1991 and was passed with an introducing constitutional act regulating important aspects of the Charter’s application (Constitutional Act No. 23/1991 Coll.). However, the introducing constitutional act was not included into the Constitutional Order of the Czech Republic.

parliaments<sup>6</sup> defining the state borders of the Czech Republic, constitutional acts of the Czech National Council adopted after the sixth of June 1992<sup>7</sup> and “constitutional acts adopted pursuant to the Constitution”. “Constitutional acts adopted pursuant to the Constitution” are acts which were or will be adopted pursuant to Art. 9(1) in conjunction with Art. 39(4) of the Constitution. These provisions provide that the Constitution (here in the sense of the entire Constitutional Order) may be supplemented or amended only by constitutional acts<sup>8</sup> and that the adoption of such acts requires the consent of three fifths of all deputies and three fifths of senators in attendance.<sup>9</sup> Because ordinary acts require the consent of more than half of members of each chamber in attendance (with the possibility that the Chamber of Deputies surpasses the Senate’s disapproval or amendments by more than half of all deputies), the process of adopting constitutional acts is more demanding than the regular legislative procedure. A constitutional amendment could also be a result of a referendum provided that a constitutional act was adopted authorizing such a referendum [Art. 2(2) of the Constitution]. The rigidity of the Constitution is further strengthened by the provision of Art. 9(2) of the Constitution containing the prohibition of “any change in respect of essential requirements of the democratic law-based state” and by the provision of Art. 9(3) of the Constitution, pursuant to which “Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.”

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<sup>6</sup> The National Assembly of the Czechoslovak Republic (the legislative body pursuant to the Constitutional Charter of 1920, the Constitution of 1948 and the Constitution of 1960), the Federal Assembly of the Czechoslovak Socialist Republic (the legislative body of the Czechoslovak federation pursuant to the Constitutional Act on the Czechoslovak Federation of 1968) and the Czech National Council (the legislative body of the Czech (Socialist) Republic – one of the two member states of the Czechoslovak federation pursuant to the Constitutional Act on the Czechoslovak Federation of 1968).

<sup>7</sup> Constitutional Act of the Czech National Council No. 4/1993 Coll., on Measures Related to the End of the Czech and Slovak Federative Republic, and No. 29/1993 Coll., on Several Further Measures Related to the End of the Czech and Slovak Federative Republic (both adopted in December 1992).

<sup>8</sup> The Constitutional Court understands Art. 9(1) of the Constitution as a “competence norm” authorizing the Parliament to adopt constitutional acts and asserts that constitutional acts which do not “amend” or “supplement” the Constitution in the sense of changing the text or adding to it further norms of a general nature, must be based on some other specific constitutional provision authorizing the adoption of a constitutional act with a specific subject-matter [e.g. Art. 100(1) of the Constitution pursuant to which a higher self-governing territorial unit can be created only by a constitutional act], or their adoption must be justified by the protection of principles protected by Art. 9(2) of the Constitution (essential requirements of the democratic law-based state) (the *Melčák* case: ruling of the Constitutional Court of 10. 9. 2009 File No. Pl. ÚS 27/09, No. 318/2009 Coll. In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1/>>). This interpretation of Art. 9(1) of the Constitution as a competence norm has been criticized and remains very controversial. Its opponents find the general competence norm for adopting (constitutional) acts in the provision of Art. 15(1) of the Constitution (“Legislative power in the Czech Republic is vested in the Parliament”) and claim that this competence is only limited via procedural rules for adopting constitutional legislation – esp. Art. 39(4) and other related provisions – and by the principles protected by Art. 9(2) of the Constitution (e.g. papers by Jan Wintr and Vladimír Míkule in a special thematical edition of *Jurisprudence*. 2010, No. 1, pp. 16–17, 20–21, cf. also dissenting opinions in the *Melčák* case).

<sup>9</sup> Deputies are members of the Chamber of Deputies, a chamber of the Czech Parliament, to which the Government is politically accountable. Senators are members of the Senate, the second chamber of the Czech Parliament.

Despite the wording of Art. 112(1) of the Constitution (enumerating which norms fall within the Constitutional Order), the Czech Constitutional Court has construed the Constitutional Order more extensively and has added ratified human rights treaties binding on the Czech Republic into its scope.<sup>10</sup>

## 2. PROCESS OF FORMAL CONSTITUTIONAL AMENDMENT

In the Czech Republic, the process of the adoption of a formal constitutional amendment does not differentiate between a (simple) amendment to the Constitution and a revision (major reconstruction) of the Constitution.

