Governance in the Czech Republic

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1. Basic constitutional principles determining governmental activity

In the first part of our contribution we would like to analyze the basic principles that determine governmental activities. Not surprisingly, these principles are stated in the Constitution of the Czech Republic (Constitutional Act No. 1/1993 Coll.[1] – hereinafter 'the Constitution'). The first Constitution of the independent Czech State, literally, is a rigid written constitution formed by a Preamble and 114 articles which are subdivided into eight chapters.

The Preamble characterizes the general traditions, present principles and aims of the newly independent Czech State. The rest of the Constitution is organized in such a way that it primarily expresses the basic values upon which the Czech state is established, then the principles of the separation of powers, including the relations of state power to the bodies of territorial self-government: these chapters regulate legislative power, executive power, i.e. the President of the Republic and the Government, judicial power, i.e. the Constitutional Court and ordinary courts, the Supreme Control Office, the Czech National Bank and territorial self-government[2]. Generally said, the Constitution does not govern the status of the individual. These issues are left to the Charter of Fundamental Rights and Basic Freedoms (hereinafter 'the Charter') which has been adopted in its original 1991-version without any changes[3]. These two documents are the main part of the so called 'constitutional order' which includes all the other constitutional acts in force in the Czech Republic as well. The Czech Constitution is thus only one component of a group of constitutional acts (poly-legal constitution). The whole body of constitutional acts is called 'constitutional order' in the Czech Republic[4].

> As we pointed out elsewhere: 'In this way, the Czech Republic is connected to the constitutional tradition which has been maintained here without break since 1867. From 1867 Austria-Hungary also did not have a mono-legal constitution consisting in one legal document, rather a set of basic laws. Czechoslovakia carried on this tradition in the year 1918'[5].

The entire **text** of the Czech **Constitution** is **based on a set of principles** which supplement each other and which markedly distinguish the present constitutional situation of the Czech Republic, not only from the constitutional situation prevailing in the state before 1989, but even from the one which lasted from 1989 till 1992. These principles are **following**: democracy, including the sovereignty of the people; the rule of law (law-abiding state); respect for the rights and freedoms of man and of citizen; the republican form of a state; parliamentary democracy; the social state; the unitary state; the regional self-government.

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[1] Coll. is the abbreviation of Collection of Laws that is the official journal for publishing legal enactments.

[2] Sequentially see Arts. 16–53, Arts. 54–66, Arts. 67–80, Arts. 83–89, Arts. 90–96, Art. 97, Art. 98, Arts. 99–105.

[3] So far, there has been only one change of the Charter made by the Constitutional Act No. 162/1998 Coll.

[4] Components of the Czech constitutional order are, except the Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts of the Czech National Council adopted during its 7th electoral period which lasted from 6 June 1992 till the end of 1992 (No. 4/1993 Coll. and No. 29/1993 Coll.), constitutional acts which have been adopted 'pursuant to the Constitution of the Czech Republic'. See in detail B) I. 1. d)

[5] J. Filip, *The New Role of the Constitution of the Czech Republic – 10 years after*, in *Ten Years of the Democratic Constitutionalism in Central and Eastern Europe. Materials of the Conference* (Poland, Kazimierz Dolny, September 14–17, 2000) pp. 53–75.

The most important of these principles are set forth at the head of the Constitution (in Article 1 paragraph 1), emphasising that the Czech Republic is a sovereign, unitary and democratic State governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. In connection with that provision it is important to mention the so called **'eternity clause'** in Article 9 paragraph 2 of the Constitution. According to it, 'any changes in the essential requirements for a democratic state governed by the rule of law are impermissible'. These provisions express the basic constitutional measures of all state actions, including the law making process. Since it has a fundamental impact on the application of law in the Czech Republic, **interpretation in favour of democracy clause** in Article 9 paragraph 3 should be mentioned as well; it states that 'legal norms may not be interpreted so as to authorise anyone to do away with or jeopardize the democratic foundations of the State'[6].

1.1. Sovereignty

1.1.1. Popular sovereignty

a) In contrast to other constitutions (e.g. Spanish, Portuguese etc.), the Constitution of the Czech Republic **does not explicitly state** that the **people is the sovereign**, nevertheless, it states it implicitly, through the statement in its Article 2 paragraph 1 which says that the people is 'the source of all power in the State'. In other words, in the Czech Republic there is no other source of the state power than the people and the state power can be exercised only through bodies of the state which are derived from the people either directly or indirectly, and thereby legitimized to exercise the power). The only exception is the **direct exercise** of the state power by the people in accordance with the provision of Article 2 paragraph 2 of the Constitution: 'A Constitutional Act may define when the people exercises state power directly'.

> The only existing example of this possibility has been the Constitutional Act No. 515/2002 Coll., which defined a referendum on the Czech Republic's accession to the European Union. On the contrary, the local referendum, set by the Act No. 22/2004 Coll., is quite frequent.

The people is as well the only source of the **indirect exercise** of the state power, thus it is the only source of the legislative power (which also includes an adoption of the Constitution), but it is limited by the Constitution itself or, more precisely, by the unchangeable substantive requisites of the democratic state, as it is stated in Article 9 paragraph 2 of the Constitution.
b) Furthermore, the **people** is recognized as the **owner of national property**[7], and as the source of power of every organ of the State[8]. The right to put up **resistance**, which is based on different ideological sources, could be recognized as the last demonstration of sovereignty of the people; it reflects the natural law basis of the Charter of Fundamental Rights and Basic Freedoms – as mentioned in Article 23[9] and offers a possibility to put up resistance towards anyone who would try to eliminate the democratic order of human rights established by the

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[6] These principles will be discussed in more detail later in this part.
[7] See Act No. 496/1991 Coll. about the reversion of property of the Communist Party of Czechoslovakia to the people of Czech and Slovak Federal Republic (CSFR).
[8] Cf. the promise of the deputies, senators and the President of the Republic is to exercise the office 'in accordance to interest of the whole people'.
[9] Art. 23 of the Charter provides: 'Citizens have the right to put up resistance to any person who would remove the democratic order of human rights and fundamental freedoms established by this Charter, if the actions of constitutional institutions or the effective use of legal means have been frustrated'.

Charter. It also applies when all the actions of constitutional institutions or any effective use of legal means have failed[10].

1.1.2. State sovereignty

The principle of the state sovereignty is stated in the very first article of the Constitution: 'The Czech Republic is a sovereign, unitary and democratic State of rule of law, based on respect for the rights and freedoms of man and citizen'.
Since 1989 (or maybe since 1991, when the last soldier of the occupational Soviet army left the Czech territory), this has been not a mere proclamation of sovereignty but a real statement of facts which is not limited by any unwelcome foreign interference; the international obligations voluntarily accepted by the state organs (as representatives of the popular sovereignty) are the only limits of the sovereignty. The observance of international obligations is explicitly stated in Article 1 paragraph 2 of the Constitution: 'The Czech Republic shall observe its obligations under international law', and concretized mainly in Article 10 (concerning the relationship between international and domestic law) and Article 10a (concerning the possibility of a transfer of certain powers of bodies of the Czech Republic to an international organisation or institution).
The main of all recent **problems** associated with the state sovereignty has been linked with an interpretation and application of **Article 10a of the Constitution**. It has been discussed as the constitutional basis and the normative framework for **a possible transfer of some of the sovereign rights to EC/EU**[11].

> The constitutionally acceptable extent of such a transfer was determined in the recent judgment of the Constitutional Court (No. Pl. ÚS 19/08) concerning the constitutionality of the Lisbon Treaty (see part C for more details), which states that the transfer of powers of bodies of the Czech Republic to an international organisation under Article 10a of the Constitution 'cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Article 9 paragraph 2 in connection with Article 1 paragraph 1 of the Constitution). If, on the basis of a transfer of powers, an international organisation could continue to change its powers at will, and independently of its members, i.e. if a constitutional competence (*Kompetenz-kompetenz*) were transferred to it, this would be a transfer inconsistent with Article 1 paragraph 1 and Article 10a of the Constitution'[12].

In this judgment, the Constitutional Court even **analyzed** the very **nature of the state sovereignty** of a state in the present globalized world.

> It stated that 'the limit for transfer of powers to an international organisation under Article 10a of the Constitution consists of the essential requirements of a sovereign, democratic state governed by the rule of law under Article 9 paragraph 2 and Article 1 paragraph 1 of the Constitution. However, today sovereignty can no longer be understood absolutely; sovereignty is more a practical matter. In this sense, the transfer of certain competences of

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[10] For details see J. Filip and L. Vyhnánek, *Responsibility and sanctions in the Czech constitutional law*, in M. Popławski and D. Šramková, eds., *Legal Sanctions: Theoretical and Practical Aspects in Poland and the Czech Republic* (Brno – Białystok 2008) pp. 243–250.
[11] And to other international institutions, such as the International Criminal Court.
[12] Quoted according to Abstract of the Judgment concerning the Treaty of Lisbon. http://www.usoud.cz/scripts/detail.php?id=613. The whole wording see http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

the state, which arises from the free will of the sovereign and will continue to be exercised with the sovereign's participation, in a manner that is agreed on in advance and is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole'[13].

