Abolition of Constitutional Statute by the Constitutional Court of the Czech Republic

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The Czech Constitutional court abolished a constitutional statute by a Judgment which was adjudicated on the basis of a constitutional complaint of the member of the Czech Parliament Miloš Melčák.[1] This Judgment has changed the traditionally understood role of the Constitutional court which should serve as a protector of constitutionality towards the laws with lower legal force. Nevertheless, the recent practice of the Constitutional court has been against cancellation of the Constitutional statutes.[2] The Constitutional court has decided to guard the constitutionality – the constitutional order against itself. The mentioned Judgment confirmed the tendency of the Constitutional court to strengthen its power. However, this is a natural feature of each power body. The Constitutional court uses the current situation because the Czech Constitution does not deal with review of unconstitutional decisions of the Constitutional court. A limited control of violating the law by the Constitutional court exercises the European Court for Human Rights in Strasbourg on the field of the fundamental rights and freedoms. The European Court for Human Rights provides protection in the cases where the national protection in front of the Czech Constitutional court has not been found. In other cases the Constitutional court uses its status of the uncontrollable incumbent. The Constitutional court is always able to find some arguments for its power competences when it wants to answer some questions of law.

1 Suspension of enforcement

The Constitutional court issued a Resolution[3] on 1. 9. 2009 before issuing the Judgment on merits. On the base of this Resolution the enforcement of the decision of the President of the Republic on declaration of the elections to the Chamber of Deputies on 9.-10. 10. 2009 was suspended. In addition the complainant did not demand the suspension of enforcement of the decision of the President. The demand is the legal condition for the suspension of enforcement which is regulated in the Law on Constitutional court[4] – this Law is binding for the Constitutional court.[5]

The Constitutional court has made a big activist move. The Constitutional court acted not only ultra petitum and that's why contrary to law[6] but also contrary to the sense of mandatory representation of the complainants by the advocate in front of the Constitutional court. The qualified petitions which should entirely defend the legal interests of the complainant are the main aim of the institution of mandatory representation. What the interest of the complainant is, the complainant himself/herself knows best. The Constitutional court is not a guardian of the complainant. The Constitutional court denied the legal capacity of the complainant Miloš Melčák and the legal qualification of the advocate Jan Kalvoda who did not request the suspension of enforcement of the decision of the President of the Republic. A big part of the constitutional judges wanted to use the opportunity and abolish a constitutional statute and that is the reason for the imposition of the enforcement to the Constitutional complaint of the deputy Melčák. At the end the suspension of enforcement had no meaning because the

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[1] Judgment No 318/2009 Sb. (Pl.ÚS 27/09) which cancelled the Constitutional statute No 195/2009 Coll. on shortening of the fifth electoral term of the Chamber of Deputies. Hereinafter only Judgment.

[2] The Constitutional court is not entitled to review (or even abolish) the provisions contained in Constitutional statutes. The aim of the Constitutional court is to interpret them. Point 6.2 of the judgment No 14/2002 of the Collection of judgments and Resolutions of the Constitutional court vol. 25 (95/2002 Sb., Pl.ÚS 21/01).

[3] Resolution of the Constitutional court No 312/2009 Coll. (Pl.ÚS 24/09-16). Hereinafter only Resolution.

[4] § 79 Art 2 of the statute No 182/1993 Coll., on the Constitutional court.

[5] Art 88 of the Constitution No 1/1993 Sb. Hereinafter only Constitution.

[6] Point 1 of the different opinion of the constitutional judge Jan Musil to the Resolution.

constitutional judges were pushed to make a quick decision because of the pressure from the public.[7]
Another condition for the suspension of enforcement is the presumption that the suspension of enforcement cannot cause more severe harm to other persons than to the complainant himself/herself by not suspending the enforcement.[8] The harm was created by the 8 month-salaries of the deputy Melčák. On the other side the private and public expenses were in play. The Constitutional court stated there were no harms regarding the public funds in the reasoning of the Resolution. It was a completely false statement, this fact was shown by the information of the Minister of Interior who presented an amount of hundred millions Czech crowns which were invested into the preparation of the elections. Subsequently the Ministry of Finance presented an amount of 115 millions Czech crowns for the unhatched elections in the National account for the year 2009.[9]
The Constitutional court did not find any violation of the rights of third persons in the reasoning of the Resolution. Nevertheless, the Constitutional court has violated the right of all the citizens to vote because by the declaration of the elections the subjective right of all the citizens to vote in October 2009 was created. The Constitutional court has also violated the finance of the political parties which had contracted obligations on the basis of the legitimate expectations of the elections in October 2009. The Constitutional court harmed financially weaker political subjects and violated the constitutional basis of the political system in an independent and untroubled competition of the political parties.[10]
The political parties had concluded their agreements concerning their elections campaigns and due to the suspension of enforcement nothing changed about the agreements regarding the billboards and the other elections materials. The political parties could not withdraw from the contracts without avoiding contractual sanctions. How big the extension was presents the subsequent statistic issued by the parties from end of September and beginning of October 2009, which originally meant to be an election statistic. The political parties spent their financial sources in varying degrees but the event (elections) for which the financial support was appointed did not happen. The party ODS opened a credit on the amount of 150 million Czech crowns without stating the exact amount of money used for the preparation of the unhatched elections.[11] The party ČSSD estimated its costs at 130 million Czech crowns.[12] The party KDU-ČSL spent almost its whole credit in the amount of 25 million Czech crowns.[13]
The fact that the Constitutional court did not think about the suspension of enforcement proves the far-awayness of the constitutional judges from the real life. However, the Constitutional court became aware of this fact and did not repeat the idea of not affecting the rights of the third persons in the final Judgment.

2 Legitimacy of the premature elections

[7] MARIE VALÁŠKOVÁ: Volby v říjnu nebudou, říká místopředsedkyně Ústavního soudu Eliška Wagnerová, *Hospodářské noviny* 2. 9. 2009, p. 3.
[8] Different opinion shows that the complaint of the deputy Melčák did not content any argumentation concerning the inadequacy of the harm. Point 2 of the different opinion of the constitutional judge Jan Musil to the Resolution.
[9] Useless spent money of the state was estimated on 67,2 million Czech crowns (above all the lease of PCs to the Czech statistic office, but also some other services). See Zrušené volby stály 67 milionů, *Právo* 2. 12. 2009, p. 3.
[10] Art 5 of the Constitution.
[11] PETR HOLUB, KATEŘINA ELIÁŠOVÁ: ODS dluží 50 až 100 milionů, ručí vlastním sídlem, *Aktuálně.cz* 26. 11. 2009, http://aktualne.centrum.cz/domaci/politika/clanek.phtml?id=654150
[12] SABINA SLONKOVÁ, PETR HOLUB: ČSSD ztratila na volbách 130 milionů. Srovná to stát, *Aktuálně.cz* 11. 12. 2009, http://aktualne.centrum.cz/domaci/politika/clanek.phtml?id=655448
[13] OLDŘICH DANDA: Lidovci nemají na kampaň, spasí je sbírky?, *Právo* 30. 12. 2009, p. 2.

The people are the source of power in the democratic countries. The deputies are not the proprietors of the power but they are the administrators of the public things on the authority of the people. The administrator cannot dedicate the entrusted property to anybody, he/she has to give it back to the proprietor in case that he/she manage the administration. The deputies have the duty to enable the electors to decide about the future government if the Chamber of Deputies is not able to create government and the administration of the state is bad. It is the fault of the creators of the Constitution that they had aggravated the procedure of breaking up the Chamber of Deputies and the solving of the governmental crises with the elections. It is possible to set it right by a special constitutional statute which should regulate the 3/5 agreement of the deputies and senators and which should regulate that the elector is the proprietor of the power and has the right to decide who will represent him/her. The premature elections are the legitimate restitution of the legislative power in the parliamentary democracy.