A constitutional bill, in the same way as an ordinary bill, can be introduced by any deputy or group of deputies, by the Senate (as a body, not individual senators), the Government and a representative council of a higher territorial self-government unit.<sup>11</sup> The bill must be introduced in the Chamber of Deputies, which is one of those aspects which create a more privileged position of this chamber of Parliament in the legislative process [Art. 41 of the Constitution]. If the constitutional bill is not approved in the Chamber of Deputies, the legislative process cannot continue in the Senate. Otherwise, however, in relation to constitutional bills, the position of the Senate is roughly equal to that of the Chamber of Deputies and the usual aspects of the more privileged position of the Chamber of Deputies in the legislative process do not apply (*infra*).

Once the constitutional bill is introduced in the Chamber of Deputies, the Government has a right to express its opinion on it (in case it is not the body introducing the bill).

In the Chamber of Deputies, the constitutional bill must be approved by three fifths of all deputies [Art. 39(4) of the Constitution], which means 120 out of 200 deputies.<sup>12</sup> Once the bill is approved, it is sent without further delay to the Senate. To be approved, the bill requires the consent of three fifths of senators in attendance, i.e. 49 out of 81

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<sup>10</sup> Ruling of the Constitutional Court of 25. 6. 2002 File No. Pl. ÚS 36/01 (No. 403/2002 Coll.). In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20020625-pl-us-3601-bankruptcy-trustee-1/>> and RYCHETSKÝ, P., LANGÁŠEK, T., HERC, T., MLSNA, P. *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*. [The Constitution of the Czech Republic. The Constitutional Act on the Security of the Czech Republic. Commentary]. Praha: Wolters Kluwer, 2015, p. 111 (Mlsna, P.) and 1123 (Baroš, J.).

<sup>11</sup> Rules under which individual senators can initiate the Senate's constitutional initiative are provided in Act No. 107/1999 Coll., on the Rules of Procedure of the Senate, as amended.

<sup>12</sup> RYCHETSKÝ, P., LANGÁŠEK, T., HERC, T., MLSNA, P. *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*. [The Constitution of the Czech Republic. The Constitutional Act on the Security of the Czech Republic. Commentary]. Praha: Wolters Kluwer, 2015, p. 384 (Herc, T.) argue that the pertinent majority must be counted exactly from the number of deputies stipulated by the Constitution, i.e. 200. On the other hand, pursuant to Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, as amended, there are two exceptional situations in which the full composition of the Chamber of Deputies may decrease [§ 54(2)(3)] and some commentators accept that the required 3/5 majority will be counted from the decreased number of deputies in this case (in BAHÝLOVÁ, L., FILIP, J., MOLEK, P., PODHRÁZKÝ, M., SUCHÁNEK, R., ŠI-MÍČEK, V., VYHNÁNEK, L. *Ústava České republiky. Komentář* [The Constitution of the Czech Republic. Commentary]. Praha: Linde Praha, 2010, pp. 470 and 475 (Suchánek, R.).

senators in the case of the Senate's full composition and attendance.<sup>13</sup> If the bill fails to win the support of the required majority in the Senate, the legislative process comes to an end. Due to the fact that the Constitution prescribes that constitutional bills must be consented to by both chambers, the Chamber of Deputies cannot outvote the Senate as it is able to do in the case of ordinary bills. Also, the Senate is not bound by the time-limit of 30 days since the reception of the bill from the Chamber of Deputies, which applies in respect of ordinary bills [Art. 46(1) of the Constitution]. This was controversial for some time but the legislative practice in relation to constitutional bills, as well as the case-law of the Constitutional Court, have supported the view that the time limit does not bind the Senate in the case of bills which require the approval of both chambers (i.e. acts enumerated in Art. 40 of the Constitution – e.g. electoral legislation – and constitutional acts).<sup>14</sup> The legislative fiction of the Senate's approval of a bill, which is connected with the lapse of this time limit in relation to ordinary acts, does not therefore apply in the case of constitutional bills either.

The Senate can approve the constitutional bill with amendments, even though there were originally controversies in this respect, too. If that happens, the Chamber of Deputies votes on the amended bill again and three fifths of all deputies are necessary for the approval. The Chamber of Deputies can also further amend the bill, in which case the bill is again passed to the Senate. The legislative process in Parliament comes to an end either with the approval of the same version of the bill in both chambers, or with the non-adoption of the bill in either chamber. Importantly, the bill must be adopted by both chambers before the expiry of the Chamber of Deputies' session (ending with the expiry of its electoral term); otherwise the legislative process ends and cannot continue.<sup>15</sup>