1.1.3. Legal sovereignty[14]

a) The structure of the Czech legal order would be quite simple if described only from the domestic point of view. But from the perspective of legal force, legal enactments form a hierarchical structure of the legal order whose highest level is formed by the Constitution and other components of the constitutional order[15]. The Czech Constitution **does not explicitly declare** that it is the basic law or has a higher legal force, however, such conclusions can be drawn from some of its provisions, e.g. Article 9, Article 39 paragraph 4, Article 87 paragraph 1, lit. a) and b) and Article 95. **No other legal enactments** (statutes, statutory enactments, orders, regulations or generally binding ordinances) **may be in conflict with** constitutional acts. Nonetheless, to **draw a distinction** between constitutional and non-constitutional enactments is not so simple, because in the Czech constitutional order there are distinct means for creating of different levels of amend-ability of particular constitutional provisions. Article 9 paragraph 2 of the Constitution can be designated as the 'eternity clause' (following the example of Article 79 paragraph 3 of the German Basic Law). This provision does not permit 'any changes in the essential requirements for a democratic state governed by the rule of law', but it can acquire more precise meaning through interpretation. **A similar provision** can be found in Article 1 of the Charter providing for that fundamental rights and basic freedoms cannot be subject to repeal. Since not every constitutional provision could be changed by amendments, the Czech constitutional order hereby restricts any future drafters in their freedom of action. Although the provisions to which Article 1 of the Charter refers are clear, Article 9 paragraph 2 of the Constitution does not explicitly enumerate these provisions; opinions expressed in scholarly writings are, and probably will continue to be, in dispute at this point[16]. An attempt has been made by the Constitutional Court in section 93 of its Lisbon Treaty Judgment (November 2008)[17].

Statutes and statutory measures which must be in harmony with implementing statutes or must not be in conflict with constitutional enactments (Article 87 paragraph 1 lit. a) of the Constitution) represent the next level of 'legal force' hierarchy.

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[13] Quoted according to Abstract of the Judgment concerning the Treaty of Lisbon. http://www.usoud.cz/scripts/detail.php?id=613.

[14] See also part B.I.1 and B.I.2.

[15] Art. 9 para. 1, Art. 112 para. 1 of the Constitution.

[16] As an example, some of the writings consider that the preferred position of human rights, the sovereignty of the people, the principle of majority rule and the protection of the minority, and the right to resist to those who would remove the democratic order of human rights, belong to the group of unchangeable provisions. The basic problem resides not in determining which provisions may not be amended, but rather in deciding how this unchangeability could be achieved. Since the law provides no means for ensuring the inviolability of certain principles or values, provisions such as those in Article 9 para. 2 are mere declarations, which were referred to in the past as 'monologues of the constitution givers'. Even Article 9 para. 2 itself could be repealed, if the number of votes required were obtained, and it would be difficult to call such an outcome into doubt. For other considerations see Filip, *op. cit.* n. 5. at pp. 53–75.

[17] The Czech Constitutional Court has held that the guiding principle is undoubtedly the principle of inherent, inalienable and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people and separation of powers, respecting the cited material concept of a law-based state, is built to protect them. According to the Constitutional Court: 'these principles can not be touched even by an amendment to the Constitution implemented formally in harmony with law, because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them'.

They are followed by the **government orders, ministerial regulations and regulations of other central bodies of the state administration**. Their lower legal force results from the fact that they are derived from statutes, as it is apparent from Article 87 paragraph 1 lit. b) of the Constitution which permits such enactments to be annulled due to non-conformity with the statutes. This provision also implies, from the perspective of legal force, that there is no distinction between government orders and ministerial regulations, since the Constitutional Court is not permitted to determine a possible inconsistency between these two types of enactments.

Finally, the lowest level of the hierarchy is determined by the generally binding **municipal or regional ordinances**; however, a distinction must be made between the generally binding municipal ordinances **issued on the basis of delegated authority**[18] and those issued on the basis of independent authority[19]. In the first case, ordinances are issued merely on the basis of the strength of a statutory empowerment and lose its validity if that statute is repealed or annulled. In the second case, they may be issued as primary enactment, that is a **non-derivative legal enactment** the existence of which is not dependent upon a statutory empowerment. However, since they lay down duties for individuals and legal persons, their validity should rest on a statutory empowerment. And last but not least, they may be annulled only by the Constitutional Court.

Domestic **law agreements** (collective bargaining agreements) can be considered as having the status of implementing regulations.

Enforceable Constitutional Court decisions which annul unconstitutional provisions of statutes or other legal enactments, are also source of law and therefore if a Constitutional Court decision annuls certain provisions of a legal enactment, such decision must be included in the citation of all acts amending or modifying that legal enactment. **In our opinion**, there is no point in discussing their legal force as they only exist in relation to the enactments they have annulled, and hence they cannot be considered in relation to other sources of law.

b) Nonetheless, this situation is getting **more complicated** when the **relationship** between this hierarchical structure of **domestic legal order and the international and supranational legal order** comes into question. The relationship was re-formulated by the Constitutional Act No. 395/2001 Coll., which 'prepared' the Czech Constitution to accept the Community law by amending a new Article 10a to the Constitution providing that: '(1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organisation or institution. (2) An approval of the Parliament is required to ratify an international agreement stipulated in paragraph 1 unless a constitutional law requires an approval from a referendum'[20] and stated in Article 10 of the Constitution the priority application of all 'promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic'. The amendment has made the relationship of domestic and international legal order more 'monistic', and in favour of the international law (in comparison with the former, more dualistic attitude).

> The Constitutional Court concluded the whole process by the judgment No. Pl. ÚS 36/01, published as 403/2002 Coll., which declares the priority application of all above-mentioned international treaties, as well as the international treaties on human rights and fundamental freedoms, which, according to the former version of Article 10 (mentioning merely these treaties and not any others), had the power to derogate ordinary legal acts, and which retains this force despite the fact that the amendment has been passed.

[18] Art. 79 para. 3 of the Constitution.
[19] Art. 104 para. 3 of the Constitution.
[20] This Article was most comprehensively interpreted in the above-mentioned judgment of the Constitutional Court No. Pl. ÚS 19/08 on the constitutionality of the Lisbon Treaty.

1.2. Principle of the rule of law

The principle of rule of law in the Czech Republic is defined by a **number of legal principles** guaranteed by the Constitution; among those we can include the following ones:
1. **The hierarchy** of legal norms with the Constitution and constitutional acts at its apex[21]. In contrast to the normative theory, this hierarchy is not based on the assumption that enactments of a higher force contain the enactments of a lower legal force thus in the final analysis the latter are nothing more than a concretization of the former. A conflict between legal enactments of a different legal force does not result in the nullity (invalidity *ex tunc*) of one of them, but rather to voidability or non-applicability[22].
2. The **respect for the international obligations** of the Czech Republic and the incorporation of all international treaties ratified by the Parliament into the domestic law with a priority application over domestic laws[23].
3. The principle that the **legislative power is bound** by the Constitution, the executive and judicial powers by the Constitution and laws, and all state power by a respect for the rights and freedoms of man and of citizens. The law-making process is determined by the Constitution[24].
4. **Safeguard of constitutionality** by the Constitutional Court and of legality by the ordinary courts; the **independence of the courts and judges**[25].
5. State authority may be asserted only in cases and within the bounds provided for by law and in the manner prescribed by law[26].
6. Everyone[27] may do what is not prohibited by law, and nobody may be compelled to do what is not imposed on him by law; nobody may be caused detriment to his rights merely for asserting his **fundamental rights and basic freedoms**; the protection of fundamental rights and basic freedoms by the judicial power, the right to fair process before an independent court, and the right to one's lawful judge are all assured; equality before the law and before courts is guaranteed[28].
7. **Compensation for damages** may be demanded even from the state if it is caused by the unlawful decision of a court or a public administrative authority, or as the result of an incorrect official procedure[29].
8. The **legality of the criminal law** – only a law may designate the acts which constitute a crime and the penalties that may be imposed for committing them; the **prohibition of retroactivity** – a criminal law may have a retroactive effect only if it is more favourable to the offender[30].
9. Apart from the standards of the state based on the rule of law (as expressly stated in constitutional texts), the actions of both the legislature and public authorities must be generally considered from the perspective of their concept which, while not expressly stated

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[21] Art. 9 para. 1, Art. 87, Art. 95 para. 1 of the Constitution.
[22] Art. 87 para. 1, lit. a), b) and Art. 95 para. 2 of the Constitution.
[23] Art. 1 para. 2 and Art. 10 of the Constitution.
[24] Art. 59 para. 2, Art. 69 para. 2, Arts. 78 & 79, Art. 87, Art. 95 paras. 1, 2, Art. 105. Arts. 39–52 Constitution.
[25] Art. 87 and Art. 95 para. 1, Arts. 81 and 82 para. 1 of the Constitution, Art. 36 para. 1 of the Charter.
[26] Art. 2 para. 3 of the Constitution and Art. 2 para. 2 of the Charter.
[27] Art. 2 para. 3 of the Charter, but Art. 2 para. 4 of the Constitution uses the word 'citizens'.
[28] Sequentially Art. 3 para. 3 of the Charter Art. 4 of the Constitution, Art. 36 para. 1 of the Charter, Arts. 36 para. 1 and 37 of the Charter, Art. 81 of the Constitution, Art. 38 para. 1 of the Charter, Arts. 1, 3, 36 para. 1 and 37 para. 3 of the Charter.
[29] Art. 36 para. 3 of the Charter and Act No. 82/1998 on responsibility for a damage caused by faulty administration.
[30] Art. 39 and Art. 40 para. 6 of the Charter.

in the constitutional order, may be identified due to an interpretation of the constitutional order, especially from Articles 1 and 2 of the Constitution and Articles 1 to 4 of the Charter. These **standards** are following:

- the prohibition of arbitrary action when selecting the means to regulate the conduct of subjects of law and then classifying them; it means that a state intrusion requires some rational justification;
- the prohibition of the excessive or superfluous application of otherwise rationally and non-arbitrarily selected instruments of regulation;
- the prohibition of insufficient protection, in the case of the state which has taken upon certain commitments and at the same time has taken from the individual the power to act in certain domains;
- the requirement of legal certainty, clarity and precision in the law, e.g. a legal enactment that is internally inconsistent so that it may be interpreted by different state authorities in varying fashion or may have a retroactive effect. If this requirement is not met, or even only insufficiently, it cannot pass the test used by the Constitutional Court for its review[31].
- recently, in the judgment No. Pl. ÚS 77/06 (37/2007 Coll.) of the Constitutional Court, even the legislative tactic of so called 'wild riders' was proclaimed to be inconsistent with the material rule of law, and such a part of a legal act which does not fulfil the criteria of germaneness rule has to be derogated by the Constitutional Court.