It is possible to agree with the speech of Pavel Rychetský which he held during discussing the constitutional statute draft on shortening of the electoral term in the year 1998. Although he had admitted the possibility of doubts, he stated to the draft: *"It was said here that it is a violation of the Constitution but we could hear from the submitter that the Chamber of Deputies considered both the options, it means both the change of the Constitution and the option of "praeter constitutionem" which is the one-shot move beyond the Constitution. And in the light of what was expressed here as the respect to the Senate, the Chamber of Deputies decided to choose the second option – not to intervene the Constitution. Virtually, what was enacted and submitted to us is undoubtedly an intentionally motivated deed. It is undoubtedly purposely aimed constitutional statute ad hoc. I would like to emphasize that this is nothing pejorative. I even suppose that all the measures which are taken by the Parliament or by other constitutional bodies are purposely aimed in the sense that they follow a clear formulated purpose.*

It was said that it is an interference into Constitution which should not be done during the crisis. The interference to the constitutional system should be made in the calm periods after a long deliberation. I want to say that the statutes are to change and to be enacted when there is such a precedence rating to make the move that the Parliament decides to change the statute. The notion that the statutes will be changed when it is not necessary is a bad notion. But in one point I fully agree with all the things which were said here - when a statute is being enacted, it is necessary to consider all the consequences. I emphasize the consequences.

The infringement of constitutional balance was mentioned as a possible consequence. The proposal to dismiss this constitutional statute was accompanied by words which I would like to say exactly. It was a challenge aimed at us: "There is no authority which could change our decision." I dare to say that I deeply do not agree with the statement that we are sovereigns and we as a Parliament are the representatives of the sovereignty of this state. The sovereign is only the citizen and no one else in a real democratic country. We are the ones who are able to express what we suppose to be the major opinion of the civil society within limited time on the authority of the people. In spite of all the reservations which we could hear here I am of the opinion that when a statute is enacted only purposely because a crisis came which is not possible to solve within a current constitutional order, then when we give the decision back to the real sovereign, to the civil society, we act democratically. The citizen is the only one who has the right to decide who will govern and enact the statutes on behalf of the citizen in this

country. I consider each move with that we return the power to the citizen to be a legitimate one.[14]

The way to elections is not complicated in Europe. The Queen dissolves the House of Commons at the request of the Prime Minister in the United Kingdom. In France the President dissolves the National Assembly and consults the dissolution with the representatives of the National Assembly and the Senate whose consent is not necessary.[15] In Germany one non-confidence vote towards the Chancellor is enough for the dissolution of the Federal Assembly by the President.[16] In Austria the President can dissolve the National Council at every moment. The National Council can dissolve itself by a common statute, there is no need of a constitutional statute.[17] During the first Czechoslovak republic the President could dissolve both the Parliament Chambers without any condition, with the exception of the last half-year of the mandate.[18] When there is a crisis, declaration of new elections is a common procedure.

From this point of view it seems to be paradoxical when the Constitutional court expressly invokes the creation of the legitimate Parliament to be the most important public interest.[19] Nevertheless, thanks to its Judgment the Constitutional court disabled such a creation because it disabled the sovereign in the state – the people – to choose the Chamber of Deputies and to create a regular government on the basis of the elections. The critic of the premature elections based on the enactment in the form of a special constitutional statute is not important. Unconstitutional are the unfair elections. The form how to reach the elections does not endanger the democratic character of the elections. What is not democratic on the constitutional statute and why is better the masquerade of three times not expressing the confidence to the government? Or is better the masquerade of submitting the draft of the statute in connection to the voting on the confidence of the government which is the institution helping to enact the statute at the part of the hesitating deputies who do not agree with the draft but on the other hand they want to express the confidence to the government? The Constitutional court[20] recommends this way although it is simulated conduct because the aim of such a draft would not be the enactment of the draft of the statute but a covered dissolution of the Chamber of Deputies.[21] The shortening of the electoral term is from the point of view of the democratic legitimacy of other quality than the extension of the electoral term[22] because the decision is in the hands of the sovereign – the people. The Charter of

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[14] Pavel Rychetský in Senate on 19. 3. 1998 during discussing the draft of the constitutional statute on shortening the electoral term of the Chamber of Deputies, Senate press 98021, 1st electoral term. http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=1&IS=2395&T=98021#st98021.

[15] Art 12 of the Constitution of the French Republic from 4. 10. 1958. VLADIMÍR KLOKOČKA, ELIŠKA WAGNEROVÁ: *Ústavy států Evropské unie, Díl 1*, 2. edition Praha 2004, p. 115. Also hereinafter the constitutions of the states of the EU are cited prom this publication.

[16] Art 68 of the Constitution of Germany from 23. 5. 1949, p. 253.

[17] Art 29 of the Constitution of Austria from 10. 11. 1920, p. 445.

[18] § 31 of the Constitutional document which was introduced by the statute No 121/1920 Coll.

[19] Point VI/a of the reasoning (p. 4634, penultimate article) of the Judgment. Here and also hereinafter the pages are stated according to the promulgation of the Judgment in the chapter 98 of the Collection of laws of the Czech Republic.

[20] Point VI./a of the reasoning (p. 4634, penultimate article) of the Judgment.

[21] In the year 2005 similar situation happened in Germany – the chancellor Gerhard Schröder asked the German Bundestag to give confidence whereas the government parties had majority in the Bundestag. However, the chancellor intended to declare premature elections. From this reason the members of government did not vote for confidence. The request for confidence was criticized as simulated with a hidden aim to dissolve the Bundestag. Nevertheless, the German president Horst Köhler considered this to be constitutional because he really dissolved the Bundestag.

[22] The judge Vladimír Kůrka points out the quality difference between the prolongation and shortening of the electoral term. Point IV. 19-20 of the different opinion of Vladimír Kůrka to the Judgment.

fundamental rights and freedoms excludes the possibility of prolongation of the electoral term[23], not the shortening although there is a constitutional exception in extraordinary times.[24]

3 Constitutional Order

The Constitution from the year 1993 introduced the concept of the constitutional order[25] which is a different expression for constitution with the small letter ú (in Czech Constitution is translated as *ústava*). The constitutional order can be expressed as complex of all the legal regulations with the constitutional legal force. Within this category of legal regulations with constitutional legal force the legal rule lex posterior derogat legi priori generali and the rule lex specialis derogat legi generali were used at collision of two legal regulations. The quantity of the constitutional regulations is not a static one (neither the state nor its legal regulations exist for eternity). The constitutional order is constantly being perfected by other constitutional statutes. Constitutional statute is considered as legal regulation which cannot be unconstitutional. When the constitutional statute differs from some other constitutional statute, the above mentioned rules will be applied. The only exception is the procedural unconstitutionality caused by a fault during its enactment. It is not convenient to say that the constitutional statute of one-chamber Parliament of the Czech National Council[26] takes priority over the constitutional statutes enacted by the two-chamber Parliament.

Some Constitutions exclude the constitutional change of some institutions – clause of inflexibility or eternity. However, this clause is likely to be reviewed as declaratory in the course of centuries or millenniums. The inflexibility can exist only there, where the social development stops and where the fellows want to set in their concept of state for eternity, which will be considered ridiculous by the next generations. We judge the others beyond their epoch and with the course of time but we miss such a course of time when we judge this epoch. In the 1st century the most of the antic politicians considered the Roman Empire with the roman peace to be the point of culmination in the history of mankind. However, the Christianity did not accept such a point of culmination and had a different vision of the social development. But after all we can learn from the recent historical periods. Is not the clause of inflexibility similar to the ideas of the chiliad 3rd German Empire or to the "With the Soviet Union for eternity and never otherwise."?

The idea of the end of the history was contented in the medieval chiliad visions of the end of the world or in the theory of the end of the world by the victory of communism (Marx, Engels, Lenin)[27] or by capitalism and liberal democracy (Fukuyama).[28] The supporters of the

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[23] Art 21 par 2 of the Charter of fundamental rights and freedoms No 2/1993 Coll.

[24] Art 10 of the constitutional statute No 110/1998 Coll. on security of the Czech Republic.

[25] Art 3 and 112 of the Constitution.

[26] The Constitution is only constitutional statute No 1/1993 Coll. of the Czech national council enacted on the base of the constitutional statute No 143/1968 Coll. on the Czechoslovak federation.