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<sup>13</sup> In the case of the Senate, it may happen that the actual number of serving senators is lower than the constitutionally stipulated 81. Senators are elected by absolute majority vote and if a senator's mandate falls vacant (because of resignation, death etc.), additional election takes place. In the meantime, the number of senators is thus lower. Also, the additional election does not take place if the mandate falls vacant during the last year of the senator's electoral period. It may also happen that the Senate works only with max. 54 senators. Every two years, one third of senators is elected for the 6 year long electoral period. If the mandate of one third of senators has lapsed but the newly elected third of senators have not yet participated in the Senate's work (they start at the moment of the first meeting of the Senate in the new composition), there may temporarily serve only the two thirds of senators elected in the previous two elections. However, even if in practice the Senate sometimes does conduct its activities during this intermezzo, it is recommended that it does not do so unless there are some specific circumstances (e.g. time-limits in the regular legislative process) (RYCHETSKÝ, P., LANGÁŠEK, T., HERC, T., MLSNA, P. *Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Komentář*. [The Constitution of the Czech Republic. The Constitutional Act on the Security of the Czech Republic. Commentary]. Praha: Wolters Kluwer, 2015, p. 353 (Herc, T.). Nevertheless, it is theoretically possible that a constitutional act may be approved in the Senate by the mere number of 11 senators (in the situation with 54 serving senators, one third of them – 18 forming the necessary quorum for adopting resolutions – and 3/5 of them being 11 members (BAHÝLOVÁ, L., FILIP, J., MOLEK, P., PODHRÁZKÝ, M., SUCHÁNEK, R., ŠIMÍČEK, V., VYHNÁNEK, L. *Ústava České republiky. Komentář* [The Constitution of the Czech Republic. Commentary]. Praha: Linde Praha, 2010, p. 477 (Suchánek, R.).

<sup>14</sup> E.g. SLÁDEČEK, VL., MIKULE, VL., SYLLOVÁ, J. *Ústava České republiky. Komentář* [The Constitution of the Czech Republic. Commentary]. C. H. Beck, 2007, p. 295 (Syllová, J.) and ruling of the Constitutional Court of 22. 6. 2005 File No. Pl. ÚS 13/05 (No. 283/2005 Coll.). In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20050622-pl-us-1305-role-of-the-senate-1/>>.

<sup>15</sup> § 2 of Act No. 300/2017 Coll., on Principles of Conduct and Interaction between the Chamber of Deputies and the Senate in Their Mutual Relations and Externally and on Amending Act No. 90/1995 Coll., the Rules of Procedure of the Chamber of Deputies, as amended (the Interaction Act).

The newly adopted constitutional act is signed by the chairperson of the Chamber of Deputies, the President of the Republic and the Prime Minister. The President of the Republic has no veto power in relation to constitutional acts [as opposed to ordinary acts, Art. 50(1) of the Constitution]. The bill is then published in the Collection of Acts, which is the official publication source, and becomes a valid source of law.

### 3. FURTHER REQUIREMENTS REGARDING CONSTITUTIONAL AMENDMENT THE UNAMENDABILITY RULE IN THE CONSTITUTION

Apart from the qualified majorities prescribed for the adoption of constitutional acts, the Constitution also provides that it may only be “amended and supplemented” by constitutional acts [Art. 9(1)] and that “[a]ny changes in the essential requirements for a democratic law-based state are impermissible” [Art. 9(2) of the Constitution]. The Czech constitutional experience prove that these two provisions can be closely intertwined, that it is very important how the Constitutional Court construes their meaning and how it approaches, *inter alia*, the issue of whether it is in *its* competence to review constitutional acts as to their constitutionality.

Art. 9(2) of the Constitution is the Czech representative of an unamendability provision. It differs from its main foreign inspiration – Art. 79(3) of the German Grundgesetz – by the fact that it does not specify certain ground principles which may not be changed even by a constitutional amendment. Art. 9(2) of the Constitution does not proclaim what it means by the essential requirements of the democratic law-based state and thus leaves this question to doctrinal analysis and interpretation by constitutional authorities and especially the Constitutional Court. The provision has not become a mute or toothless constitutional imperative. The Constitutional Court, identifying the “essential requirements” with *the material core of the Constitutional Order*, has applied it on various occasions, in the sphere of constitutional review of legislation, in proceedings concerning individual constitutional complaints, as well as in other types of proceedings. The provision is usually used only as a supporting argument in the Court’s reasoning but it formed a primary and fundamental basis for a novel and rather unexpected decision in several cases, too.

Doctrinal approaches differ as to the range of principles protected by Art. 9(2) of the Constitution. Some authors point to principles stipulated in a few specific provisions of the Constitution [e.g. Art. 1(1), Art. 5 and 6], while some authors stress that not all changes concerning principles regulated in those provisions would amount to a change “in the essential requirements for a democratic law-based state”.<sup>16</sup> The Constitutional Court has chosen a case-by-case approach and refrains from providing an authoritative definition (or enumeration) of the essential principles. However, its general value approach can be inferred from its case-law in which the Court stressed the principle of substantive Reschtsstaat, the principle of inherent, inalienable, non-prescriptible, and non-repealable

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<sup>16</sup> Various opinions with references to authors are summarised in PREUSS, O. Demokratický právní stát tesaný do pískovce [Democratic State Governed by the Rule of Law Carved into Sandstone]. *Časopis pro právní vědu a praxi*. 2016, Vol. 24, No. 3, p. 371.