1.3. Principle of democracy

This constitutional principle is strongly attached to the aforementioned principle of popular sovereignty and is articulated mainly in Article 1 paragraph 1 of the Constitution and Article 2 paragraph 1 of the Charter '(1) The State is founded on democratic values and must not be bound either by and exclusive ideology or by a particular religion', as well as in its persistently mentioned Article 23.

Not only this general principle, but **principles** which in fact compose it (according to academic theories of political science), can be found in the Constitution. These are namely:

1. **Government of the people** as stated in Article 2 paragraph 1 of the Constitution[32]; government **for the people** as stated in its Article 2 paragraph 3 ('State power shall serve all citizens…'), which is attached to the principle that for the state there shall be no privileged groups or classes in the society (which is quite an essential requirement in the society where for the last 40 years 'all were equal, but some were more equal'); government **by the people**, which is realized either indirectly, which is a traditional form in the Czech Republic employing mainly the elections as the basic procedure or directly by referendum if set in a constitutional act, or, in an extreme situation, by exercising the right to put up resistance.

2. The **principle of plurality** according to which the State is not bound by any concrete ideology or religion[33], and conflicts of opinions are solved by discussion and voting or elections. The **free competition of political forces** is stated in Article 22 of the Charter[34] and in Article 5 of the Constitution[35]. This plurality is represented by a **wide scale of mass media, civic associations** and especially **political and election parties** which can challenge each other in free and fair elections where at least two parties have to take part.

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[31] Judgment of the Constitutional Court No. IV. US 167/97 (8 Coll. of Decisions No. 98).

[32] See part A) I. 1.

[33] See Art. 2 para. 1 of the Charter.

[34] 'The legal provisions governing all political rights and freedoms, their interpretation, and their application shall make possible and shall protect free competition between political forces in a democratic society'. For more detailed analysis of this principle see J. Filip and M. Gillis, *Czech Report*, in A. Weber (ed.), *Fundamental Rights and Freedoms in Europe and North America. Part A*, (Kluwer, Deventer 2001) part 9 V.

[35] 'The political system is based on free and voluntary formation of and free competition between political parties respecting the basic democratic precepts and rejecting violence as a means of asserting their interests'.

3. **The principle of consensus** is implicitly stated in Article 5 of the Constitution, and according to which all the participants of the political competition have to accept basic democratic precepts and reject violence as a means of asserting their interests, otherwise this non-violent, open and pluralistic competition would not be possible at all. This is safeguarded in the Political Parties Act No. 424/1991 Coll. with its mechanism of dissolution of political parties and movements despising these basic consented principles of democracy, non-violence and respect for human rights of all;
4. The **principle of majority** is stated in Article 6 of the Constitution together with the closely connected principle of protection of minority: 'Political decisions shall proceed from the will of the majority, expressed by free vote. Majority decisions shall respect protection of minorities'. The principle of majority stems from the fact that although there is only rarely a consensus about daily political questions (with the exception of abovementioned basic democratic precepts) and the society is obviously divided in their responses, the answer of the people as a whole has to be united; in other words, the answer has to be 'yes' or 'no', not . Naturally, in a democratic society, the actual majority decides (not a permanently ruling class, ruling party or a wealthy or racially 'pure' minority, for example). The rule of majority is nevertheless **limited by two facts**: the first one is the time limit of being a political majority (because this is the majority which decides political questions) and the other one is the protection of minority. The Czech constitutional order mentions explicitly only ethnic and national minorities, but according to Article 27 of the International Covenant on Civil and Political Rights the language and religious minorities are protected too. The abovementioned Article 6 does not speak about any particular majority. The specific means **of protection of minorities** in the Czech constitutional order are following: the requirement of a qualified majority for constitutional changes[36], a qualified minority which can for example initiate a session of the Assembly of Deputies, the right of a minority group of Deputies or Senators to initiate a proceeding before the Constitutional Court contesting the constitutionality of an act adopted by the majority; the proportional election system in elections to the Assembly of Deputies[37] which guarantees that even minor political forces can be represented in the Parliament, the right to hearing (e.g. during commentary ruling in the legislative process) and, last but not least, the protection of human rights and fundamental freedoms.
5. The **timely limited terms** of office of the Government, the President and the Parliament, which are secured by regularly hold elections[38].
6. The **equality** of those who decide. This principle stems from the general principle of equality of citizens according to Article 1 of the Charter and protection against any discrimination[39]. **The freedom of those** who have the right to decide, which is stated generally in Article 1 of the Charter[40] and, more specifically, as the freedom of elections in Article 21 paragraph 1 of the Charter[41]. Furthermore, the other forms of **participation** in the public affairs administration and the right to put up **resistance**, according to Article 23 of the Charter.
The **principle of democracy shall be respected** not only during the law-making process, but also when laws are interpreted. The rule of maintaining democracy or the rule prohibiting the misuse of interpretation are contained in **Article 9 paragraph 3** of the Constitution which provides that '[l]egal norms may not be interpreted so as to authorise anyone to remove or

[36] Art. 39 para. 4 of the Constitution.
[37] Art. 18 para. 1 of the Constitution.
[38] Art. 21 para. 2 of the Charter.
[39] Art. 3 para. 1 of the Charter.
[40] 'All people are free and equal in their dignity and in their rights. Their fundamental rights and freedoms are inherent, inalienable and not subject to repeal'.
[41] 'Citizens have the right to participate in the administration of public affairs either directly or through free election of their representatives'.

jeopardized the democratic foundations of the state'. This provision by itself could be the subject of a **complex interpretation**[42]. The interpretive rules for international treaties binding for the Czech Republic are directly related to it.

1.4. State structure, type of government

1.4.1. Concept of 'republic'

The **republican principle** is tightly associated with the abovementioned principle of democracy but they are not subordinated to each other. In contrast to other constitutions[43], this fact is not explicitly emphasised, as it would have been undoubtedly natural in 1992, when the Constitution was written – the only exceptions are the name of the state (the Czech Republic) and the fact that the judicial power is exercised in the name of the Republic[44]. Although these are the only explicit references to the republican principle, it is possible (even though not surely) that it is a part of unchangeable essential requirements of the democratic state governed by the rule of law[45].
As well as the principle of democracy, the republican principle is also consisting of several **principles**. These are following:

- the people stands as the universal source of legitimacy of the state power[46];
- freedom and equality of individuals, including the equality before the law, before the state organs, and in their access to any public office are guaranteed[47];
- decisions are taken and representatives of the state (including the head of the state) are elected by the majority of the citizens;
- ideological and religious neutrality of the state is guaranteed[48];
- publicity of authoritative decisions of the state power and the possibility of their control (which is realized for example by publicity of Parliamentary hearings, publicity of oral hearings of the courts and general right of free access to information controlled by the public authorities are required[49];
- all the state authorities are bound by the Constitution and the law, in contrast to the principle of '*princeps legibus solutus'* (**i.e. 'The sovereign (prince) is not bound by the law'**) as known from monarchies;
- all the state representatives (except judges in the 'ordinary justice') hold an office only for a certain period of time;
- decisions of all the organs of a state should be made in the best interest of all the people.

1.4.2. State structure[50]

Since the Czech Republic is a **unitary** and not a federative **state**, we can only speak about the territorial structure of its state organs and self-governmental units. In the Czech Republic, there exists a **two-tier system of territorial administration** (as a form of de-concentration)

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[42] These remarks are based on Filip and Gillis, see n. 34, at part 9 V.
[43] Especially to the Czechoslovakian Constitutional Charter from 1920 which explicitly stated in Article 2 that 'The Czechoslovakian state is a democratic republic headed by an elected President'.
[44] Art. 81 of the Constitution.
[45] Art. 9 para. 2 of the Constitution.
[46] Art. 2 para. 1 of the Constitution.
[47] Art. 1 and Art. 3 para. 1 of the Charter, Art. 2 para. 3 of the Constitution, Art. 21 para. 4 of the Charter.
[48] Art. 2 para. 1 of the Constitution, Art. 15 of the Charter.
[49] Art. 36 and Art. 96 para. 2 of the Constitution, Art. 17 para. 5 of the Charter.
[50] This chapter is based on information from a report by J. Marek and M. Pánková and P. Šímová, *Public Administration in the Czech Republic,* (Praha, Ministry of the Interior of the Czech Republic 2004) p. 30–32.

and **self-government** (as a form of decentralisation). The territorial division is set forth in Article 99 of the Constitution providing that the territory of the State is divided into fundamental self-governing territorial units, which are municipalities, and higher self-governing territorial units (in the Czech Republic called regions). As concerns the **territorial self-government**, it is necessary to point out that it is not vertically hierarchical; it means there is no superiority or inferiority, because every territorial self-governing unit has its own competencies and no other territorial self-governing unit can interfere with them. The territorial self-governmental organisation grows from the bottom whereas the state administration is based on the principle of vertical de-concentration. In the Czech Republic, a **'joint model of public administration'** is applied which means that municipalities and regions exercise, in addition to their own competencies, the state administration as well (by way of delegated competence).