[27] The essence of the Marxist philosophy of history consisted in a special type of fabricating process which was based on the relation between the productive forces (productive instruments and human labor) and the production relations. Their conflict was the driving engine of the history when the still developing productive forces get into conflict with the existing production relations, which causes revolution and the old production relations are replaced with the new production relations within the new ruling class over the private ownership of the productive instruments (production tools and natural resources). The last revolutionary class is the proletariat which will dispose of the private ownership, the state will die and the classless society will be created in the last revolution – communism as the top of the human history. BEDŘICH ENGELS: *Původ rodiny, soukromého vlastnictví a státu*, Praha 1967, p. 110-120. VLADIMÍR ILÍČ LENIN: *Stát a revoluce*, Praha 1967, 15-19. ARNO ANZENBACHER: *Úvod do filozofie*, Praha 1990, p. 67, ISBN 80-04-25414-4. Kolektiv: *Filozofický slovník*, Praha 1976, p. 522-525.

[28] Fukuyama considers together with Hegel and Alexander Kojéve (A. V. Koževnikov) the drive for recognition to be the driving motor of the history. The drive for recognition is fulfilled with the victory of the liberal democracy which eliminates the difference between the lords and servants. At this moment the general

victory of communism and of capitalism drew the theses of the end of the world from the philosophy of Georg Wilhelm Hegel who considered the drive for appreciation to be the mover of the history. The end of the history cannot come, if the mankind lives.

Already Hayek warned of implementing the ideological concepts to the legal regulations. Hayek identified as moral states in a negative sense those states which bring the ideas of moral problems into the law and enforce such ideas to all the people (Nazism and communism). In contraposition stands the liberal state which is not unmoral and does not enforce its ideas of moral problem to all its citizens – its law is created by the system of noted rules where the foreseeability of the consequences is the main priority for the free choice of the behavior of the people.[29] From this point of view the theory of material gist seems only to be an endeavor of the Constitutional court (which uses this theory as a reasoning for the usurpation of power to repeal the constitutional statute) to regulate particular subjective moral opinions of law in the legal system beyond the traditional enacting mechanism by the constitutional body and by the legislative body in the continental European system. At this place it is possible to remind of the Hayek's warning of the arbitrariness of the public authorities: *"Constantly the broadest powers are conferred to new authorities which, without being bond by fixed rules, have almost unlimited discretion ..."*[30]

France has a regulation which prohibits change of the republican form of state.[31] Nevertheless, France changed its form of government in the recent two and half centuries. Since 1789 France changed repeatedly monarchy in both the absolutist and constitutional form with two concurring dynasties of the Bourbons and the Orleans. France was also an

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recognition of everyone is gained and the end of history comes. It is not the end of historical events but it shows the final and supreme social order in capitalism and liberal democracy where no essential conflicts in fulfilling the needs of recognition exist and the life is satisfying (there are no sources of deeper dissatisfaction). An **universal state** will be created which will guarantee recognition for everyone and a **homogenous state** when the classless society will be created by the disposal of the differences between the lords and servants and the lord's freedom and servant's labor will be available for everyone. The liberal democracy is not the most just thinkable regime but in reality it is the most just regime. According to Fukuyama there exists only one way and one aim for the mankind on the journey on the imaginary conveyances through the history. Fukuyama relatives his words with an allegation at the end: "*... we cannot be sure if the passengers do not find the new milieu unsatisfactory and do not set up on next journey."* (p. 318)

Francis Fukuyama insists on his thesis of the top of the history in the liberal democracy and capitalism: The west has won, The Guardian 11.10. 2001, http://www.guardian.co.uk/world/2001/oct/11/afghanistan.terrorism30 (the text was imprinted as an introduction to the Czech edition of the book The end of the history and the last man) even after the attack on the World Trade Center in New York on 11. 9. 2001 when he stated that the terrorist attacks are not able to create a general accepted alternative to capitalism and liberal democracy. These Fukuyamas' words are remarkable: *"... on the international stage no ideologies will compete – the majority of economic developed states will be established according to similar principles* (capitalism – note by ZK*) – but cultures*" which brings him near to the theory of the battle of civilizations by Samuel Huntington who does not agree with the end of history (p.228), Fukuyama accepts that "*... liberal democracies are not self-sufficient: the life of the society on that they are dependent have to appear from another source than from liberalism itself*." (p. 308) and that also in democracy originates:*"...dissatisfaction with the freedom and equality. From this reason those who stay discontent will always be able to start new history*." (p. 314).

FRANCIS FUKUYAMA: *Konec dějin a poslední člověk*, Praha 2002, p. 9, 11, 12, 17, 53, 61-67, 145, 150-153, 173, 178-179, 181-182, 193-195, 199, chapter 19 Univerzální a homogenní stát, **200,** 202, 204, 228, 276, 285, 286, 295, 308, 317-318, ISBN 80-86182-27-4.

[29] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p. 80-82. Similarly points out the connection between the morality understood by the Nazis and the Nazi law VIKTOR KNAPP: *Problém nacistické právní filozofie*, Dobrá Voda 2002 – reprint from 1947, p. 69, 97-98, 114, 186, ISBN 80-86473-21-X.

[30] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p. 83.

[31] Art. 89 (change of Constitution) of the French Constitution from 4. 10. 1958, p. 136. The inflexibility of the republican form of state was enacted in the year 1884.

empire and republic in the form of government of the Convent, presidential form and parliamentary form including the partial presidential form.[32]

The constitutional body states what the part of the constitutional order is. The Constitutional body is identical with the legislative body in the Czech Republic (Parliament). A bill of a constitutional statute which is marked as a bill of a constitutional statute has to be enacted by a qualified majority within a certain procedure which is different from the procedure to enact a common statute (a consent of both the parliamentary chambers is needed). Because the democratic state refused to draw its power out of itself (it means out of the society), the constitutional order cannot be based on theocratic or other authority standing out of the society either. The legitimacy of the constitutional order (supremacy in the legal force) is given by the wider consent of the society which is represented in the Parliament in the system of representative democracy. This wider consent is determinated by more rigorous procedural rules to enact the constitutional statutes. The rigidity of the Czech Constitution is not very big in contrast to some other constitutional systems which request e.g. ratification plebiscite[33], consent of other state bodies[34] or choice of a special constitutional convent for the change of the Constitution.[35] Systems with flexible constitution which can be changed by a common statute (Great Britain) have also their own legitimacy – here is no need for the Constitutional court as a guardian of the constitutionality.

From this point of view it is possible to regard the inflexibility of the Constitution as a relative self-limitation of the sovereign[36] which can be withdrawn because no sovereign as a creator of the Constitution is everlasting. A sovereign in a monarchy or the nation in democracy change by the death of the old and by the birth of the new people, including the opinions what the public good is. Formally the sovereign is still the same (a monarch or the nation) but his

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[32] Till the year 1789 the absolute monarchy of the Bourbons, then the Constitutional monarchy till 1792. 1792-1804 was the form of state republic (first governed by the assembly and gradually by consul as dictator). 1804-14 followed empire with a short 100 day epilogue in the year 1815. Since the year 1814 the kingdom of the Bourbons was restored in a Constitutional form but there were tendencies to restore absolutism which led 1830 to the overthrowing of the Bourbons and the Orleans got to power in the form of Constitutional kingdom. The Constitutional kingdom was 1848 replaced by presidential republic which was 1952 changed to kingdom. Since the year 1870 the republic in its parliamentary form lasted till 1958 with a break when the totalitarian republic Vichy 1940-44 was created. Since the year 1958 classical form of partial presidential republic have been established by Charles de Gaulle.

[33] In Denmark the consent of the chamber of representatives is needed which is then broken up. The newly elected chamber of representatives has to agree with the change of Constitution in the same text, then a ratification plebiscite follows and then the king's consent is requested. § 88 of the Constitution of Denmark from the 5. 6. 1953, p. 79.

[34] In the USA the constitutional amendments have to be first enacted by 2/3 of the Congress and then the ratification consent of ¾ of Parliaments of the member states of the federation follows. Possible but not realized option is choosing special bodies – convents – for the state ratification as well as for the federal level. Art. V of the Constitution of the United States from the 17. 9. 1787. JIŘÍ KROUPA: *Dokumenty ke studiu státního práva kapitalistických států*, Brno 1986, p. 14. Similarly is in Russia changed the catch 3-8 of the Constitution by the federal constitutional statute of the Federal assembly, which is behindhand approved by 2/3 of the citizens of the Russian federation. Art. 136 of the Russian Constitution from 12. 12. 1993. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, p. 73, ISBN 80-210-1356-7.