fundamental rights and freedoms, the principles of democracy, the sovereignty of the people, and the separation of powers as principles which cannot be encroached upon even by a constitutional amendment adopted procedurally in harmony with the Constitution.<sup>17</sup>

Some authors claim that even if the Constitution did not contain an explicit unamendability rule in Art. 9(2), the relevant principles would in any way be impliedly under the protection of the Constitution as principles the change of which is impermissible. They rely on the argument that the constitution-maker did not establish these principles as unamendable but simply confirmed them because they are outside the competence of the constitution-maker's mandate.<sup>18</sup>

Until today, the most important constitutional case regarding the application of Art. 9(1) and (2) of the Constitution is the landmark *Melčák case*.<sup>19</sup> It concerned the review of constitutionality of a constitutional act which provided for a shortening of the fifth electoral term of the Chamber of Deputies.<sup>20</sup> That legislation was adopted as a constitutional act [it was passed by the required qualified majorities in both chambers of Parliament pursuant to Art. 39(4) of the Constitution] with the aim to call elections to the Chamber of Deputies earlier than it would have corresponded with the end of the regular 4-year long electoral period prescribed by the Constitution. Although the Constitution regulated (at that time) four possibilities for an earlier dissolution of the Chamber of Deputies, these were considered by the then constitutional majorities in both chambers as lengthy and awkward at the moment. Moreover, they could point to a constitutional precedent in this regard because a similar constitutional act for an *ad hoc* dissolution of the Chamber of Deputies had been adopted back in 1998, at that time without any challenge before the Constitutional Court.

Mr Melčák, a deputy, filed a constitutional complaint to the Constitutional Court against the decision of the President of the Republic to call prior elections to the Chamber of Deputies, arguing, *inter alia*, that the decision violated his constitutional right to equal access to an elected and other public office [Art. 21(4) of the Charter], which, in harmony with the Court's previous case-law on that Charter provision, includes the right to exercise the function without undue (unlawful) hindrance. In addition, as a constitutional petitioner, he used his right pursuant to the Act on the Constitutional Court to propose the repeal of the relevant legislation upon which the decision of the President of the Republic was based. The legislation in issue was the pertinent constitutional act.

The case raised a question of whether it was within the Constitutional Court's competence to review constitutionality of constitutional acts. The majority of judges answered

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<sup>17</sup> E.g. the *Lisbon I case*: Ruling of the Constitutional Court of 26. 11. 2008 File No. 19/08 (No. 446/2008 Coll.), par. 93. In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>>.

<sup>18</sup> BAHÝLOVÁ, L., FILIP J., MOLEK, P., PODHRÁZKÝ, M., SUCHÁNEK, R., ŠIMÍČEK, V., VYHNÁNEK, L. *Ústava České republiky. Komentář* [The Constitution of the Czech Republic. Commentary]. Linde Praha 2010, p. 157 (Šimíček, V.).

<sup>19</sup> Ruling of the Constitutional Court of 10. 9. 2009 File No. Pl. ÚS 27/09 (No. 318/2009 Coll.). In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>>. For a thorough analysis and critique see, e.g., ROZNAI, Y. *Legisprudence Limitations on Constitutional Amendments? Reflections of the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*. *ICL Journal*. 2014, Vol. 8, No. 1.

<sup>20</sup> Constitutional Act No. 195/2009 Coll.

the question affirmatively. The Court found the necessary competence in Art. 87(1) a) of the Constitution (“the Constitutional Court has jurisdiction to repeal acts or individual provisions thereof if they contradict the Constitutional Order”) when it construed its text as covering not only ordinary acts but also constitutional acts. The Court argued that this interpretation was necessary in view of Art. 9(2) of the Constitution and that the constitution-maker would otherwise explicitly state that constitutional acts cannot be repealed by the Court. The Court also noted that its role of the protector of constitutionality (Art. 83 of the Constitution) would be otherwise eliminated.

After the Constitutional Court solved the jurisdictional issue, it moved to the assessment of the pertinent constitutional act. It held that the Constitution requires that any constitutional amendment must fulfil three conditions: First, it must be adopted in harmony with the procedural rules of the Constitution regarding the necessary majorities in both chambers of Parliament. Second, it must adhere to the requirement stipulated in Art. 9(1) of the Constitution and thus “amend or supplement” the Constitution, or be based on some other specific constitutional provision foreseeing the adoption of a constitutional act with a specific individual subject-matter [e.g. Art. 100(3) of the Constitution], or be justified by the need to protect the essential requirements of the democratic law-based state protected by Art. 9(2) of the Constitution in some extreme emergency situation.<sup>21</sup> Third, the amendment must not violate the proscription of Art. 9(2) of the Constitution.