A **municipal self-government** was re-established in the Czech Republic in 1990 by the Act on Municipalities (No. 367/1990 Coll.). Nowadays, the municipal self-government is regulated by the Act on Municipalities No. 128/2000 Coll. The territory of every municipality is formed by one or more cadastral districts. The municipalities can be further divided into parts (especially some larger ones – e.g. statutory towns). Each part of the territory of the Czech Republic is a part of the territory of certain municipality, unless the special law stipulates otherwise[51]. Nowadays there are 6245 municipalities[52] and 5 special districts for military purposes. Municipalities differ from each other by the scope of authority to perform the state administration in delegated competence. According to this, municipalities with the scope of delegated competence (actually all the municipalities belong into this category), and municipalities with extended scope of delegated power can be distinguished. These municipalities perform the state administration in delegated power in the territory of other municipalities as well (for the municipalities within their administrative district)[53].

Regions as higher territorial self-governing units are specified in the Constitutional Act Establishing Higher Territorial Self-governing Units No. 347/1997 Coll. which came into force on 1 January 2000. In the territory of the Czech Republic, fourteen higher territorial self-governing units were established including Praha (Prague), which is a higher self-governing unit, as well as a municipality and the capital of the Republic[54]. The Constitutional Act Establishing Higher Territorial Self-governing Units delimits the territory of regions according to the territory of districts[55] and it arises from the form of territorial division of the State given by the Act No. 36/1960 Coll. on Territorial Division of the State. However, the newly established fourteen self-governing regions differ territorially and organisational from eight administrative regions in which the Regional National Committees operated until 1990, and which so far represent territorial districts for a number of specialized authorities of the state administration[56]. From the territorial point of view, regions established by the Constitutional Act No. 347/1997 Coll. approximate to regions existed in 1949–1960, and thus generally respect all the regional centres at the medium level.

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[51] Act No. 222/1999 Coll. on Provision of Defence of the Czech Republic.

[52] http://www.mvcr.cz/clanek/zmeny-v-uzemni-verejne-sprave.aspx?q=Y2hudW09NA%3d%3d (24.1.2009).

[53] Authorised municipal offices (388) and offices with extended powers (205, which are specified by the Act No. 314/2002 Coll. on Determination of Municipalities with *s.c.* Entrusted Municipal Office and Municipalities with Extended Powers) also belong into this category.

[54] Art. 13 of the Constitution and a special Act on the Capital City of Praha No. 131/2000 Coll.

[55] Formerly the basic type of division of the state, recently only some state authorities are organised on the district basis, e.g. tax offices or labour offices.

[56] The most important example is the structure of ordinary courts according to Act on Courts and Judges No. 6/2002 Coll.

1.4.3. Constitutional status of the participants exercising main state powers

Similarly to other states with a written constitution, the status of prominent participants exercising state power is stated by the Constitution, whereby the inviolability of the principle of division of powers and stability of their respective positions, competences and relations is secured and guaranteed against a will of change of a simple (obviously governmental) majority in the Parliament.
These constitutional norms comprise creational and organisational norms establishing these state organs (but not the state itself, because the independence of the Czech Republic was established by the Constitutional Act No. 542/1992 Coll.) and regulating their internal organisation, competence norms defining their competences[57], norms for exceptional situations[58]. The supreme organs of the State[59] even have constitutionally defined their basic organisational, temporal and procedural rules and the status of their members. Other issues are regulated by means of ordinary acts.
In addition to this regulation of status of supreme state organs, the Constitution expressly prescribes cases in which the form of a constitutional act (and not an ordinary statute) must be employed: to introduce some form of direct democracy, to amend the Constitution itself (as well as other constitutional acts and the Charter), to modify the borders of the state and to create higher territorial self-governing units. The last of such provisions concerned the means for prescribing elections to a Provisional Senate, which was never employed (as no Provisional Senate was ever established) and has become obsolete since the establishment of the (regular) Senate[60].

2. Governmental system

2.1. Tasks and competences

In this part, we shall deal with certain tasks and competences of the most important state bodies. Firstly, we will mention the constitution-making power, the legislative enactments and their implementation. Afterwards, we shall focus on the most important areas of the governmental activity. Special attention will be paid to the relations between state bodies.

2.1.1. Constitution-making and its implementation

Law in the Czech Republic possesses the characteristics of the continental legal system, which means that its elementary sources are generally binding normative acts, headed by statutes adopted by the Parliament. The legislative activity and the activity of law creation overall is regulated by law, while only the Parliament has the legislative competence. Therefore, in the Czech Republic a distinction is drawn between the creation of law (the creation of abstract and general rules of conduct) and the application of law (the issuance of individual and particularised decisions). Authorities applying the law do not create law[61] (with

[57] Either positively or negatively – including the fact that even the legislator is limited in his competence by the Constitutional order and the Constitution-maker is limited by Article 9 para. 2 of the Constitution which sets limits that cannot be overstepped even by him.
[58] Crises, imminent military threat or state of war according to Constitutional Act No. 110/1998 about security of the Czech Republic.
[59] i.e. the President of the Republic, the Government, Members of the Parliament and judges, especially judges of the Constitutional Court.
[60] Art. 2 para. 2, Art. 11, Art. 99, Art. 106 of the Constitution.
[61] On the territory of the Czech Republic, this has been the case since the adoption of the General Civil Code (ABGB) in 1811.

the exception of certain types of Constitutional Court judgments). Court decisions are binding only upon the specifically designated subjects in each and every particular case.

The constitutional definition of the sources of law

Constitutional law determines which forms of law qualify as sources of law in the Czech Republic. The Czech legal order is relatively closed. The components of that order (from constitutional acts to generally-binding municipal ordinances) are exhaustively defined in the Constitution. In addition to that, certain types of treaties and decisions of the Constitutional Court are considered sources of law.

1. The separation between constitutional and ordinary legislation is accomplished by several ways. In the case of the Constitution, the form of legal enactment is expressly prescribed. Such enactment must be expressly designated as a constitutional act. This is of great significance, as an ordinary statute, even if it is adopted by a vote of all 200 deputies, cannot operate as an amendment to the Constitution. A different act, as long as it is designated as a constitutional act, may amend the Constitution if only 120 deputies vote in favour of it.

In this connection, the circumstances surrounding the adoption of the Charter of Fundamental Rights and Basic Freedoms were quite extraordinary. It was adopted in 1991, but not in the form of a legal enactment of the Czech and Slovak Federal Republic[62] but in the form of a 'Charter' introduced by a Constitutional Act no. 23/1991 Coll. When the Czech Constitution was adopted in 1992, the Charter was taken out from under the protective umbrella of the Constitutional Act No. 23/1991 Coll. and was republished in the form of a resolution of the Presidium of the Czech National Council, No. 2/1993 Coll. Such a resolution is not a type of legal enactment either. However, it is not disputed that, since Article 3 of the Constitution incorporated it by reference, it became a part of the constitutional order and may be amended only by a constitutional act.

2. According to František Weyr (the leading Czech lawyer in the first half of the 20th century), the constitution in the narrow sense of the word is the 'totality of rules which govern the creation, modification and repeal of legal norms'[63]. The Constitution of the Czech Republic prescribes the nomenclature and the legal force of legal enactments only partially[64].

The relationship between the constitutional order[65] and other sources of law

1. In addition to assigning a different legal force, a special procedure for the adoption of constitutional acts (the Constitution itself was adopted as a constitutional act) may be employed. This is due to avert a conflict between the substantive provisions of the Constitution and those of other legal enactments. The special characteristics of the constitution-making process can, in contrast to the ordinary legislative process, be expressed in the followings.

- In the **enumeration of subjects** which may initiate the constitution-making process, which may be either a larger or a smaller group than in the case of statutes. The Czech Constitution makes no distinction in this respect. Pursuant to Article 41 paragraph 2, a bill may be submitted by a deputy, by a group of deputies, by the Senate, by the Government or by a representative body of a higher self-governing territorial unit. The so-called 'people's initiative' (*Volksbegehren*), in which a certain number of citizens would be able to submit a

[62] The forms of legal enactment recognized in the Czech Republic are, in particular, constitution, constitutional act, statutes, statutory measures, orders and regulations, but not a Charter.
[63] F. Weyr, *Československé právo ústavní* [*Czechoslovak Constitutional Law*] (Prague 1937) p. 15.
[64] For the hierarchy of legal enactments in the Czech Republic, see part A) I. 3.
[65] For definition see below under 'The concept of constitutional order'.

proposed constitutional act, has been proposed to Parliament more than once, but none of the proposals have succeeded in being adopted.

- In the **bodies** which are competent to adopt a proposed bill. In the Czech Republic, there has traditionally been no difference between adoption of ordinary legislation and of constitutional legislation.
- In the **manner** in which a proposed constitutional act is dealt with. In the Czech Republic there is no difference in the manner in which proposed constitutional acts are acted upon with the exception of the requirement that the consent of the Senate with the proposed constitutional act is necessary[66], which is not required in the case of ordinary statutes (with the exception of standing orders and electoral acts)[67].
- In the **majority** required for adoption of the proposed act. In some countries, in addition to a heightened majority, other requirements for the adoption of a constitutional act may include a new election (Sweden), a referendum (Switzerland) or both (Denmark). In the Czech Republic, a 3/5 majority of all deputies and a 3/5 majority of senators present is required[68]. In comparison with other states, these requirements might appear insufficient, however, in the period since 1993 only five constitutional acts affecting the text of the Constitution or the Charter of Fundamental Rights and Basic Freedoms have been adopted[69].

2. In addition, the separation of constitutional enactments from ordinary statutes is accomplished by means of a difference in legal force. The **concept of 'legal force'** is connected with the legal order which is hierarchically organised.

> In such a case: an enactment of lower force may not conflict with enactments of higher force and an enactment of lower force must be in conformity with enactments of higher force. Further, **rules** '*lex superior derogat legi inferiori*', '*leges posteriores, priores contrarias abrogant*', '*lex specialis per generalem non derogatur*' should be mentioned. Finally, Article 2 of Constitutional Act No. 4/1993 Coll. provides that, in cases of conflict, **enactments of the Czech Republic shall take precedence over** those of the Czech and Slovak Federal Republic (CSFR).