[35] In Russia it is possible to change catch 1 (The essentials of the constitutional system), catch 2 (The rights and freedoms of the human and citizen) and catch 3 (Constitutional revisions) only on grounds of 3/5 consent of both the chambers of Parliament a special constitutive assembly is established which prepares a draft bill of the new constitution which will be passed by 2/3 of all the members of the constitutive assembly or by a plebiscite. Art. 135 of Constitution of Russia. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, p. 73-74, ISBN 80-210-1356-7.

[36] Inflexibility of constitutions is relative. "*It is not possible to presume naively that such a change is not possible in fact. It is something different: the current system has to use all the available instruments to prevent from such a change*." VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, in *Vladimír Klokočka Liber amicorum*, Praha 2009, p. 223, ISBN 978-80-7201-793-5.

substantiality is different. The clause of inflexibility can be changed[37] – can be extended, reduced and abolished.
The Constitutional court distinguishes the material gist in the constitutional order which is the priority according to the Constitutional court.[38] Differently said – the material gist is upper-constitutional in fact. Because the real upper-constitutionality cannot be derived from the legal order itself which does not know the upper-constitutional regulations, it appears the question from whom the upper-constitutionality is derived. From God or from the Constitutional court? Virtually, it arises from the Judgment that upper-constitutional is that legal regulation which is marked in this way by the Constitutional court. The Constitutional court is not bound by procedural rules which would require a major consent to decide what is upper-constitutional than the majority of constitutional judges needed for the consideration when the common statute is contradictory to the constitutional order. The Constitutional court was aware of the fact that this argumentation can be considered as an antidemocratic one. The Constitutional court operates with the fact that while abolishing some constitutional statute, the problems can be avoided by marking the regulation as not a constitutional one because according to the Constitutional court: "Neither the constitutional body must declare a legal norm for a constitutional statute if such a norm does not have character of a statute, let alone the constitutional statute."[39] The Constitutional court considered the given constitutional statute to be an individual legal act.[40]
Virtually, the Constitutional court does not solve the problem of its nondemocratic activities because it is always its arbitrariness which is not presumed by the Constitution. By means of the arbitrariness the Constitutional court determines which constitutional statute it agrees with and from this reason the Constitutional court cannot cancel this constitutional statute. The Constitutional court also determines which constitutional statute it does not like and that's why it cancels it because according to the Constitutional court such a constitutional statute is not a constitutional one. The Constitutional court refuses to respect the procedural rules for enacting the constitutional statute as a determining qualification what the constitutional body wants to enact as a constitutional statute – the Constitutional court determines itself as the supreme power body of the state. But it is a double sword. If the Constitutional court can determine a constitutional statute as something what is not a constitutional statute and at the same time the Constitutional court does not respect such a constitutional statute, than somebody can designate a judgment of the Constitutional court as a non-judgment and from this reason will this person not respect such a Judgment of the Constitutional court and will act constitutional conformal. The rules are the same for everybody or otherwise one cannot wonder if somebody breaks the rules. If the Constitutional court does not respect the Constitution than the Constitutional court cannot demand it from other people.
The legal order of the Czech Republic does not distinguish between the Constitution and constitutional statute. The Constitution itself is a constitutional statute.[41] The same was also

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[37] *„ ... impossible is the norm which expressly prohibits change of the legal order or of some of its part. ...If I know under which conditions such a norm was create, than I have to admit logically that under the same conditions the change or abolishing of such a norm is legally possible*." FRANTIŠEK WEYR: *Základy filozofie právní*, Brno 1920, p. 105-106 note 18.
[38] Šimíček acknowledges and defines the priority of of the material gist. He divides the constitutional order into the unchangeable principles and into the soft constitutional law. VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, *Vladimír Klokočka Liber amicorum*, Praha 2009, p. 224-225, 227.
[39] The ultimate article of the point VI/a of the reasoning (p. 4635) of the Judgment.
[40] Point VI./a (Generality of the constitutional statute as an essential element of the democratic state) of the reasoning (p. 4633, penultimate article) of the Judgment.
[41] Constitutional statute of the Czech National Council No 1/1993 Coll., Constitution of the Czech Republic.

the Czechoslovak Constitution[42] – it was changed constitutional statute on the Czechoslovak federation.[43] There is no special constitutional authorization requested to enact a constitutional statute (e.g. which changes the Constitution).[44] This is the difference from the states which call their constitution different than constitutional statute but above all they enact the constitution in more rigid procedure than the constitutional statutes although the constitutional statutes have the same legal force. In such a case the control of constitutionality of constitutional statute is possible by changing the constitution either directly or indirectly – on condition that it is not a change of constitution which should have been enacted within a more rigorous procedure.[45]
Similar is the case when the constitution distinguishes between several types of constitutional statutes according to the procedure of enacting – all of these constitutional statutes have however the same legal force. In Austria the qualified majority in the National Council is generally required for enacting constitutional statutes. For the constitutional statutes which restrict the competences of the federal countries the consent of the Federal Council is required. For the change of the constitution the facultative plebiscite is needed if at least one third of the members of the National or federal Council requests it. The plebiscite is obligatory if there is a complete change of constitution.[46] In such cases the control by the Constitutional court is admissible to find out if a concrete constitutional statute which was enacted within the simpler procedure, should not have been enacted within the qualified and more rigid procedure. This was the case when the Austrian Constitutional court abolished a constitutional statute – the Czech Constitutional court refers to this judgment of the Austrian Constitutional court in its own Judgment.[47] The reason for abolishing the Judgment of the Austrian Constitutional court was the fact that the constitutional statute was enacted as a common constitutional statute and the Constitutional court concluded that it should have been enacted as a qualified constitutional statute within the more rigid procedure. The Czech constitutional order does not know any grades of rigidity for enacting the onstitutional statutes and from this reason referring to the Austrian judgment in the Czech Judgment of the Constitutional court is not admissible.

4 Retroactivity

The Czech Constitutional court considers the prohibition of retroactive effects to be the essential element of the legal order. As the reason for abolishing the constitutional statute the

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[42] Constitutional statute No 100/1960 Coll., Constitution of the Czech and Slovak Federative Republic (originally of the Czechoslovak socialist Republic and of the Czechoslovak federative Republic).
[43] Constitutional statute No 143/1968 Coll.., on the Czechoslovak federation.
[44] The problems are presented in points VI. 25-32 of the different opinion of the judge Jan Musil to the Judgment.
[45] In Russia the Federal Assembly can enact the constitutional statutes but the Russian Constitution can be changed only under the condition that 2/3 of the citizens of the Federation agree with it. Art 136 of the Constitution from 2. 12. 1993. ZDENĚK KOUDELKA, RENATA VLČKOVÁ: *Ústavní systém Ruska, Ústava Ruské federace*, Brno 1996, p. 73.
[46] Art 44 of the Austrian Constitution from 10. 11. 1920. PAVEL KANDALEC: Materiální jádro ústavy v judikatuře rakouského Ústavního soudu, sborník *Dny práva 2009*, Právnická fakulta Masarykovy univerzity Brno, 2009, http://www.law.muni.cz/edicni/dny_prava_2009/files/prispevky/mezin_smlouvy/Kandalec_Pavel%20__1350_.pdf
[47] The judgment of the Austrian Constitutional court from 11. 10. 2001, VfGH 16.327. Part IV of the reasoning (p. 4629) of the judgment where the date of the judgment (11. 11. 2001) is false. The Constitutional court refers to the German literature which admits theoretically the possibility of abolishing constitutional statutes. However, this has not happened so far. Theodor Mautz, Gűnter Dűrig et alii: Grundgesetz Kommentar, Műnchen 1997, Art. 79, p. 14.

