CONFERENCES AND REPORTS

Report from the Conference "20 Years of the Constitution of the Czech Republic" held on December 10th and 11th, 2012 at the Chamber of Deputies and Senate of Parliament of the Czech Republic

On December 10th and 11th, 2012 the conference "20 Years of the Constitution of the Czech Republic" was held at the Chamber of Deputies and Senate of Parliament of the Czech Republic, joined also with the opening of an exhibition on the framing of the Constitution in 1992. It offered an opportunity to recall the forming of the Constitution, reflect on its functioning and consider its possible amendments.

The conference was inaugurated by the presidents of both chambers of Parliament. Ms Miroslava Němcová, President of the Chamber of Deputies, evaluated positively the process and shape of the division of Czechoslovakia. She is persuaded that the wording of the Constitution was a reasonable compromise.

Mr Milan Štěch, President of the Senate, stated that the 20th anniversary allows us to view the Constitution from a distance and expressed an opinion that positive experience prevails, despite the hurried making of the Constitution. Problems only arose due to non-fulfilment of the Constitution (e. g. Provisional Senate not being established). He criticised fast-track changes of the Constitution and also mentioned that the constitutional role of the Senate will have to be rethought in the future.

Prof. Jiří Drahoš, President of the Academy of Sciences of the Czech Republic, described the circumstances of the making of Constitution. He pointed out the similarities between the situation at that time and the events of the second half of 1930s and emphasized the inspiration of the framers of the Constitution by the interwar Constitutional Charter, however he regarded them as "picky heirs". He appreciated the stability of Constitution, which proves its exceptional quality.

The last opening speech was delivered by Prof. Aleš Gerloch, Dean of the Faculty of Law, Charles University in Prague, and it bridged the ceremonious and the scientific part of the conference. Prof. Gerloch remembered the unsettled times when the Constitution was created, without the possibility to damascene all the conceptions. Although the Czech Republic is usually considered to be a typical parliamentary republic, the Constitution contains notable differences from this model (e. g. direct election and competencies of the president). Even though Gerloch sees weak spots in a constitution framed in such a way (insufficient separation of the legislative and executive power, process of appointment of the Constitutional Court judges, a possibility to appoint the prime minister by the president of the Chamber of Deputies), he is not of the opinion that a conceptual revision of the Constitution is necessary. It is essential to avoid the adoption of legal transplants without thinking out the context.

First panel was dedicated to the origin of the Constitution in 1992. It brought together speakers, who had directly participated in its writing or who had been involved in the process in another way. First of them, Prof. Dušan Hendrych, noted that the Constitution had not undergone significant changes between the initial proposal and the final version. One of the main guidelines for its framing was ensuring the effectiveness of decision-making procedures. This resulted in the strong position of the Chamber of Deputies. He mentioned topics that had not been decided at the time of the adoption of Constitution: territorial organization of the state (historical lands or regions) and the form of the second chamber (Senate elected in regions, composed of honorary officers on the basis of virility etc.). A possibility of adopting a provisional constitution that had been contemplated in 1992 was rejected by him as he quoted Constitutional Court judge Dr. Miroslav Výborný in saying that if the constitution had had to be perfect, it would have not come into being at all.

Long-term deputy Marek Benda took up here by acknowledging with thanks that the Constitution had been in part written by non-lawyers (the goal being not to involve constitutional lawyers active

in the previous regime). Then he stressed the aim to weaken the president by eliminating his powers to initiate legislation and veto bills. While the first had been removed from the Constitution, the second had not. Among other changes the Constitution had brought, he mentioned the incorporation of the State Attorney's Office in the executive power or the abrogation of the Constitutional Court's power of abstract interpretation of constitutional laws. He also uncovered slightly the way the Constitution had been adopted. Coalition deputies agreed not to move any amendments in order to ensure a smooth passing of the Constitution. It is interesting (and perhaps also symptomatic) that the deputies were discouraged from obstructing under the threat of a constitutional referendum.