In the case at hand, the Court found that the relevant legislation did not pass the two latter conditions. It was not an amendment of the Constitution or its supplement but rather a diversion from the Constitution or its suspension (breach) for an *ad hoc* situation.<sup>22</sup> Moreover, the act violated the principle of the generality of acts (laws) and prohibition against retroactivity considered by the Court as a part of the essential requirements of the democratic law-based state.<sup>23</sup>

The unamendability rule in Art. 9(2) of the Constitution also affected the Constitutional Court’s interpretation of constitutional amendments adopted by the Parliament, sometimes in a rather controversial way.<sup>24</sup> In addition, the provision of Art. 9(2) has had an im-

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<sup>21</sup> See fn. No. 8.

<sup>22</sup> The Court also explained its understanding of the concepts of an “amendment” and a “supplement” of the Constitution: “A supplement to the constitution can be characterized by the fact that the supplemented constitutional provision does not change, and the supplemented and supplementing provisions are not inconsistent. An amendment to the constitution means that a specific constitutional provision is annulled or partly annulled and perhaps (not necessarily) a new provision is established. In a breach, the constitution is not annulled, but the breached (in this case, suspended) provision and the breaching (in this case, suspending) provision are inconsistent.” (part VI./a).

<sup>23</sup> For an English critique see ROZNAI, Y. *Legisprudence Limitations on Constitutional Amendments? Reflections of the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act*. *ICL Journal*. 2014, Vol. 8, No. 1.

<sup>24</sup> Ruling of the Constitutional Court of 25. 6. 2002 File No. Pl. ÚS 36/01 (No. 403/2002 Coll.), dealing with the status of ratified human rights treaties. In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20020625-pl-us-3601-bankruptcy-trustee-1/>>. Further details in BOBEK, M., KOSAŘ, D. *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*. In: G. Martinico – O. Pollicino (eds.). *National Judges and Supranational Laws. A Comparative Overview on the National Treatment of EU Law and the ECHR*. Amsterdam: Europa Law Publishing, 2010, pp. 157–190.



portant role in terms of the Czech Republic's legal stance towards the EU law. In the *Lisbon I* case, in which the Court assessed the compliance of the Lisbon Treaty with the Constitutional Order, the Court followed its previous case-law and held that the delegation of powers of the Czech Republic upon the European Union (based on Art. 10a of the Constitution) “must not go so far as to impair the very essence of the republic as a sovereign and democratic state governed by the rule of law and based on the respect for rights and freedoms of man and citizen or establish a change in the essential requirements of the democratic state based on the rule of law.” It also held that despite the fact that it feels the requirement to regularly apply the principle of Euro-conforming interpretation, this cannot result in an “implicit Euro-amendment” of the Constitution. Therefore, “in the event of a clear conflict between the domestic Constitution and European law that cannot be cured by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its material core, must take precedence.”<sup>25</sup>

#### 4. INFORMAL CONSTITUTIONAL AMENDMENT (CHANGE)

The Czech constitutional doctrine describes an informal constitutional amendment or change (*ústavní proměna* or *přeměna*) as “a change in the contents of constitutional norms, without the text of the constitution changing on its face.”<sup>26</sup> This type of change, in the sense of the German *Verfassungswandlung*, can take various forms, some of which are outlined *infra*. It may not be always obvious whether it is a real change of the applicable constitutional norm or, rather, its specification, making it more precise or certain where there was originally uncertainty as to the contents of the norm. The answer may differ depending on how relevant constitutional provisions are construed in the first place.

One form of an informal constitutional change may be a change through actual practice – e.g. when a constitutional body does not use a power it is vested with by the constitutional text. An example might be that despite the text of Art. 63(1) b) of the Constitution, authorizing the President of the Republic to negotiate treaties by himself/herself, the President of the Republic practically always authorizes the Government to negotiate (the same constitutional provision explicitly establishes the power of the President of the Republic to do so).<sup>27</sup>

New sub-constitutional legislation can also amount to an informal change of the Constitutional Order. Provisions in the Constitution or other constitutional acts which are very general or brief and refer to an implementing act undergo a change with the modification of the relevant legislation (e.g. the Citizenship Act, electoral legislation, legislative regulation of territorial self-government).<sup>28</sup>

<sup>25</sup> Ruling of the Constitutional Court of 26. 11. 2008 File No. 19/08 (No. 446/2008 Coll.), par. 93. In: *Ústavní soud* [online]. [2018]. Available at: <<https://www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/>>.

<sup>26</sup> FILIP J. *Ústavní právo České republiky (Základní pojmy a instituty. Ústavní základy ČR)* [Constitutional Law of the Czech Republic (Fundamental Concepts and Institutes. Constitutional Fundamentals of the Czech Republic)]. Brno: Václav Klemm, 2011, p. 78.

<sup>27</sup> FILIP J. *Ústavní právo České republiky (Základní pojmy a instituty. Ústavní základy ČR)* [Constitutional Law of the Czech Republic (Fundamental Concepts and Institutes. Constitutional Fundamentals of the Czech Republic)]. Brno: Václav Klemm, 2011, p. 78.