From this we can deduce **the higher legal force or superiority of the Constitution**. The Czech **Constitution does not explicitly declare** that it is the basic law or that it has a higher legal force. These conclusions can, however, be reliably drawn from its provisions, such as Article 9, Article 39 paragraph 4, Article 87 paragraph 1, lit. a) and lit. b)[70] and Article 95.

No other legal enactments (statutes, statutory enactments, orders, regulations or generally binding ordinances) may be in conflict with constitutional acts. It is primarily the constitutional judiciary which serves, as a practical matter, to uphold this principle, but so does the constitution drafting procedure. Nonetheless, drawing a distinction between constitutional and non-constitutional enactments is not so simple, and there exist in the Czech constitutional order means for making differing levels of amendability of particular constitutional provisions.

3. Article 9 paragraph 2 of the Constitution can be designated as the 'eternity clause' in the Czech Constitution. The basic problem resides not so much in determining which provisions may not be amended, but in deciding **how this unamendability is to be achieved**. To the extent that the law provides no means for ensuring the inviolability of certain principles or values, then provisions such as those in Article 9 paragraph 2 are mere declarations which were referred to in the past as 'monologues of the constitution drafters'. Even Article 9

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[66] Art. 39 para. 4 of the Constitution.
[67] Art. 40 of the Constitution.
[68] Art. 39 para. 4 of the Constitution.
[69] More than 100 constitutional bills were submitted during this period.
[70] Compare with the Act on Constitutional Court.

paragraph 2 itself could be repealed, provided that the number of votes required therefore were obtained, and it would be difficult to call such an outcome into doubt.
The situation would be entirely different if it were a matter of revising the principle of the sovereignty of the people, of the independence of courts or judges, of the right to one's statutory judge, of the freedom of expression, etc. Should we not find in the legal order some means to protect these principles, then Article 9 paragraph 2 is a mere directive or an instruction, but nothing more than *lex imperfecta*[71].

The possibility to abuse constitutional acts for political purposes

The problem of misuse of constitutional acts or particular constitutional provisions for political purposes is an issue that has been discussed in several states, such as Austria and France. In the Czech Republic, it is well-known that the Parliament could, by adopting a constitutional act, prevent the Constitutional Court from reviewing its enactments. In practice, however, this option has never been used (as we know this practice, for example, from Slovakia), so that it is not necessary to list instances in which consideration was given to it.
The only instance that might be considered to be such a case (although the views on this are certainly not uniform) was Constitutional Act No. 69/1998 Coll. on the Shortening of the Electoral Term of the Chamber of Deputies.

> After the Klaus government fell in 1997, the new Tošovský's government was able to secure a vote of confidence only under the condition that new elections would be scheduled as soon as possible. However, the Constitution did not contain a provision for such early elections. For this reason, the strongest parties succeeded in adopting a constitutional act laying down an exception to Article 17 of the Constitution (i.e. the 4-year electoral term of the Chamber of Deputies). Thus, the Constitution was not amended, it was however evaded. This possibility was considered anew in 2006 when the election to the Chamber of Deputies ended with a draw (100 to 100) and complications with obtaining a vote of confidence for new government occurred.

The question remained whether the Constitutional Court could review even the constitutional acts (arguably from the point of view of consistency with the provision of Article 9 paragraph 2 of the Constitution) as we were aware of such possibility from the jurisprudence of German, Indian, Austrian, Mongolian, Bulgarian and some other courts. Such possibility could prevent the legislator from evading the constitutional order by means of special constitutional acts.
The Czech Constitutional Court resolved this question in its decision which annulled Constitutional Act no. 195/2009 Coll. on Shortening the Fifth Term of Office of the Chamber of Deputies[72]. In the reasoning of the judgment, the Constitutional Court considered, in particular, Article 9 paragraph 1 of the Constitution which provides that '**this Constitution may be supplemented or amended only by constitutional acts**', and Article 9 paragraph 2 of the Constitution, under which '**any changes in the essential requirements for a democratic state governed by the rule of law are impermissible**'.
The Constitutional Court pointed out the roots of these provisions which include the tragic experience of 20th century history, specifically Germany during the Weimar Constitution,

[71] In addition, the Czech Constitution expressly prescribes cases in which the form of a constitutional act (and not an ordinary statute) must be employed: to introduce some form of direct democracy (Art. 2 para. 2), to amend the Constitution itself (including other constitutional acts and the Charter), to modify the borders of the state (Art. 11), and to create higher territorial self-governing units (Art. 99). The last such provision concerned the means for prescribing elections to the Provisional Senate (Art. 106), which was never employed (as no Provisional Senate was ever established) and has become obsolete since the establishment of the Senate.
[72] The facts were similar to those mentioned above.

which led to the Nazi regime usurping power and to World War II, as well as our experience with the totalitarian communist regime. It was for this reason that, when the Constitution of the Czech Republic was adopted in 1993, the original constitutional framers prevented changes to the material focus, the core of the Constitution (the essential requirements for a democratic state governed by the rule of law) by subsequent, derivative constitutional framers, i.e. parliaments established on the basis of the Constitution of 1993[73].

The Constitutional Court first answered the question of whether, as a body for the protection of constitutionality, it is competent to review an act designated as a constitutional act. It stated that protection of the Constitution's material core according to Article 9 paragraph 2 of the Constitution is not a mere proclamation, but an enforceable constitutional provision. In other words, the Constitutional Court is competent to review constitutional acts from the point of view of their conformity with the material core of the Constitution. Otherwise – according to the Constitutional Court – the protection of constitutionality would be illusory, because a constitutional act could be used to do anything, with no opportunity to prevent it from changing or otherwise damaging the Constitution's core.

The Constitutional Act – in the Constitutional Court's opinion – temporarily *ad hoc* suspended Article 35 of the Constitution and, outside the framework of constitutionally prescribed procedure, established a procedure for this individual case that is completely different from what the Constitution presumes and requires. Furthermore, the contested Act was adopted outside the competence of the Parliament and thus contrary to Article 9 paragraph 1 of the Constitution. Such an *ad hoc* solution would be permissible only under the most exceptional circumstances which have not been present in the case.

Moreover, the Constitutional Court stated that the contested constitutional act is also retroactive, and the principle of a prohibition on retroactivity of law is also among the essential requirements of a democratic state governed by the rule of law. The retroactivity of the contested constitutional act lies in the fact that changing the rules during the course of a term of office violated the right of citizens to vote and be elected with knowledge of the conditions for creating the democratic public authorities resulting from the elections, including knowledge of their term of office.

This judgment, however, was immediately and strongly criticized even by the authors otherwise generally agreeing with the concept of material core and supporting the possibility to annul – in exceptional cases – a constitutional act[74].

The concept of constitutional order

One particular feature of the Czech constitutional law is the existence of the concept of 'constitutional order'. By defining the content of the constitutional order, Article 112 of the Czech Constitution resolved the issue of fate of the large number of constitutional acts which, pursuant to Czech National Council Constitutional Act No. 4/1993 Coll. on Measures connected with the Dissolution of the CSFR, were received into the Czech legal order.

What was the reason for this step then? First of all, this concept assists in determining which of the federal constitutional enactments **retain legal force of a constitutional act** in the independent Czech Republic. These are: a) the Charter of Fundamental Rights and Basic

[73] Compare the first Judgement of the Constitutional Court n. 14/1994 Sb., drafted by Judge Klokočka.

[74] Šimíček, V. *Materiální ohnisko ústavního pořádku, jeho ochrana a nález Ústavního soudu ve věci M. Melčáka*, in *Pocta Vladimíru Klokočkovi k 80. narozeninám* (forthcoming). Šimíček submits that this concept has been misused by the Constitutional Court and that the solution adopted by the Parliament – however bad and purposive – was adopted in conformity with the material core of the Constitution. According to Šimíček, the material core should be applied only under the most exceptional circumstances.

Freedoms, in the scope promulgated as No. 2/1993 Coll., however, and b) constitutional acts which, from 1920 until 1992, approved changes to the boundaries of the Czech Republic.
Other constitutional acts of the CSFR, which were in force in the Czech Republic, lost the force of a constitutional act on 1st January 1993 so that they can be amended by means of an ordinary statute. Nevertheless, according to Article 112 paragraph 3 of the Czech Constitution, there are not many of them.
In addition, in cases of conflict between legal enactments of the federation and legal enactments of the Czech Republic adopted during the period the federation existed, the legal enactments of the Czech Republic should be applied[75]. In practice, legal enactments of the Czech Republic are applied and enactments of the defunct federation are not taken into account, even though it is not always the case that the texts are in conflict.

The components of the Czech constitutional order

The components of the Czech constitutional order are the following:
- The **Constitution** of the Czech Republic of 16 December 1992.
- The **constitutional acts of the Czech National Council** adopted during its 7th electoral period that is from 6 June 1992 until the end of 1992.[76]
- The **constitutional acts** which will be adopted '**pursuant to the Constitution**' of the Czech Republic. The Czech Constitution expressly mentions constitutional acts to establish the Provisional Senate, to create higher territorial self-governing units, to consent to changes in the state boundaries or to create the institute of referendum[77].
In the Czech Republic there are **six constitutional acts** nowadays, among which the Constitution of the Czech Republic is included, as well as the Charter of Fundamental Rights and Basic Freedoms which Article 3 of the Constitution makes a component of the Czech constitutional order. These constitutional acts regulate constitutional problems. The remaining constitutional acts (there are **nine** of them) concern consent to changes of the borders of the Czech Republic.
Apart from those mentioned above, there are **further constitutional acts** which, while they are still in effect, **no** longer have the **force of a constitutional act**, since Article 112 paragraph 3 of the Czech Constitution deconstitutionalized them (deprived them of the force of a constitutional act, leaving them with the force of a statute). Further, one Constitutional Decree of the President of the Republic from 1945 (renewal of the legal order) remains in effect, but was deconstitutionalized by Article 112 paragraph 3 as well.
- Every **amendment** to the constitutional order requires, according to Article 9 paragraph 1 of the Constitution, the form of a constitutional act. In this case, however, it is an amendment or a supplement to the Constitution, which is something different.
- And, arguably, **international treaties concerning human rights and fundamental freedoms**. The first examples can be derived from the text of Article 112 of the Constitution. However, according to the Constitutional Court, the concept of constitutional order cannot be interpreted only with regard to Article 112 paragraph 1 of the Constitution.