Constitutional court mentions the retroactivity of this constitutional statute. The retroactivity vests in shortening of the electoral term of the Chamber of Deputies because such a shortening was not known in the moment when the elections to this Chamber of Deputies took place.[48] However, the law distinguishes various kinds of retroactivity. Retroactivity for the benefit of private persons is admissible. The persons can later obtain more rights or a better position.[49] The constitutional law even orders the retroactive effects on the condition that it is more favorable for the perpetrator.[50]
The retroactivity is divided into the real one and the non-real one. The real retroactivity newly regulates the legal relations which were established before the enactment of the new legal norm (also backward from the creation of the legal relationship). The real retroactivity with the exception of the retroactivity for the benefit of private persons is considered to be inadmissible. Differently is considered the non-real retroactivity which newly regulates the legal relations created before the enactment of the legal norm but it does not touch the part of the legal relations which already went on, it refers to the future existence of the legal relation.
In given case it is not possible to regulate newly the conditions of electing the deputies and e.g. to declare some deputies as unelected on the base of the new regulation of the right to be elected. Nevertheless, it is possible to regulate the legal relations pro futuro including the ways of terminating the mandates of the deputies in the future. This is the non-real retroactivity. On the contrary the deputies cannot enact any constitutional change concerning their own position, it would mean that all the changes would concern only the future deputies. The constitutional judge Jan Musil points out these consequences of the Judgment.[51] According to this logic of prohibition of the non-real retroactivity the Constitutional court would have to designate as unconstitutional the proposed limitation of the legislative immunity, of the immunity of the Senators and of the immunity of the constitutional judges on the condition that it would concern the contemporary deputies, senators and constitutional judges. Such an opinion is to refuse. It is possible to refer to the change of immunity in Slovakia which concerned the elected deputies, it means it was the effect of the non-real retroactivity.[52]
The absurdity of the conclusions of the Constitutional court can be shown at the constitutional statute on dissolution of the Czechoslovakia in connection to a new Constitution because on the base of these regulations the mandates of the deputies of the Federal Assembly and of other officers dissolve[53] because together with the dissolution of the state also the public bodies of the state dissolve. If some federal deputy or some other federal officer had brought a Constitutional complaint that he/she had been elected for four years and the constitutional majority allowed him/her to stay in the office only for half a year, then he/she would have been successful according to the conclusions of the Czech Constitutional court.[54] And what

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[48] Point VI.b of the reasoning (p. 4635-4636) of the Judgment.
[49] E.g. claims on creation of the pension are assessed according to the new regulation (also while fulfilling conditions before effectiveness although it did not constitute any entitlement to pension according to the regulations effective at which time - § 69/1 of the statute No 155/1995 Coll., on pension insurance.
[50] Art 40 par 6 of the Charter of fundamental rights and freedoms, No 2/19993 Coll.
[51] Part VIII. (Final notes), point 40 of the different opinion of the judge Jan Musil to the Judgment.
[52] Art 78 par 3 of the Constitution of the Slovak Republic No 460/1992 Coll., in the text of the constitutional statute No 90/2001 Collection of the laws of the Slovak Republic.
[53] Art 3 par 1 of the constitutional statute No 542/1992 Coll., on dissolution of the Czech and Slovak federative Republic (ČSFR). In the art 4 the deputies tried to ensure their mandate in the newly created states because they did not understand that together with the dissolution of the state also their mandates vanish. This attitude was accepted neither in the Czech Republic nor in the Slovak Republic.
[54] From the point of view of the Czech Constitutional court either the constitutional statute itself which abolished all the federal bodies would be unconstitutional or the new Constitution which would not respect the constitutional command to involve the deputies of the Federal Assembly to the parliaments of the Czech Republic and Slovak Republic. Similarly neither the deputies of the Federal Assembly in Slovakia were involved

about the dissolution of the district offices? Would the senior clerk of the district office be successful with his constitutional complaint concerning his demand to stay in the office till he retires because he did not know that the district offices would be abolished in the future and he suggests abolishing the district offices gradually according to the situation how the senior clerks will retire. The common sense refuses such a constitutional complaint but the Czech Constitutional court accepted that in the case Melčák.

Sometimes some appeals demanding abolishing the high courts arise. This would cause the dissolution of positions of the judges there – they would be assigned somewhere else, it means also without their consent. According to the logic of the Czech Constitutional court in the case Melčák the Constitutional court would likely consider the abolishing of the high courts as unconstitutional[55] because the conditions of their functions change, the judges were not aware of this fact when they entered the office. The absurdity of the logic of the Constitutional court vests in the fact that any office could not be abolished until the officers retire.

The Constitutional court considers as unconstitutional also the shortening of the electoral term of the Chamber of Deputies in the year 1998[56] which was elected in the year 1996. On the other hand the Constitutional court considers as constitutional the ad hoc shortening[57] for the elections which took place in the year 1990 because these were enacted before the elections to the Parliaments took place.[58] The Constitutional court suppressed that this constitutional statute could be enacted by the Czech National Council only on the base of the constitutional authorization of the Federal Assembly[59] because the electoral term of the National Councils was contented in Czechoslovak, not in Czech or Slovak, constitutional statute. The mentioned constitutional statute enacted by the Federal Assembly shortened the electoral term of both the Federal and the republics' Parliaments about a year – naturally it was an ad hoc constitutional statute. The electoral term started as a 5-year electoral term.[60] The silence of the Constitutional court is clear because it did not dare to declare the constitutional base of the free elections in 1990 as unconstitutional and draw the consequences of its interpretation of law not even 20 years after the year 1989. However, it is hypocrisy to suppress that the constitutional statute which serves as an example of constitutionality was enacted on the base of a constitutional statute which shortened the electoral term of the contemporary Parliaments which is the fact that is considered as contradictory to the state of law.

5 Essential elements of the democratic state respecting the rule of law

The Czech Constitutional court went out of the inadmissibility of changing the essential elements of the democratic state respecting the rule of law at judging the constitutional statute on shortening the electoral term. The Constitutional court considers also the basic principles of the election law to be one of the essential elements. Of course a change of the election law

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in the legislative procedure because their mandates were finished by the § 2 of the constitutional statute of the Slovak National Council No 70/1994 Collection of laws of the Slovak Republic, on shortening the electoral term of the Slovak National Council.

[55] The judiciary system of courts is presented in art 91 par 1 of the Constitution and any change of this system is possible only on the base of a constitutional statute.

[56] Constitutional statute No 69/1998 Coll., on shortening the electoral term of the Chamber of Deputies.

[57] One-shot constitutional statute is now constitutional conform according to the Constitutional court. Where is the requested generality of the constitutional statute? The Constitutional court changes its interpretation in the same judgment.

[58] The Constitutional court mentions here the constitutional statute No 64/1990 Coll., on the electoral term of the Czech National Council. Similar situation was in § 2/1 of the constitutional statute No 45/1990, on shortening the electoral term of the representative assemblies.

[59] § 2/2 of the constitutional statute No 45/1990 Coll., on shortening the electoral term of the legislative bodies.

[60] Art 30 par 3, art 31 par 3, art 103 par 2 of the constitutional statute on the Czechoslovak federation in the text of the constitutional statute No 43/1971 Coll. Till the amendment in 1971 the electoral term lasted four years.

instituting for example the racial or religious distinction for the right to vote is inadmissible according to the Czech Constitution. The question is if the possibility of premature elections can be considered to be one of the essential elements of the democratic state.
Already in the year 1998 the political situation in the Czech Republic was solved by the premature elections which were declared on the base of a special constitutional statute ad hoc. The same situation came in the year 1990 when the electoral term of the legislative bodies was shortened by a constitutional statute.[61] Shortening of the electoral term is a repeated solution[62], also after the November 1989, which constitutes a constitutional convention. The Constitutional court recognized the constitutional convention to be the objective source of law including the constitutional law.[63] The Constitutional court applied a constitutional convention e.g. while deciding if the competence of the President of the republic to appoint the governor of the Czech National Bank underlies the countersignature of the Prime Minister. The Constitutional court applied the constitutional convention when the governors of the Czech National Bank were appointed without the countersignature and the Prime Minister did not mind. Before the appointing of Zdeněk Tůma to the office of the governor of the Czech National Bank in the year 2000, which became the object of the dispute between the Prime Minister and the President of the Republic, the governor was appointed only twice[64] (20. 1. 1993 and 22. 7. 1998 and only the second appointment was made by the President). In the first case the chairman of the Chamber of Deputies appointed the governor because the office of the President was not staffed.[65] The Constitutional court speaks about a constitutional convention on the base of one act of appointment. The Constitutional court adjudicates in conflict with its previous practice when it does not recognize that a repeated solution became a constitutional convention.
Because the Constitutional court refused to accept the possibility of shortening the electoral term in conflict to the constitutional convention and abolished the given constitutional statute due to unconstitutionality, it says at the same time that also in the years 1990 and 1998 the essential elements of the democratic state were breached. If a normal person who is touched neither by the law nor by the opinions of the Constitutional court should say how he/she imagines the breach of the essential elements of the democratic state which has to be corrected by disobedience to the will of the constitutional majority in Parliament, he/she would say that it has to be something like severe social crises when anarchy appears, the