A significant speech was delivered by Prof. Zdeněk Jičínský, a representative of the parliamentary opposition at the time of creation of the Constitution and co-author of an alternative proposal for the constitution. He pointed out that the Constitution had been debated and adopted only by one part of the political representation of the Czech nation, the Czech National Council. The other part consisted of the Czech deputies in the Federal Assembly. They had a stronger democratic legitimacy considering that all the leading figures of the political parties (then in forming) had been members of Federal Assembly and considering further the higher number of votes necessary to acquire a mandate there. Termination of the Federal Assembly significantly changed the situation in the parties in opposition, because their leaders suddenly ceased to be members of parliament and were not represented in the government either. This has led to the current political and social crisis, the symptom of which is contempt for the citizens' will. Furthermore he criticised that the division of Czechoslovakia had not been decided by a referendum, contrary to what the constitution had envisaged then. Again, the citizens have been omitted. The renewal of parliamentary democracy only began after the elections in 1996. In conclusion of his speech, he summarized the concurrent proposal for a constitution of the Czech Republic elaborated in 1992 by the Czech Social Democratic Party. It proposed a unicameral parliament and emphasized elements of direct democracy. He observed that some institutes included in this proposal have eventually found their way into the legal order of the Czech Republic (states of emergency, ombudsman, basis for membership in the European Union).

The first bloc ended with a short speech by Dr. Cyril Svoboda, who warned of the devastation of the constitutional system by the majority and making decisions based on guess of what the majority of voters would appreciate.

In the following debate, Dr. Jan Wintr asked why the Chamber of Deputies had been shaped as practically undissolvable. Dr. Cyril Svoboda explained this as an attempt to achieve stability and avoid premature elections. This was later addressed by Prof. Jičínský, who said that stability cannot prevail over democracy.

Second panel dealt with modifications and changes of the Constitution in the two decades of its legal force, especially in the case-law of the Constitutional Court.

In this "panel of professors", the first speaker was Prof. Jan Filip from the Masaryk University in Brno. He made a distinction between "change" and "shift" of Constitution. Under the "change", he understands an amendment of the wording of Constitution, while the "shift" of Constitution means an alteration of its content, if only by a change in application for instance. He mentioned the witticism that the English experience their constitution, while the French are writing it at nights like a pudding recipe. In his opinion we tend not to confide in those who will come after us. On the other hand, there have been quite a few proposals to amend the Constitution and even fewer have been successful. He emphasized the role of the Constitutional Court and ended with a thesis that the Constitution is not a solution, but rather a way to a solution.

Prof. Pavel Holländer, vice-president and one of the leading figures of the Constitutional Court focussed on the problem of interpretation of the Constitution. In his opinion, a different methodology has to be applied in constitutional law and in "ordinary" law. He views the Constitution as an open texture containing only ruins or torsos of norms (Böckenförde) and rather sets the goals and principles. Naturally, he emphasized the role of the Constitutional Court in the gradual interpretation and stabilisation of the Constitution, but also mentioned the increasing role of the ordinary courts, that have far more often applied the Constitution directly in its second decade. He criticised an in-

sufficient elaboration of the case-law in the doctrine. According to him, the Constitution must not be petrified; changes of the Constitution mark the search of the spirit of the age.

Prof. Jiří Malenovský, judge of the Court of Justice of EU, pointed out that our state has always been dependent on the observance of international law. He spoke of the relations between international and constitutional law from the beginning of Czechoslovakia. He treated in detail the so-called euro-amendment of the Constitution and the relation to European Union law. For him, the history of constitutional law is a history of underestimation of international treaties. He drew attention to the insufficiently covered topic of application of international treaties by courts and administrative authorities on the basis of the modified Art. 10 of the Constitution. He gave his opinion on the international treaties according to Art. 10a of the Constitution, which he puts on equal footing with the constitutional order, but considers their respective scopes of application separated (a parallel constitution). Prof. Malenovský infers that with the exception of a review of an international treaty prior to its ratification, the Constitutional Court has no power to review the compatibility of EU law with the Constitution.

In the following discussion, Dr. Miloš Matula reflected on the limits of the open texture of constitutional law. Prof. Jan Filip noted that the so called eternity clause of Art. 9(2) of the Constitution had been put through by president Václav Havel. His proposal listed individual unalterable articles of the Constitution (Art. 1 to 11), but this enumeration had not been accepted in view of the debate on eternity clause that had been taking place then in Germany.