[75] Art. 2 of Czech National Council Constitutional Act No. 4/1993 Coll.
[76] No. 4/1993 Coll. and No. 29/1993 Coll.
[77] Art. 106 para. 2, Art. 99 para. 3, Art. 11, Art. 2 para. 2 of the Constitution. Some of them have, however, never been adopted (like, for example, constitutional act on the Provisional Senate). Concerning the referendum, the only constitutional act dealing with this issue was adopted for a particular referendum on the Czech Republic's accession to the European Union.

In its most famous *obiter dictum* (which has attracted much criticism)[78] it has stated that the constitutional maxim in Article 9 paragraph 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. 'The changes brought by the amendment to the Constitution, implemented by Constitutional Act No. 395/2001 Coll., in Article 1 paragraph 2, Article 10, Article 39 paragraph 4, Article 49, Article 87 paragraph 1 let. a), b) and Article 95 of the Constitution. The enshrining in the Constitution of a general incorporative norm, and the overcoming thereby of a dualistic concept of the relationship between international and domestic law, can not be interpreted to mean that ratified and promulgated international agreements on human rights and fundamental freedoms are removed as a reference point for purposes of the evaluation of domestic law by the Constitutional Court with derogative results. Therefore, the scope of the concept of constitutional order can not be interpreted only with regard to Article 112 paragraph 1 of the Constitution, but also in view of Article 1 paragraph 2 of the Constitution, and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it'[79].

2.1.2. Legislation and its implementation

Generally binding normative acts – legal enactments

1. As far as ordinary statutes are concerned, the Czech Constitution does not contain an exhaustive list of issues which may be dealt with in a statute. While the **legislative power** is only one of the powers conferred upon the Parliament, nonetheless, it is **exclusively** in the hands of the **Parliament** and it consists in the authority to issue statutes, that is the particular type of legal enactments that form the foundation of the legal order and of the exercise of state power in a state governed by the rule of law. From the perspective of positive law this is shown in the following areas in particular:
- Pursuant to the Czech Constitution and the Charter statutes are **the foundation for** the assertion of state power and also constitute **the limits of** state power in relation to individuals. State power may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed '**by law**'[80]. On the other hand, individuals may do everything that is not prohibited '**by law**', and nobody may be compelled to do what is not imposed on him '**by law**'[81].
- Statutes are the **foundation for norm-creation** by other state authorities. Pursuant to Article 78 of the Constitution, the Government may issue orders only 'in order to implement statutes and while remaining within the bounds thereof'[82]. Pursuant to Article 79 paragraph 3 of the Czech Constitution, the ministries, other administrative offices and bodies of territorial self-government may, if they are so empowered by statute, issue regulations on the basis of and within the bounds of that statute. Pursuant to Article 104 paragraphs 1 and 3, representative

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[78] For example J. Filip and J. Nález, *403/2002 Sb. jako rukavice hozená ústavodárci.* [*Judgement No. 403/2002 Coll. as gage to the constituent power*] Právní zpravodaj, 11 (2002) p. 12–15 or Z. Kühn and J. Kysela, *Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je?* [*Is the Constitution always that what the Constitutional Court will say it is?*] Časopis pro právní vědu a praxi 3. (2002) p. 199.

[79] See the judgment of the Constitutional Court, No. Pl. ÚS 36/01, No. 403/2002 Coll. http://angl.concourt.cz/angl_verze/doc/p-36-01.php.

[80] Art. 2 para. 2 of the Constitution and Art. 2 para. 3 of the Charter.

[81] Art. 2 para. 4 of the Constitution and Art. 2 para. 3 of the Charter.

[82] These limits may not be overstepped. Nonetheless, it is a matter of dispute whether each statute must demarcate such bounds. According to the still authoritative work of J. Hoetzel, *Czechoslovak Administrative Law* (Prague 1937), p. 55, sub-statutory acts must respect the limits of directives which are in statutes, if there are any. A different position has been adopted in Constitutional Court judgment No. 265/1995 Coll. which holds that the Parliament must, in the empowering provisions of a statute, lay down the bounds of legal enactments of a lower legal force.

bodies may issue generally binding ordinances within the limits of their jurisdiction, which must be laid down by law. Statutes are the measure for the assessment of acts issued by executive bodies[83].

- It is only by means of a statute that **executive bodies** may be established. Ministries and other administrative agencies may be established, and their powers provided for, only by statute (Article 79 paragraph 1 of the Constitution). The **judiciary** is bound by statutes. The jurisdiction and organisation of courts shall be provided for by statute[84]. In making their decisions, judges are bound by statutes; they are authorised to judge whether enactments other than statutes are in conformity with statutes, but this decision is binding only for the individual case[85].

2. In addition, the content of **statutes is designated by** constitutional acts, the state's international commitments and by the Constitutional Court's decisions[86]. Otherwise, in theory there are no limits on Parliament, but in practice a wide range of factors affect creation of statutes. These include the mandate theory, the restraint of Parliament and the necessity to consult the voters (in the Czech Republic this is recognized for entry into the EU). After the Czech Republic entered the EU, the Parliament's freedom of action is further significantly limited by external factors.

The **limitations on the legislative power** result partly explicitly from the provisions of the Constitution, the Charter and international treaties under Article 10 of the Constitution, and partly these limitations are implicitly contained in the basic principles of constitutionalism, such as the principle of democracy (majority rule, protection of minority, government for a limited period, the principle of consensus, etc.), the state governed by the rule of law, republicanism, and so on. These principles restrict the legislative power in adopting statutes with certain content and a certain direction[87].

The Czech **Constitution makes no distinction** between statutes in the material and the formal sense. According to it every legal act adopted by the Parliament using the prescribed procedure, fulfilling the requirements as to the content and designated as a statute (or a statutory measure) is a statute.

The **concept of the reservation** (stipulation) of the statute is closely connected with the concept of the legislative power and restrictions upon it. In particular, it should protect against intrusions by the executive power into personal liberty and property rights. The Parliament is expected to be the guarantor. With the modified conception of parliamentarianism, where a parliamentary majority and the government are politically identical, the requirements for the reservation to statute has undergone change. Often the mere form of a statute does not alone suffice, as the conditions under which a statute may be issued are also prescribed in some cases[88]. Thus the rule of statutes has been assumed by the Constitution, the Constitutional Court and international standards. This change has occurred

[83] Art. 78, Art. 79 para. 3, and Art. 87 para. 1, lit. b) of the Constitution.

[84] Art. 91 para. 2. of the Constitution.

[85] Art. 95 para. 1 of the Constitution. The jurisdiction to declare general invalidity of these enactments belongs to the Constitutional Court.

[86] Traditionally, there is a dispute in this connection as to whether the Parliament may adopt a statute or a provision which has already been annulled by the constitutional court. In those places where this right is recognized, sometimes the Parliament defends its position by adopting the same text, but in the form of a constitutional act (France, Austria). In Poland, this issue was resolved until 1999 by permitting the Sejm to reject decisions of the Constitutional Tribunal, but only by the same majority as is required for adopting a constitutional amendment.

[87] For example, for the legislative power the principle of rule of law entails the requirement of legal certainty (the prohibition of retroactive statutes), the prohibition of arbitrariness (rationally justifiable means of regulation must be chosen) and the prohibition of excessive or disproportionate intrusions, that is cases where the means selected are admittedly not arbitrary, but where the intrusion is nonetheless excessive.

[88] Compare for example Art. 12 para. 3, and Art. 14 para. 3 of the Charter.

in the Czech Republic, even though there are still many areas which are explicitly reserved to regulation by statute.
Presently, the Government in the Czech Republic is not empowered to issue orders with the force of a statute. While roughly ten such orders are in force, they date from the period 1948–1960, and since that time it has not been permissible to adopt any new one.

Implementation of statutes through sub-statutory legislation

Article 78 of the Constitution postulates orders (ordinances) as the form of legal enactment for the executive branch, specifically the Government. This is a significant provision since the Government adopts a large number of resolutions which, without this designation, could not acquire the force of a legal enactment[89]. In the case of the ministries, other administrative agencies and bodies of territorial self-governing units, Article 79 paragraph 3 of the Constitution merely empowers these bodies generally to issue legal enactments without designating what legal form should they take. According to Article 79 paragraph 1, the legal powers of these state bodies may be set down only by statute, and the relevant statutes provide that the ministries and other central bodies of state administration may issue legal enactments in the form of regulations. It may be deduced from the systematic placement of these provisions that, in the case of bodies of territorial self-governing units, it is a matter of issuing legal enactments on the basis of **delegated authority**. This conclusion also finds support in the constant jurisprudence of the Constitutional Court, beginning with its judgment published as No. 35/1994 Coll.
Authorisation to issue such implementing enactments is derived either directly from the Czech Constitution and arises from the constitutionally defined functions of a state body such as, for example, the Parliament, pursuant to Article 15 paragraph 1, or is delegated to the legislative organ[90]. **Implementing enactments** may be issued:
- in order to implement a statute, while staying within the bounds thereof in the case of government orders[91]. All that is required is that there be a statute and that its bounds be respected. In some instances, nonetheless, the government is expressly authorised by statute to issue orders,
- on the basis of and within the bounds of a statute in relation to empowering ministries, other administrative agencies and bodies of territorial self-governing units to issue implementing enactments[92]. These are distinguished from government orders by the fact that the government, even though it is empowered to carry out something, may do so on the basis of an order, even beyond the extent of the empowerment, whereas other state authorities may not do so.