<sup>28</sup> *Ibid.*

An important source of a constitutional change can be found in the case-law of the highest courts, especially the Constitutional Court, construing constitutional provisions and sometimes coming to conclusions which substantially divert from the constitutional text. An example might be a case in which the Constitutional Court construed the provision of Art. 62 f) of the Constitution pursuant to which the President of the Republic “appoints from among judges the chairperson and vice-chairpersons of the Supreme Court” as limiting the group of eligible judges only to judges already appointed to the Supreme Court and excluding judges of other courts.<sup>29</sup>

The fact that the conclusion as to whether or not an informal constitutional change takes place is not always clear-cut due to the primary disagreement about the correct construction of a particular constitutional provision can be illustrated, e.g., on the rule that the resignation of the Prime Minister also means the resignation of the entire Government (so that no collective decision of the Government is necessary for this purpose).

Whereas some constitutional scholars argue that this rule, not explicitly stipulated in the constitutional text, flows from a systematic construction of the Constitution, others consider exactly this construction as, more properly, an informal constitutional change.<sup>30</sup> This construction has also been supported by the relevant constitutional practice, probably amounting to an already established constitutional convention.<sup>31</sup>

Although it is regularly accepted that constitutional conventions have an important role in informal constitutional change, their understanding and position in the constitutional system of the Czech Republic is not entirely clear. It is ambiguous, for instance, how constitutional conventions relate to customs (in the Czech practice, they are sometimes treated as synonyms), what prerequisites must be fulfilled before the existence of a convention is recognised, how long a required practice must last and whether its existence requires the following of the same practice by constitutional bodies with different persons in office (e.g. two Presidents of the Republic), whether they are sources of constitutional law and in what ways courts can employ them in their decision-making. The Constitutional Court referred to constitutional conventions only in a handful of cases and used that reference as an instrument supporting a chosen interpretation of the text of the Constitution. A number of (former) constitutional judges hold or held the view that constitutional conventions are sources of constitutional law with the force to decide which construction of a consti-

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<sup>29</sup> Ruling of the Constitutional Court of 12. 7. 2007 File No. Pl. ÚS 87/06.

<sup>30</sup> FILIP, J. *Ústavní právo České republiky (Základní pojmy a instituty. Ústavní základy ČR)* [Constitutional Law of the Czech Republic (Fundamental Concepts and Institutes. Constitutional Fundamentals of the Czech Republic)]. Brno: Václav Klemm, 2013, p. 78.

<sup>31</sup> KYSELA, J. *Ústavní principy, ústavní konvence a ústavní inženýrství* [Constitutional Principles, Constitutional Conventions and Constitutional Engineering]. In: K. Klíma – J. Jirásek. *Pocta Jánů Gronsckému* [Festschrift for Ján Gronscký]. Plzeň: Aleš Čeněk, 2008, p. 136.

tutional text should prevail, or which could even modify applicable constitutional norms.<sup>32</sup>

All in all, not only the nature and status of constitutional conventions but the entire multifaceted sphere of informal constitutional change deserves, undeniably, more systematic academic attention in the Czech Republic, which is, however, on the rise. It is probably a logical result of the flow of time, the growing experience with the life of the constitution and, also, the global trend in studying the subject.

## 5. ASSESSMENT OF THE CURRENT SITUATION REGARDING FORMAL AND INFORMAL CONSTITUTIONAL AMENDMENT

The quantitative requirements to be met for a formal constitutional amendment, i.e. the consent by the prescribed three fifths of all deputies and three fifths of senators in attendance (and the same majorities for the potential adoption of a constitutional act authorizing a nation-wide constitutional referendum) provide the relative stability of the Constitutional Order, being neither extremely strict, nor too benevolent.<sup>33</sup> The Constitutional Court's jurisprudence regarding the necessary prerequisites for a constitutional amendment and the Court's preparedness to intervene against constitutional amendments newly adopted by the Parliament provide another control mechanism, which may prove valuable in the future, even though one may disagree with its actual outcome in the *Melčák* case. Many open questions remain, though. Uncertainty surrounds not only the interpretation of the concept of the "essential requirements of the democratic law-based state" but also the level of vigilance of the Constitutional Court in different constitutional situations. Would, for instance, the same active approach be applied in relation to a constitutional amendment adopted through a referendum? How would the Court assess the impact of the difference between constitutive power and constituted power (including the derivative constitution-maker) in such a situation? The Czech Constitution was never subject to a formal approval in a referendum and was adopted by the Czech National Council, elected in 1992 as a legislative body of the Czech Republic – then a member state of the Czechoslovak federation. Would the idea of the superiority of the "essential requirements of the democratic law-based state" in Art. 9(2) of the Constitution over *any* constitutional amendment based on the Constitution be as actively enforced against an