Third panel followed on a similar topic. Prof. Václav Pavlíček spoke about the question of sovereignty and the state idea. He said that the Czechoslovak state idea has perished. His comprehensive contribution dealt with the relation between the people as the source of the sovereign power and the parliament as the representation of the people. Prof. Pavlíček defended the thesis of an exclusive role of Parliament among the supreme bodies of the state and recalled his sharp critique of the Constitutional Court's well-known decision in the Melčák case (abolition of a constitutional law by the Constitutional Court). From this fundamental thesis, the concept of sovereignty unwinds, also within the context of European integration.

Dr. Jan Kudrna argued that the Constitution is unstable and did not suceed, but the situation is not critical. He mentioned several problems in the application of the Constitution caused by the fact that, in his view, the Constitution is treated as a temporary one. Provisions and institutions that do not suit are not realised (for instance the delayed establishment of the Senate and regional self-government) and correction of flaws is delayed till later. He expressed an opinion that a classical provisional constitution should have been adopted. This would have prevented the need to "patch" the constitution, which is worse than its total revision. Instead of that, we are witnessing abusive approach to constitutional institutes as well as an extension of the role of Constitutional Court. He mentioned the unclear division of powers in the area of foreign policy, which may become the source of conflicts between the president and the government in connection with the direct election of the president.

Prof. Michal Tomášek considered the question, whether europeanisation limits the functioning and decision-making of constitutional institutions. He recalled his diplomatic service in the early 1990s. He had become convinced then that the superpowers do not take the national constitutional rules into account. According to his opinion, this view had foreshadowed the following development. He went on to note that the europeanisation pierces into unexpected areas (criminal law, constitutional law) because of the growing "appetite for powers" of the European Union connected with the not very sharp and rather indeterminate catalogue of powers. He also dealt with questions of economic and monetary integration.

A varied discussion followed. Dr. Pavel Rychetský, president of the Constitutional Court took a different perspective on modern sovereignty and division of powers as a counter-argument to some of the conclusions of Prof. Pavlíček and mentioned the uneasy situation of the Constitutional Court in the European legal system. Jan Kudrna added his view on the future of Europe. In his opinion, the modern state is being deprived of its sovereignty far more by multinational corporations then by integration.

The fourth panel concentrated on the development of the principles of rule-of-law state (Rechtsstaat) in the Czech Republic. Assoc. Prof. Zdeněk Kühn spoke about the "first" and "second" Constitutional Court. He identifies an immense problem in the discontinuous personnel change constitutional judges caused by the fact that most of the judges end their ten-year term almost at the same time (within two years). Therefore the composition of the court changes dramatically in a short time. This opens doors for discontinuous developments in the case-law. Both courts have been creatively widening their powers, especially by the end of their terms. Assoc. Prof. Kühn recalled the decisions on the review of constitutionality of a law after its legal power is terminated and on the content of constitutional order by the "first" court and decisions on the constitutionality of a constitutional act and on declaring an act of EU law ultra vires by the "second" court. He considers the second Constitutional Court more varied in opinions than the first (the number of dissenting opinions has doubled) and at the same time more "activist", i.e. more willing to enter a controversy with political powers. On the other hand, the second court shows a great disproportion of the "success rate" of complainants in the constitutional complaint proceedings depending on who acts as the judge-reporter in the case.

Dr. Kateřina Šimáčková spoke about the rule-of-law state. She draws a connection between it and the confidence in the state and its rules. The Constitutional Court inclines towards the material understanding of rule-of-law state. Inspiration may be drawn from the USA, where the roots of the principle lie that no law may contain an individual decision. Historically, the concept of rule-of-law state emerged as an opposite of the police state. Legality encompasses demands for good legislative procedures. Another of its elements is the right to access the court and equality before the law. She said that the principle ignorantia iuris non excusat has become a sarcasm.

Dr. Marek Káčer, who substituted for Assoc. Prof. Radoslav Procházka, constitutional lawyer and member of the Slovak National Council, presented the basic theses of Assoc. Prof. Procházka's book on the role of constitutional court in the democratic rule of law state. He proceeded from the central idea that the constitutional court should not and must not review the constitutionality of the constitution (constitutional laws). The concept of a material core of the constitution is a negative one (it is the negation of formalism). From this he deduces the concept of a "materialist", a legal scholar, often a judge, who is more interested in the outcome of the decision than in the relevant procedure. He also dealt with the concept of social contract based on a majority principle and reminded of Karl Popper's critique of Plato, who asked a fundamentally wrong question 'who should rule?' instead of 'how to limit the ruler?'.