In the field of self-government there is another possibility to issue generally binding enactments. Article 104 paragraph 3 of the Constitution has empowered the representative

[89] It should be noted that, until 31 December 1968, even Government resolutions were published in the form of a legal enactment (Art. 68 point 5 of the CSSR Constitution of 1960).
[90] Since 1 January 1969, it has not been permissible in the Czech Republic to sub-delegate the power to issue implementing enactments. This conclusion also derives support from judgment III. US 105/95 where the Court came to the conclusion that a chart of accounts (accounting directive) issued on the basis of a statutory authorisation is a secondary form of legal enactment, but that it is not permitted to remould it to the conditions prevailing in agriculture in the form of a chart of accounts for the Ministry of Agriculture and nutrition. Due to the fact that fiscal bodies proceeded on the basis of this chart, they did not act in conformity with Article 4 para. 1 of the Charter which provides that duties may be imposed only on the basis of a statute.
[91] Art. 78 of the Constitution.
[92] Art. 79 para. 3 of the Constitution. The observance of these conditions was dealt with in Constitutional Court judgment No. 265/1995 Coll. See also judgment No. 271/1995 Coll. where the Court evaluates the character of an order defining the binding part of a territorial plan.

bodies of municipalities and higher territorial self-governing units to issue generally binding ordinances. This provision establishes the basis for distinguishing legal enactments having a national, regional or local effect. Even though the Czech Constitution does not require special empowerment for the issuance of generally binding ordinances (they are not implementing enactments), according to the older jurisprudence of the Constitutional Court, specific empowerment by statute was necessary in cases where such an ordinance imposes duties on natural or legal persons. However, since the decision No. Pl. ÚS 45/06, the Constitutional Court does not seem to impose a specific empowerment any longer.

List of sub-statutory legal enactments of the national scope

1. **Government orders** are legal enactments issued by the whole Government[93]. It is made clear by Article 87 paragraph 1, lit. b) of the Constitution that they have the same legal force as other sub-statutory legal enactments of the nation-wide scope. However, as the supreme executive body, the Government may employ other means to ensure the conformity of its orders with legal enactments of the ministries and other central administrative authorities.

Government orders with the force of a statute, which existed until 1960, are a special type of government orders. The government was permitted to issue them to regulate matters whose regulation would otherwise require a statute. However, they were subject to review by courts just as were other sub-statutory enactments. Several of them still remain in force.

2. The **legal enactments of ministries and other central organs of state administration** are generally designated as regulations, provided that the full text of them has been promulgated in the Collection of Laws (Coll.), and as decrees, provided that they have been merely notified in the Collection of Laws, but the full text of them has not been promulgated therein. The Act on the Collection of Laws classifies **regulations and measures of the Czech National Bank** among legal enactments and requires that they be promulgated in the Collection of Laws.
3. According to the Act on Municipalities the **sub-statutory legal enactments with the regional scope and generally binding municipal ordinances issued on the basis of independent competence** may not be inconsistent with the statutes. They are issued by the representative bodies of the 6245 municipalities in the Czech Republic. Their special characteristic is (in contrast to the above-described sub-statutory enactments) that no authorisation in a statute is necessary in order to issue these municipal ordinances.
4. Municipal bodies may also be empowered by statute to issue generally binding ordinances on the basis of delegated authority (**sub-statutory legal enactments with the local scope**). Even though the Act on municipalities lays down requirements that they be in compliance with sub-statutory enactments of the nation-wide scope, it can be logically assumed that they may not be in conflict with sub-statutory enactments of the regional scope.

2.1.3. Governmental activity

Foreign policy making

It can be read from the Preamble of the Constitution, that the Czech Republic follows **two principles** when forming its foreign policy. Firstly, it is resolved to promote the democracy and human rights, as values common to the European civilization, and secondly, it subscribes to the rule of law. This is – in practice – confirmed by the membership of the Czech Republic

[93] Of course not in the meaning of a whole executive but in the meaning of 'Cabinet of Ministers' as it is used by the Constitution.

in various international organisations concerning the human rights or by its position towards Cuba or Belarus[94].

1. **Negotiation and ratification of international tre***aties* is vested by the Constitution in the executive, in particular the President. The **President** can, however, **delegate** the competence to negotiate treaties to the Government or individual members thereof[95]. Such a delegation of powers was accomplished through the Presidential Decree No. 144/1993 Coll. on conclusion of international treaties. The Decree is following the traditional division of international treaties into three categories: presidential, governmental and departmental[96]. The competence for negotiating bilateral and multilateral treaties which do not necessitate the approval of the Parliament has been delegated to the Government (**'governmental treaties'**). Bilateral and multilateral treaties of minor importance laying within the competence of the central state administration body can be negotiated by an individual member of the Government (**'departmental treaties'**)[97]. It follows that the negotiation of international treaties not mentioned in the Decree fall under the competence of the President (**'presidential treaties'**)[98].

The approval of **both Chambers of Parliament** is required in case of international treaties affecting the rights or duties of persons, treaties of alliance, peace or other political nature, treaties by which the Czech Republic becomes a member of an international organisation, treaties of a general economic nature and treaties concerning additional matters the regulation of which is reserved to the statute[99].

The **judiciary** participates in the process of negotiation and ratification of international treaties as well. According to Article 87 paragraph 2 of the Constitution, prior to the ratification of a treaty under Article 10a or Article 49 of the Constitution, the **Constitutional Court** shall have jurisdiction to decide concerning the treaty's conformity with the constitutional order. The potential practical impact of the Constitutional Court in this area is quite significant because it can prevent the President from ratifying a international treaty; a treaty may not be ratified prior to the Constitutional Court giving judgment and, pursuant to § 71e paragraph 3 of the CCA (Act on the Constitutional Court No. 182/1993 Coll.), a judgment of the Constitutional Court in which the conflict with an international treaty with the constitutional order is declared creates a hindrance to the ratification until such time as the non-conformity shall be cured. However, these proceedings were initiated only once in the Czech constitutional history – in the case concerning The Treaty of Lisbon[100].

2. In the field of **diplomacy and representation of the state**, two state bodies play a crucial role. The **President** performs extensive competences: he represents the state externally, receives heads of diplomatic missions, accredits and recalls heads of diplomatic missions. However, since these competences are laid down in Article 63 of the Constitution, the **countersignature** by the prime minister or by a member of the Government is necessary. The **Ministry of Foreign Affairs** is naturally the most significant part of the Government in respect to the foreign policy. Despite the President's constitutional competences, the every-day diplomacy and foreign policy-making rests with the Ministry of Foreign Affairs and its diplomatic missions. The diplomatic missions, delegations and representations, which are subordinated to the Ministry of Foreign Affairs can be divided in the following categories:

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[94] Compare, for example, the activities of International Committee for Democracy in Cuba (ICDC). More at http://www.czechembassy.org/servis/Soubor.asp?ID=9571 (25. 1. 2009).

[95] Art. 63 of the Constitution.

[96] K. Klíma, *et al*., *Komentář k Ústavě a Listině* [*Commentary on the Constitution and the Charter*]. (Plzeň, Aleš Čeněk) p. 319.

[97] Presidential Decree No. 144/1993 Coll. on conclusion of international treaties.

[98] Klíma, *op. cit*., p. 318.

[99] Art. 49 of the Constitution.

[100] See part C) II.1.

embassies, consulates general, permanent missions and permanent delegations[101], Czech centres[102], honorary consulates and other missions[103].

State security, qualified situations

It is generally recognized that it is the State's basic duty to ensure sovereignty and territorial integrity, and the protection of lives, health and property of its citizens. The extraordinary situations endangering these values are thus very often subjected to constitutional regulation. In the Czech Republic, the extraordinary and qualified situations **are regulated by** Constitutional Act No. 110/1998 Coll. on the Security of the Czech Republic[104]. The Czech Republic's security is to be **ensured by** the armed forces, the armed security corps, rescue corps and accident services. The Constitutional Act recognizes **several types of extraordinary (qualified) situations**. If the Czech Republic's sovereignty, territorial integrity or democratic foundations are directly threatened, or if its internal order and security, lives, health or property are, to a significant extent, directly threatened, or if such a measure is necessary to meet its international obligations on collective self-defence, a state of emergency, situation of threat to the State or a state of war may, in accordance with the intensity, territorial extent and character of the situation, be declared.

1. Pursuant to Article 5 of the respective Act, a **state of emergency** may be declared in cases of natural catastrophe, ecological or industrial accident, or other danger which, to a significant extent, threatens life, health or property or the internal order or security. This positive enumeration is accompanied by a negative one according to which a state of emergency may not be declared on grounds of a strike held for the protection of rights or of legitimate economic and social interests. A state of emergency can be imposed by the **Government** or – in exceptional cases – by the prime minister. Such declaration may however later be annulled by the **Chamber of Deputies**. The declaration must contain a precise statement of facts upon which it is based as well as the period (no more than 30 days) and territory of application. At the same time, the Government must specify which rights shall be restricted and which duties shall be imposed. A **decision** to declare a state of emergency shall be **made public** by means of the mass media and shall be promulgated like a statute. It enters into force at the moment provided for in the decision.