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<sup>32</sup> KYSELA, J. Ústavní principy, ústavní konvence a ústavní inženýrství [Constitutional Principles, Constitutional Conventions and Constitutional Engineering] In: K. Klíma – J. Jirásek. *Pocta Jánu Gronskému* [Festschrift for Ján Gronský]. Plzeň: Aleš Čeněk, 2008, and KINDLOVÁ, M. Ústavní zvyklosti jako součást ústavy (komparace commonwealthského přístupu a judikatury Ústavního soudu ČR) [Constitutional Conventions as Part of the Constitution (a Comparison between the Commonwealth Approach and the Case-Law of the Constitutional Court of the Czech Republic)]. In: K. Klíma – J. Jirásek. *Pocta Jánu Gronskému* [Festschrift for Ján Gronský]. Plzeň: Aleš Čeněk, 2008, p. 121 and 300 respectively. A question which remains unclear is the problem of whether constitutional practice under previous Czechoslovak constitutions can be relevant when deciding whether or not a constitutional convention came into existence (e.g. in the context of the exercise of the power of the President of the Republic to issue pardons and amnesties – Ruling of the Constitutional Court of 19. 6. 2018 File No. Pl. ÚS 36/17).

<sup>33</sup> However, specific requirements for a valid decision in the referendum (quorum, the required majority) would depend on the regulation in the pertinent authorizing constitutional act.

amendment approved in a referendum (according to the prevailing doctrine in the domain of the constituted power), as it was against the Parliament?

In the Czech Republic, similarly as in other countries, there have been warnings against too a strong intervention of the Constitutional Court in democratic processes through the protection of the principles guaranteed in Art. 9(2) of the Constitution. The Court is being advised to heed “methodological prudence, transparency in argumentation and moderation in results because political powers do not have a legitimate and legal possibility, within the system, to “outvote” the Constitutional Court. The people in the sense of a constitutive power is an abstract notion and its ability of convincing the actual people (voters) and bodies derived from them, about its prohibitions through the mouths of constitutional justices is limited.”<sup>34</sup>

In the current political situation in which the number of political parties in the Chamber of Deputies is on its record height (9 parties), new political parties entered the stage and traditional political parties undergo a period of decline and self-reflection, the consensus on the adoption of major formal constitutional amendments in both parliamentary chambers appears rather unlikely.

Nevertheless, especially the topic of strengthening instruments of direct participation of citizens in the management of public affairs is an *evergreen* in the Czech parliamentary practice and even now there are parts of the political spectrum in the Parliament which do promote these efforts and propose constitutional amendments to achieve that goal. They face, however, certain skepticism caused by, *inter alia*, the experience with a constitutional amendment also adopted with the aim to promote more direct participation of the people in the constitutional system – the introduction of the direct election of the President of the Republic by the people by Constitutional Act No. 71/2012 Coll. – and especially with its aftermath.

The experience is, first, an example of one actual tendency we see in the processes of informal constitutional change in the current Czech Republic. More generally, however, it is also an example of the possible relationship between a formal constitutional amendment and an informal constitutional change (the amendment contributing to tendencies of the informal change).

Both presidential campaigns and electoral results under the new legislative regime (in 2013 and 2018) intensified negative aspects of divisions within society (aggressive expressions on social networks regarding the candidates and their supporters, etc.). In addition, the exercise of some presidential powers by the current President Miloš Zeman has provoked criticisms that he oversteps his position pursuant to the Constitution. Despite the fact that powers of the President of the Republic were not formally changed in the Constitution<sup>35</sup> and that the explicit legislative intention behind the pertinent constitutional amendment was to maintain his constitutional position, in reality the exercise of office by the President of the Republic has been strongly influenced by the appeal to the newly

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<sup>34</sup> KYSELA, J. *Ústava mezi právem a politikou (Úvod do ústavní teorie)* [The Constitution Between Law and Politics (The Introduction To Constitutional Theory)]. Praha: Leges, 2014, p. 233.

<sup>35</sup> With one exception which, however, *curtailed* the power of the President of the Republic to issue pardons.

acquired direct democratic legitimacy. Admittedly, the text of individual provisions in the Constitution may be, in some instances, construed in different ways and finding their meaning requires systematic construction. This is also true in respect of provisions regulating several presidential powers which may be construed either more extensively or more restrictively and the President of the Republic tends to lean (but not always) to the more extensive interpretation. The direct democratic link to the citizenry is very relevant in this context, although concerns over extensive interpretation of several presidential powers predated the introduction of direct election and related to both previous presidents elected by Parliament, too. Opponents of the more extensive construction of presidential powers usually argue by the principle explicitly stipulated in the Constitution that the supreme power of the executive is the Government [Art. 67(1) of the Constitution], which is politically accountable to the Chamber of Deputies, whereas the President of the Republic is constitutionally characterized as the head of state not accountable for the performance of his office (except for the process of impeachment for high treason or other severe infringement of the Constitutional Order, which can, however, be initiated only with the consent of constitutional majorities in both chambers of Parliament) and with substantial immunities [Art. 54(1) and (3) and Art. 65 of the Constitution].