In the subsequent debate, Prof. Gerloch argued, that an uncritical approach to the Constitutional Court case-law may signalise a crisis of the society marked by a search of an undisputable authority. Dr. Rychetský pointed out the immense workload of the Constitutional Court, which is making the model of four senates consisting of three judges untenable.

The topic of the final panel was the development of the political system. Dr. Jan Wintr delivered a speech on parliamentary culture, especially in the Chamber of Deputies. He pointed out that the Constitution had been tailored to the needs of the Czech National Council elected in 1992, which became the first Chamber of Deputies. Therefore the Chamber of Deputies cannot be dissolved against its own will. He discussed whether the Chamber of Deputies is rather a stage or a battleground. In the first term, an effort to solve problems consensually had been apparent. This consensus had slowly vanished in the subsequent terms and was replaced by various obstructions.

Prof. Michal Klíma dealt with the problems of the political system in the Czech Republic. He spoke of a clientistic democracy, in which the major role is played by fractions, the separation of powers is weakened and the political parties do not fulfill their functions. He recalled the "opposition pact" of 1998 which he described as a cartel agreement and mentioned the notion of "state capture", i.e. hijacking of the state by the political parties. He mentioned the revitalisation of the concept of separation of powers as a way out.

As follows from the above, the overall atmosphere of the conference was that of a critical balancing. The conference named the problems and deficits of the Constitution and its application and –

owing to the insight of the framers of the Constitution, who took part in the conference – revealed some of their causes and roots. However, it could not entirely pay off the debt consisting in the insufficient explanatory report of the Constitution, mentioned for instance by Jan Kudrna, and in the generally sketchy information on arguments and stances that formed the shape of the institutes and provisions of the Constitution. On the other hand, it also offered noteworthy contributions regarding topics that had not and could not have been thought out at the time of adoption of the Constitution, such as the implications of the membership of Czech Republic in the European Union or the impact of the case-law of the Constitutional Court. The output of the conference will be a collection of contributions by the speakers as well as other participants of the conference. It will be published in the first half of 2013.

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Seminar of the Charles University Law Faculty and the Russian Law Academy of the Ministry of Justice of the Russian Federation, Moscow, 18–22 June 2013

On 18–22 June 2013, the Russian Law Academy of the Ministry of Justice of the Russian Federation in Moscow hosted a research seminar as part of cooperation between this educational institution and the Law Faculty of Charles University in Prague. The cooperation project started more than ten years ago and consists of the exchange of academics and students as well as of the organizing of research seminars and subsequent publishing of papers delivered during the respective seminar in the form of a collective monograph.

The Russian Law Academy of the Ministry of Justice of the Russian Federation is an educational institution in the position of a university. Its headquarters is located in Moscow and branches are placed in larger cities of the Russian Federation. The Academy is headed by its Rector; individual departments are divided according to traditional branches of law and subjects. The Academy provides legal education in the form of Master's and Doctoral studies within particular subject-areas of law. It is one of more than 1,100 higher education institutions focusing on law which exist in Russia. This number seems to be quite high considering that the population of Russia is around 140 million; on the one hand, such a high number of educational institutions focusing on law may create a competitive environment, but, on the other hand, it may lead to a certain devaluation and variable quality of legal education provided.

The Charles University Law Faculty started its cooperation with the Russian Academy in 2002. Until 2011 the cooperation had applied just to its affiliation in St. Petersburg (North-West affiliation) consisting of the exchange of teachers and students and organizing research seminars once a year in Prague and St. Petersburg interchangeably. Papers from those seminars were regularly published in collective monographs; however, it should be noted that recently the publication has become stagnant. In 2012, the Russian delegation to the research seminar in Prague was composed of teachers from the Moscow Headquarters, and the experience inspired them to extend the cooperation to the centre of the Academy.

This year, the research seminar was held in Moscow with a traditional agenda. Members of the delegation of the Prague Law Faculty delivered their papers in their respective expertise subject-area; their primary focus was on legal issues topical and extensively debated in the Czech Republic. In

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