[61] § 1 of the constitutional statute No 45/1990 Coll., on shortening the electoral term of the representative assemblies.
[62] Before the November 1989 it was the § 2 of the constitutional statute No 35/1960 Coll., on change of the constitutional statute on the elections to the National Assembly and on the elections to Slovak National Council and of the constitutional statute on the national comities, constitutional statute on No 75/1963 Coll., on finish of the electoral term of the National Assembly, of the Slovak National Council and of the National Comities, constitutional statute No 112/1967 Coll., on finish of the electoral term of the National Assembly, of the Slovak National Council, of the Supreme court, of the regional, district and military courts, constitutional statute No 83/1968 Coll., on finish of the electoral term of the national comities, of the National Assembly and of the Slovak National Council.
[63] Judgment No 163/1997 of the Collection of judgments and resolutions of the Constitutional court, vol. 9 (30/1998 Coll., Pl.US 33/97) and judgment No 91/2001 of the Collection of judgments and resolutions of the Constitutional court, vol. 22 (285/2001 Coll., Pl.ÚS 14/01).
[64] Also the vice-governors were appointed this way.
[65] The chairman of the Chamber of Deputies appointed the first governor, Josef Tošovský, and from this reason he understood this competence as a competence which does not request the contrasignation otherwise the competence would passage to the Prime Minister. Václav havel took the office of the first President of Czech the Republic on 2. 2. 1993 and on 17. 2. 1993 he appointed six members of the Bank Council of the Czech National Bank including Josef Tošovský who had two special decrees – the first on the position of the governor and the second on the position of the member of the Bank Council. Art 62 letter k) and art 66 of the Constitution. Tošovský guvernérem ČNB, *Právo* 21. 1. 1993 p. 3. Prezident jmenoval bankovní radu, *MF Dnes* 18. 2. 1993 p. 2.

people are on barricades and the enemy is getting closer. If we look at the year 1998 through the eyes of ordinary people, we can see a normal year during which the elections took place and a new government was created, but no severe social crises can be mentioned. The year 1998 cannot be compared with the years 1918, 1938, 1939, 1948, 1968 or 1989. In the year 1998 the government was changed but no struggle for the existence of the state or for its democratic basis existed. On the base of the elections in the year 1998 the government of Miloš Zeman was created which as the last government finished its whole four-year constitutional mandate. In the eyes of the Constitutional court it was a government which was created on the base of breach of the essential elements of the Constitution. But only the Constitutional court understands the year 1998 this way. The premature elections were not a breach of the democratic state but they served as confirmation of the democratic state, it means that the political crisis can be solved by the people in the elections. Pavel Rychetský was the person in the government of Miloš Zeman who directed the legislative activity – Pavel Rychetský is nowadays president of the Constitutional court, he must don sackcloth and ashes now because he accepted the previous position on the ruins of the democratic state. Rychetský as senator opposed the alleged unconstitutionality of the shortening of the electoral term of the Chamber of Deputies.[66]

The Constitutional court considers the one-shot changes to be inadmissible. According to the Constitutional court the statutes as well as the constitutional statutes have to be general and they mustn't serve to solve a concrete situation.[67] The one-shot changes of the Constitution are not convenient, but they are not unconstitutional. The Constitutional court considers them to be unconstitutional. Nevertheless, one-shot changes cannot be quite eliminated out of the legal order. The constitutional judge Vladimír Kůrka[68] mentions some examples of one-shot statutes – e.g. statutes on the state budget or the statutes on restitution.[69] Also the one-shot statutes on the merits are virtually honors awarded by the legislative power.[70] One-shot constitutional statute constituted also the ad hoc National Assembly.[71] The Constitutional court says that the constitutional statute on shortening the electoral term of the Czech National Council elected in the year 1990[72] is a constitutionally conform solution.[73] But it was a one-

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[66] The speech of Pavel Rychetský in Senate on 19. 3. 1998 during discussing the draft of the statute on shortening the electoral term of the Chamber of Deputies, Senate press 98021, 1st term of office, http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=1&IS=2395&T=98021#st98021.

Another constitutional judge Miloslav Výborný as a deputy in 1998 opposed the draft of a gropu of ČSSD deputies to enact a constitutional statute to shorten the electoral term of the Chamber of Deputies. However, KDU-ČSL, the party of which Výborný was a member, supported the draft. See the 12th vote, 21st meeting of the Chamber of Deputies on 26. 2. 1998 http://www.psp.cz/sqw/hlasy.sqw?G=11353.

As a rare opinion to the issue of shortening the electoral term let's mention the article of: JAN FILIP: Zkrácení volebního období, *Parlamentní zpravodaj* No 12/1997-98, p. 132-134. PAVEL HOLLÄNDER: Materiální ohnisko ústavy a diskrece ústavodárce, Právník 4/2005, p. 313-335, ISSN 0231-6625.

[67] Point VI./a of the reasoning (p. 4631-4635) of the Judgment.

[68] Point III, 11. of the different opinion of the judge Vladimír Kůrka to the Judgment.

[69] Law No 298/1990 Coll., on regulating some proprietary relations of the religious orders and congregations and of the archbishopric in Olomouc.

[70] Law No 22/1930 Coll., on honors of T.G. Masaryk, Law No 232/1935 Coll., on the state honor to the first president of the Czechoslovak Republic T.G. Masaryk, law No 35/1933 Coll., on erecting the monument to dr. Alois Rašín and to dr. Milán Rostislav Štefánik, law No 117/1990 Coll., onhonors of M. R. Štefánik, law No 292/2004 Coll., on honors of Edvard Beneš. Similarly in Slovakia – law No 402/2000 Collection of the laws of the Slovak Republic, on honors of Milan Rastislav Štefánik, law No 531/2007 Collection of the laws of the Slovak Republic, on honors of Andrej Hlinka, law No 432/2008 Collection of the laws of the Slovak Republic, on the honors of Alexandr Dubček.

[71] Constitutional statute No 65/1946 Coll., on the constitutional National Assembly was enacted without changing the regulation of the two-chamber National Assembly and it was applied in accordance with the rule lex specialis derogat legi generali.

[72] Constitutional statute No 64/1990 Coll., on the electoral term of the Czech National Council.

shot change of the Constitution. Once is the constitutional change unconstitutional and in other case it is alright.
As a reason to justify abolishing constitutional statutes, the Constitutional court mentions the prevention from misuse of the power by Parliament. The Constitutional court points out the possible future bad intentions of the Parliament (if it is possible to shorten an electoral term, in the future it could be possible to suspend the Constitutional court or the office of President of the Republic).[74] But don't we have to be afraid of bad intentions of the constitutional judges? It does not mind that the contemporary Constitutional court probably does not have bad intentions – however, it opened a way due to the abolishment of the constitutional statute. What if the Constitutional court abolished as unconstitutional the restriction of the judicial term of the office of the constitutional judges and declared it for lifelong office? It is possible to find some arguments which suggest the judicial mandate as lifelong office and a lot of states dispose of regulation with such a mandate at the supreme or constitutional courts. Who prevents the next intention of the Constitutional court from abolishing the Constitution when it is fully sufficient that the Constitutional court is convinced what other state bodies should or mustn't do in a democratic state? It is surely possible to foresee hypothetically that the Constitutional court can become mad the same way as the Parliament can become and becomes a tyrant. We can presume this situation either at all the state bodies or at nobody. It is unthinkable in a democratic state for the deputies to vote for the hereditary mandate as well as the possibility that the constitutional judges would abolish a part of a constitutional statute of the Czech National Council which restrict the length of their office and would make the office of the constitutional judges lifelong. The base of the law creates the common sense. The Constitutional court points out the common sense while judging the decisions of other state bodies.[75] Nevertheless, the Constitutional court does not apply this criterion on itself.