Especially the exercise of presidential powers regarding the relationship with the Government has been symptomatic of these controversies. In the sphere of appointing the Government, President Zeman was, for instance, criticized for forming a *de facto* presidential government in 2013, despite the will of the relevant political parties in the then Chamber of Deputies (the Government ruled for a number of months without the confidence of the chamber), or for his expressions that he may, for political, and not only legal, reasons refuse to appoint other Government members proposed by the Prime Minister, which contravenes practice followed in the past and, according to some commentaries, even followed as a constitutional convention.<sup>36</sup> Also, in 2017, the President's construction of the constitutional rule on the resignation of the Prime Minister as meaning the resignation of the Prime Minister only rather than of whole Government was, again, considered as innovatory (and unconstitutional) by many constitutional lawyers, commentators and the Prime Minister himself (who, in the end, did not resign).

Another field concerns the scope of presidential powers under Art. 63 of the Constitution. These powers are specific for their close connection with the Government because any decision of the President of the Republic made within these powers requires a countersignature of the Prime Minister or another member of the Government designated by the Prime Minister. Without the cooperation between the President of the Republic and the Prime Minister, the decision of the President of the Republic is not valid. If the decision is countersigned, the Government takes accountability for it before the Chamber of Deputies. The experience (not only with President Zeman but also with previous Presi-

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<sup>36</sup> WINTR, J., ANTOŠ, M., KYSELA, J. Direct election of the president and its constitutional and political consequences. *Acta Politologica*. 2016, Vol. 8, No. 2, pp. 145–163, [2018]. Available at: <<https://acpo.vedeckecasopisy.cz/publicFiles/001181.pdf>>. The consequences of the direct election are also described by ŠLOSARČÍK, I. Constitutional Development in the Czech Republic in 2013–2017: Direct Presidential Elections and Their Constitutional Consequences. *European Public Law*. 2018, Vol. 24, No. 1, pp. 43–53.

dents Václav Klaus and Václav Havel) has been marked by controversies in the exercise of these presidential powers, not only as regards issues when a formal decision is being made (e.g. appointing ambassadors, and judges, etc.) but also, for instance, in the area of representing the state externally when the Government and the President of the Republic were sometimes speaking “in different voices”.

This brief exposition of one tendency we currently experience in the Czech Republic provides insights into the potential effect a formal constitutional amendment can have upon informal constitutional changes. Here, a formal constitutional amendment introducing the direct election of the President of the Republic and thus strengthening his formal democratic legitimacy has reinforced controversies as regards the true meaning of the constitutional regulation of presidential powers and their relationship towards the Government and other constitutional bodies. Of course, other factors are relevant in the understanding of the whole context such as the tradition of very strong personalities in the office of Czech Presidents and formerly Czechoslovak Presidents, backed by the image of “the Castle” in the minds of many Czechs, the history of previous instances of stepping outside the expected mode of conduct by the President of the Republic and still keeping the general respect for the office, etc. Most commentators agree that the Czech Republic has not shifted to the system of semi-presidential form of government yet, especially because the President of the Republic has only a limited array of his own, exclusive powers (not connected with the Government or other constitutional bodies). However, it is clear that a more robust interpretation of some presidential powers has been on the rise and that it is crucial how other constitutional bodies and the general political elite react to it and also what the reaction of the electorate is. The more acquiescence, the more potential for an informal constitutional change in the direction of a stronger presidential office.

These and other developments provide potent stimuli for further assessment of processes of formal and informal constitutional amendment in the Czech Republic and elsewhere and especially for a more focused analysis of phenomena like constitutional conventions and their working in the constitutional system, evolving methods of political or legal (esp. judicial) control over the exercise of constitutional bodies’ powers, as well as theoretical and practical limits of such methods (e.g. the doctrine of comity, the political question doctrine, judicial self-restraint in relation to certain presidential powers considered to be traditional prerogatives, etc.).

Studying the topic of formal and informal constitutional amendment can never be finished because the constitution is a living instrument the task of which is to provide, with relative stability, the rules according to which the state and its society is governed. As the society changes, the constitution should adopt its rules, otherwise it may not be viable in the longer run and may lose legitimacy because of the loss of popular approval. Informal constitutional amendments are natural and necessary and it is the task of various constitutional bodies to participate in the process but also to use their powers and influence to keep the changes within the proper limits. However, the principles of the rule of law, legal certainty and predictability require that the more substantial the change, the more formalized process is apt because formalization means more control and more reason-giving. After all, the rigidity of a constitution has been an instrument of valuable constitutional vigilance.