5.1. International excursus

Comparison with Slovakia is very interesting because the Czech Republic has common constitutional history with Slovakia. The electoral term of the Slovak National Council was repeatedly shortened in 1994 and 2006 by enacting two constitutional statutes ad hoc.[76] This procedure was fully accepted in Slovakia, the elections were not infirmed due to breach of the essential elements of Constitution – neither in Slovakia nor in an international view. In 2004 trade unions even requested the plebiscite to accept premature elections to the Chamber of Deputies, however the plebiscite was not valid due to the insufficient participation of the electors (Constitution requests the absolute majority of electors).[77] The participation in the plebiscite was 35,86%, from this quantity 86,73% people said yes, 11,93% said no.
The international attitude is very important because even under a mere suspicion of a possible endangering of principles of the democratic state the political sanctions can be imposed. Such sanctions were imposed against the former Austrian president Kurt Waldheim in the years

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[73] Point VI./b of the reasoning to the Judgment.
[74] Point VI./a of the reasoning (p. 4635, 2nd article) to the Judgment.
[75] The Constitutional court judges if the statutes are reasonable – and it is right. The legal regulation should be reasonable. Judgment No 160/2006 of the Collection of judgments and regulations of the Constitutional court, vol. 42 (Pl.ÚS 57/05).
[76] Constitutional statutes even stated the concrete term of elections. The following promulgation by the chairman of the National Council was only a formal act. Constitutional statute No 70/1994 of the Collection of laws of the Slovak Republic and constitutional statute No 86/2006 of the Collection of laws of the Slovak Republic, on shortening the electoral term of the Slovak National Council. The decision of the chairman of the National Council of the Slovak Republic No 105/1994 of the Collection of laws of the Slovak Republic and No 62/2006 of the Collection of laws of the Slovak Republic, on declaration of the elections to the National Council.
[77] Art 98 par. 1 of the Constitution of the Slovak Republic No 460/1992 Coll.

1986-92, he was engaged in the Hitler army on the Balkan peninsula.[78] In the year 2000 the Austrian coalition government of the chancellor Wolfgang Schüssel had to face the sanctions due to the participation of Jörg Haider's FPÖ in this coalition. The participation of the Slovakian political party Směr – sociální demokracie in the European social-democratic party was suspended in the years 2006-08 due to its cooperation with the Slovakian national party. The politicians in Europe are able to criticize even a mere suspicion of breach of the democratic rules, nevertheless it never happened in connection with shortening of the electoral term of the Parliaments in Czechoslovakia in 1990, in Slovakia in 1994, 2006 and in the Czech Republic in 1998 and 2009. Premature elections are not connected to breach of democratic state in Europe.

6 Constitutional category "statute"

The Constitutional court states a reason for acquisition of the right to abolish the constitutional statutes in the part IV of its Judgment – the constitutional statute is only statute. If the Constitution does not exclude some constitutional statutes expressly in a concrete situation,[79] then the concept of statute includes also the constitutional statutes. If the Constitution enables the Constitutional court to abolish statutes, it enables the Constitutional court to abolish the constitutional statutes as well.

The article 33 of the Constitution enables the Senate to enact the so called statutory measures in those cases which would demand enactment of a statute.[80] At the same time it cannot happen in the issues of the Constitution, state budget, national account, the law on elections and the international agreements in accordance with the article 10 of the Constitution. On the condition that we accept the interpretation of the Constitutional court that the category statute comprises also the category constitutional statute, then the statutory measures of the Senate could change also the constitutional statutes with the exception of the Constitution. The exception from the applicability of the statutory measures of the Senate is only in the Constitution (it means in one concrete constitutional statute). However, this attitude is indefensible. The statutory measures of the Senate cannot change the constitutional statutes, they can change only the statutes because the categories of constitutional statutes and statutes are divided if there is no contrary.

It is possible to apply the procedure determined by the Constitution for the statutes e.g. at their enactment to the constitutional statutes analogically.[81] Nevertheless, a new competence cannot be determined on the base of analogy. The competence can be given to the state body only on the base of constitutional or statutory regulation. Neither the Constitutional court can usurp a new competence. The competence to enact a constitutional statute is given to the Parliament expressly by the Constitution.[82] Already Hayek warned against the arbitrariness of the public authorities that are not bound by firm rules: "*Constantly broader competences which are conferred to new authorities without being bound by fixed rules, have almost unlimited discretion...*"[83]

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[78] A lot of heads of states did not want to communicate with him in spite of the fact that he acted as a Secretary General of the United Nations in the years 1972-81. From the initiative of the World Jewish Congress the American Minister of Justice Edwin Meese declared on 27. 4. 1987 that Waldheim had been written to the list of the undesirable people in the USA, which meant prohibition of entry for Waldheim as a private person to the USA. Also Israeli and Canada prohibited entry for Waldheim. See the German Wikipedia: Waldheim-Affäre http://de.wikipedia.org/wiki/Waldheim-Aff%C3%A4re

[79] Art 50 par 1, art 62 letter h) of the Constitution.

[80] Art 33 par 1 of the Constitution.

[81] Art 44-48, art 62 letter i) of the Constitution.

[82] Art 39 par 4 of the Constitution.

[83] FRIEDRICH AUGUST von HAYEK: *The Road to Serfdom*, Phoenix Books, 1944, p.83.

7 Abolishing at the day of promulgation

The Constitutional court abolished the Constitutional statute at the day of the oral promulgation of the Judgment without giving reasons why it cannot use the common abolishing at the day of publishing in the collection of laws.[84] Sudden quickness is contradictory to the proclaimed responsible long-time process of creating decisions after the suspension of enforcement of the decision of the President of the Republic.

Judgments of the Constitutional court abolishing a legal regulation are published in the collection of laws of the Czech Republic. Legal regulation is abolished at the day which is determined in the Judgment (usually it is the day of publishing in the collection). The Constitutional court can suspend the enforcement of the judgment and give some time to the legislator to regulate such a field of social relations if the immediate abolishing seemes to be undesirable. The Constitutional court cannot abolish regulations with retroactive effects, which flows from the principle of prohibition of retroactivity and from the principle of legal certainty. The regulation can be abolished from the day of promulgation. Due to the demands on publicity of law it is necessary to publish the Judgments of the Constitutional court in the collection of laws. Nevertheless, also in this demand the Constitutional court determinated the day of the oral promulgation as the day of abolishing the constitutional statute.[85] It means breach of the old principle that the law has to be published formally including the legal acts abolishing the effective regulations. The Constitutional court tries to introduce a new practice – the state bodies should follow information on TV about the fact that some regulation has been abolished or should follow the information about such a fact on the internet pages of the Constitutional court – but such ways of informing do not have any official publication capacity. Such way of informing is to accept in the time of war or in case of e.g. a comet falling down on the area of the Czech Republic. If the Constitutional court had really been interested in an accelerated publication, it would have arranged a priority publication of the Judgment in the collection of laws.

Let us mention that such an important regulation for the economy of the state like law on separating the currency from the common Czechoslovakian crown in the year 1993 was correctly published in preferably published collection of laws within one day.[86] Also the law on passage of the Hospital of accident in Brno (Úrazová nemocnice v Brně) was after its signature by the President of the Republic on 29. 12. 2008 signed by the Prime Minister on 30. 12. 2008 and published the following day on 31. 12. 2008.[87] This law became effective on the first day of the calendar month after the day of publication. The causation of the accelerated publication was to simplify the financial flows in the frame of the budget year. This law was enacted by the opposing deputies, it was not a governmental draft. The Senate did not discuss this draft within the 30-day time period and the President of the Republic used almost all the 15 days to decide about the signature of the law because the draft was submitted to the President on 15. 12. 2008. Despite this fact the publisher of the collection of laws published preferably the given chapter of the collection of laws. It would be comprehensible

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[84] Point I of the statement (p. 4622) and point VI./c of the reasoning (p. 4637) of the Judgment.

[85] The Constitutional court did it in the judgment No 283/2005 Coll. (127/2005 of the Collection of judgments and resolutions of the Constitutional court, Pl.ÚS 13/05) which abolished the statute No 96/2005 Coll. changing the statute No 238/1992 Coll., on conflict of interests. Judgment No 483/2006 Coll. (Pl.ÚS 51/06) which abolished part of the statute No 245/2006 Coll., on public non-profit medical institutions. A critical opinion to the steps of the Constitutional court: JOSEF VEDRAL: K právním účinkům derogačního nálezu ÚS, *Právní zpravodaj* 8/2005, p. 13.

[86] Statute No 60/1993 Coll., on separating the currency. Enacted on 2. 2. 1993 and published in the Collection of laws on 3. 2. 1993.

[87] Statute No 485/2008 Coll., on passage of the Hospital of Accidents in Brno, published in the series 155 of the Collection of laws on 31. 12. 2008. http://www.psp.cz/sqw/historie.sqw?o=5&T=373

to bind the enforceability to the oral promulgation of the Judgment of the Constitutional court on the condition that the publisher of the collection of laws causes any obstructions. If it is not so, the Constitutional court breaches the generally acknowledged principles of the democratic state by not respecting the principle that the legal regulations of the state as well as their abolishing have to be formally published in official collections of laws.

8 Legitimate expectation

The Constitutional court insists on prohibition of restricting the exercise of the right to vote.[88] This pronouncement is interesting because it is really uncommon. One of the aims of the Constitutional court is the protection of the constitutional rights. It is logical that the Constitutional court mustn't limit these rights. In other judgments of the Constitutional court we do not find such a declaration. Why did the Constitutional court feel the need to declare something like this? The explication is simple – the Constitutional court was aware of the violation of the right to vote and that is the reason why the Constitutional court declared the contrary.

The objective right to vote the deputies in 2009 came to existence because the constitutional statute on shortening the electoral term had been enacted. By the decision of the President of the Republic this objective right to vote was transformed into a subjective right of each citizen of the Czech Republic to elect the deputies in October 2009. On the base of the publication of the Judgment of the Constitutional court in the collection of laws the citizens expected legitimately that they are going to elect the deputies in October 2009.

The Constitutional court used to protect the legitimate expectations. According to the practice of the Constitutional court a person mustn't be deprived of a once existing right by a unilateral act. The Constitutional court abolished[89] a part of a statute[90] which cancelled a legal regulation of transformation of the right of permanent use into the right of ownership.[91] The Constitutional court pronounced unconstitutionality of this statute which cancelled the right of the future transformation of the right of permanent use into the right of ownership in the time when the ownership did not come to existence. The Constitutional court stated that the people expected legitimately the transformation into the right of ownership after the lapse of one year time period. Such a legitimate expectation is capable of getting some legal protection. Although it is clear that legitimate expectation in the field of the protection of the ownership cannot be applied in all the legal areas with the same effects, it is worth a deliberation.[92] However, the right to vote belongs together with the right of ownership into the same category of human rights and basic freedoms of the Charter of fundamental rights and freedoms.[93]

On one hand the existence of a statute regulating the right which comes to existence in the future is sufficient for the legitimate expectation. On the other hand a subjective right on the base of a constitutional statute is not enough for the Constitutional court to protect it.[94] The

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[88] Point VIII (Orbiter dictum) of the reasoning of the Judgment.

[89] Judgment No 35/2004 of the Collection of judgments and resolutions of the Constitutional court, vol. 32 (278/2004 Coll., Pl.ÚS 2/02).

[90] Part two (Change of the Civil Code) of the law No 229/2001 Coll.

[91] § 879c-879e of the Civil Code No 40/1964 Coll., in the text of the law No103/2000 Coll.

[92] The Supreme Administrative Court went out of the legitimate expectation while judging the position of the trainee judge applying for the function of judge, it means in the area of labor law. Judgments of the Supreme Administrative Court No 905/2006 of the Collection of judgments of the Supreme Administrative Court (4Aps 3/2005) and No 1717/2008 of the Collection of judgments of the Supreme Administrative Court (4Ans 9/2007-197).

[93] The right of ownership is in art 11 and the right to vote in art 21and both the articles are part of the catch II – human rights and basic freedoms.

[94] Constitutional statute No 195/2009 Coll., became effective on the day of promulgation (29. 6. 2009). The decision of the President of the Republic No 207/2009 Coll. from 1. 7. 2009 was published on 9. 7. 2009.

Constitutional court would not forgive such a treatment with legal institutions to some other state bodies. Towards the others the Constitutional court insists on following the established practice of the Constitutional court on the condition that no change is justified. Despite this fact the Constitutional court itself changes its practice without reasoning it properly. The Constitutional court is bound by its own judgments, it can change its own practice but it is necessary to follow certain procedure respecting the legal certainty and foreseeability.[95] One new judgment is not able to change the present practice of the Constitutional court, it has to be considered as a changed practice of the Constitutional court and the Constitutional court has to pronounce expressly why the practice should be changed.[96] The Constitutional court is getting to a position of an unlimited ruler who creates the law but is not bound by the law.

9 Conclusion

Abolishing the constitutional statute enacted within a correct procedure is in conflict with the constitutional command referring to the duty of the Constitutional court to be bound by the constitutional statutes. The constitutional judges tried to become immortalized. If the Constitutional court can designate the constitutional statute as unconstitutional, then others can designate judgment of the Constitutional court as something what is no judgment and can refuse to respect it. Such a consequence is a serious breach of legal certainty.

It is admissible to abolish a constitutional statute on the condition that there appeared some procedural mistakes. Taking place of premature elections[97] does not correspond to the mentioned situation if the elections fulfill the principles of equal, universal and secret franchise and the principles of free competition of political parties. The legislator should regulate abolishing of the constitutional statutes by a qualified majority of the constitutional judges.

Let us appreciate the consequence of the Judgment of the Constitutional court which led to the permanent change of functionless part of Constitution in the area of dissolution of the Chamber of Deputies.[98] It is the fault of the representatives of the strongest political parties that they were not able to enforce such a change earlier. However, the educational function of the Judgment of the Constitutional court mustn't endanger the legal certainty and the hierarchic structure of the legal order, it cannot lead to unconstitutional extension of competences of the Constitutional court. The Constitutional court cannot withdraw the existing right to vote in elections and endanger the constitutional base of our political system by wasting the financial sources of the political parties which were spent on the election

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[95] Hayek points out the respect to the legal culture and from this reason he considers as important for the constitutional court to follow its previous judgments and each obvious need of changing such judgments should be made within a constitutionally regulated procedure. FRIEDRICH AUGUST von HAYEK: *Právo, zákonodárství a svoboda*, 2. edition 1994, p. 365.

[96] It is not a rare situation. E.g. the judgment No 45/2007 of the Collection of judgments and resolutions of the Constitutional court, vol. 44 (162/2007 Coll., Pl.ÚS 42/05) changed legal opinion to the possibility of stating a general police hours for restaurants in a general binding regulation of the municipality issued to protect the public order in accordance to § 10 of the statute No 128/2000 Coll., on municipalities when the Constitutional court considers these regulations newly to be unconstitutional although it considers them to be constitutional in its earlier judgment No 189/2001 of the Collection of judgments and resolutions of the Constitutional court, vol. 20 (51/2001 Coll., Pl.ÚS 4/2000). The fact that this a new practice of the Constitutional court is not mentioned in the new judgment.

[97] Even the supporter of the possibility to abolish constitutional statutes by the Constitutional court due to the conflict to the material gist of constitution considers abolishing of the constitutional statute on shortening the electoral term of the Chamber of Deputies to be wrong. VOJTĚCH ŠIMÍČEK: Materiální ohnisko ústavního pořádku, jeho ochrana a nález ÚS ve věci M. Melčáka, *Vladimír Klokočka Liber amicorum*, Praha 2009, p. 227, 230, 234.

[98] Art 35 par 2 of the Constitution in the text of the constitutional statute No 319/2009 Coll.

campaign.[99] The Judgment of the Constitutional court which abolished the constitutional statute was ultra vires. It is a legal pseudo-act. The binding effect was conferred to this pseudo-act by the fact that other state bodies followed this Judgment and did not declare it for pseudo-act.

[99] The Constitutional court should not enter the political disputes and teach the politicians lessons. Politics as well as economy, culture or science is quite independent and separate areas and the Constitutional court mustn't be involved. Point 19, part III. Change of paradigm of the democratic state of the different opinion of the judge Jan Musil to the Resolution of the Constitutional court from 15. 9. 2009, Pl.ÚS 24/09 in the case of the constitutional complaint against shortening the electoral term of the Chamber of Deputies.