2. While a state of emergency can be quite common (natural catastrophes or industrial accidents) a **situation of threat to the state** constitutes a reaction on the gravest situations endangering a state as a whole. It may be declared, if the State's sovereignty, territorial

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[101] Permanent Missions and Permanent Delegations represent the Czech Republic in an international governmental organisation or integration group of states. There are currently following permanent missions and delegations of the Czech Republic: permanent delegations of the Czech Republic to the NATO and UNESCO, permanent representation of the Czech Republic to the EU and to the OECD, permanent mission of the Czech Republic to the United Nations in New York, permanent mission of the Czech Republic to the United Nations, OSCE and other International Organisations in Vienna and permanent missions of the Czech Republic to the Council of Europe. By joining NATO on 12 March 1999, the Czech Republic fulfilled one of its main foreign-policy goals, publicly declared as a priority of Czech (and prior to that Czechoslovak) foreign policy as far back as 1992. Stálé mise a delegace České Republiky [Permanent Missions and Permanent Delegations of the Czech Republic]. http://www.mzv.eu/wwwo/mzv/default.asp?id=8740&ido=215&idj=1&amb=1 (last visited on 25. 1. 2009). Evaluation of the State of the Czech Republic's Integration into NATO. http://www.mzv.eu/wwwo/mzv/default.asp?ido=9074&idj=2&amb=1&ikony=&trid=1&prsl=&pocc1= (27.1.2009).

[102] Czech Centres represent the Czech Republic abroad especially in the area of culture, trade and tourism. They do not have a diplomatic status.

[103] See. http://www.mzv.eu/wwwo/mzv/default.asp?id=8946&ido=6572&idj=2&amb=1 (23.1.2009).

[104] As amended by Constitutional Act No. 300/2000 Coll. of 9 August 2000.

integrity, or democratic foundations[105] are directly threatened. This importance is reflected by the fact that the declaration of a situation of threat to the state is not entrusted to the executive but to the **Parliament**. The assent of an absolute majority of all deputies and the assent of an absolute majority of all senators is required for the adoption of a declaration of a condition of threat to the state.

3. Moreover, a **state of war** may be declared in case of attacks from without or in order to fulfill treaty obligations. It is regulated in Article 43 paragraph 1 of the Constitution[106] and Act on the Security of the Czech Republic does not deal with it in detail. The declaration of the above-mentioned qualified situations has several **consequences**. The following possibilities should – of course – be used only very rarely, since they modify the rules concerning very basic principles upon which the Czech Republic is based (such as the principle of democracy and time limited government). Pursuant to Article 8 of Act on the Security of the Czech Republic, following a period of a situation of threat to the State or of a state of war, the **Government** may **request** that the **Parliament deal with** government bills (the Government may, however, not propose a Constitutional Act in this procedure) in a shortened debate. The Chamber of Deputies shall adopt a resolution on such a bill within 72 hours of its submission and the Senate within 24 hours of its transmittal. Moreover, the President does not have the right to return statutes adopted in a shortened debate.

If, following a period of a state of emergency, a situation of threat to the State or a state of war, the conditions in the Czech Republic do not permit the holding of elections by the deadline prescribed for regular electoral terms, the deadline may be extended by statute, however for not longer than six months. Moreover, during a period when the Chamber of Deputies is dissolved, the Senate is competent to decide on the extension or termination of a state of emergency, to declare a situation of threat to the State or a state of war, to decide on the Czech Republic's participation in defensive systems of international organisations of which the Czech Republic is a member and to give consent to sending the armed forces of the Czech Republic outside the territory of the Czech Republic.

4. Under certain conditions, the existence of a **qualified situation** may lead to derogation from certain obligations under **international human rights law.**

> For example, Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that, in time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations[107] under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. A similar regulation can be found in the International Covenant on Civil and Political Rights. The effect of such derogations is of course limited by the national law which is in many aspects stricter than the international human rights treaties.

Constitutional fundaments of budgetary policy

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[105] These values are often recognized to be the basic objects protected by the Constitution and basic values of the state (compare Article 23 of the Charter of Fundamental Rights and Freedoms or § 96 of the Act on Constitutional Court which protect similar values).

[106] 'The Parliament decides (by an absolute majority of all senators and by an absolute majority of all deputies – authors' note) on the declaration of a state of war, if the Czech Republic is attacked, or if such is necessary for the fulfilment of its international treaty obligations on collective self-defence against aggression'.

[107] However, according to Article 15 para. 2 of the Convention, no derogation from Art. 2 (right to life), except in respect of deaths resulting from lawful acts of war, or from Art. 3 (prohibition of torture, inhuman, cruel or degrading treatment or punishment, Article 4 para. 1 (prohibition of slavery) and 7 (prohibition of retroactivity of in criminal law) shall be made under this provision.

The budgetary policy is aimed at pursuing three essential **economic goals**: resource allocation, distribution of revenues and stabilization of economic and price fluctuations. In addition to the economic functions of the budgetary policy, budgets have **relevance from a constitutional point of view**, especially from the point of view of relations between the state bodies (i.e. parliamentary control of the Government's economic policy, control of the State's expenditures etc.).

Despite the relevance of budgetary policy, the Constitution of the Czech Republic **does not deal, to the extent appropriate**, with the issue. Several principles are laid down in the Constitution[108], further, detailed regulation can only be found in the **Budgetary Rules**[109]. Certain provisions of the Budgetary Rules[110] lay down the basic constitutional principles of the budgetary policy and can therefore **be considered a material constitution**[111]. The process of introducing, debating or approving a bill on the state budget must conform to the following constitutional principles: the principle of legality, the principle of publicity, the principle of an annual budget and a calendar budget year, the principle stating that a budget must be approved prior to the 1st of January of the relevant year and the principle of a periodical budgetary control.

The **principle of legality** stems from Article 42 of the Constitution, which reads: 'bills on the state budget and the final state accounting shall be introduced by the Government'. It follows that the state budget must be enacted as a Law. The state budget is thus a regulation binding on the executive which delimits the financial framework in which the executive can operate when fulfilling its tasks. It is, however, not the only statute regulating the financial relations between the public authorities and other bodies within the state. The state budget revenues and expenditures in relation to natural persons and legal entities are regulated by different statutes[112].

The **principle of publicity**, as stipulated in Article 42 of the Constitution, guarantees that the bill on the state budget can never be debated and adopted 'behind closed door'. This applies for any other bill concerning the financial policies of the State. The statutory form of the state budget, moreover, warrants the general knowledge of its content – the specification of the expected State revenues and expenditures. This is due to the informative function of the Collection of the Acts in which every statute shall be promulgated[113].

The **principle of an annual budget** and **a calendar budget year** does not originate in the Constitution, but rather in the Budgetary Rules[114]. This principle is interconnected with the principle that the budgetary means can only be used in a given budget year for a predefined purpose[115].

The principle stating that a budget must be **approved prior to the 1st of January** of the given relevant year is laid down in the Budgetary Rules[116]. Accordingly, the **Government** has an obligation to introduce the bill on the state budget in a reasonable advance. This is due to ensure that the Government does not seek the approval of the budget which is already being implemented in practice**. If the Chamber of Deputies fails** to give the approval to the proposed budget act prior to the 1st of January of the relevant year, a period of the **stop-gap budget** follows. In each month governed by the stop-gap budget, expenses cannot reach more

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[108] Art. 42 of the Constitution.
[109] Act No. 218/2000 Coll. on the Budgetary Rules and amendment to some related Acts.
[110] § 2, § 5 para. 1 § 20 of the Budgetary Rules.
[111] V. Vybíhal, *Veřejné finance* [*Public Finances*], (Hradec Králové 1995) pp. 51–57.
[112] Act No. 337/1992 Coll. on Administration of Taxes and Charges or Act No. 586/1992 Coll. on the Personal Income and Corporate Profits.
[113] Art. 52 para. 1 of the Constitution.
[114] § 2 para. 2 of the Budgetary Rules.
[115] § 21 of the Budgetary Rules.
[116] § 9 para. 1 of the Budgetary Rules.

than 1/12 of the total expenses of the previous calendar year. This is an interim solution lasting until the regular budget is approved by the Chamber of Deputies.
The principle of a **periodical budgetary control** can be implied from the Constitution[117] and the Act concerning the Supreme Audit Office[118]. The audit is administered by the Supreme Audit Office which is an independent institution. For the **fulfilment** of the state budget, the **Government** is responsible to the Chamber of Deputies. It is, accordingly, obliged to submit a semi-annual report on the fulfilment of the budget and an annual final state accounting.
Neither the Constitution, nor the Budgetary Rules lay down the principle of completeness of the state budget revenues and expenditures. This is owing to the fact that the Government, in addition, administers the resources of the National Fund[119]. Nevertheless, this does not allow for some 'monkey business funds' of the Government. All the revenues and expenditures are under the public control and must be approved by the Chamber of Deputies. Last but not least, Czech constitutional law does not enshrine the **principle of balanced budget**. Increasing the state debt thus cannot be considered unconstitutional.

European integration issues[120]

> As was stated in the national report by Ministry of Interior: 'Coordination of the Euro agenda within the state administration aims at arrangement of preparation of positions on behalf of the Czech Republic, especially by provision of necessary instructions and supporting information at all levels of the European Union's operation. The current system of coordination of the European matters within the Czech Republic in the framework of the European Union went in the past period through a number of changes in accordance with requirements resulting from a need to arrange optimal operation of relevant capacities. These requirements were formulated in a number of Resolutions of the Government of the Czech Republic since 1993 (No. 97 of 3rd March 1993, No. 580 of 20th October 1993, No. 237 of 4th May 1994, No. 631 of 9th November 1994, No. 151 of 15th March 1995 etc.)'[121].
> As the Czech Republic signed the Accession Treaty on 16th April 2003, it gained a position of an active observer in the European Union, which meant in practice that its representatives participated in meetings of the European Union bodies, till the 1st May 2004 without the voting right. Making effort to accommodate the institutional structure to conditions arisen after the signature of the Accession Treaty, the Government of the Czech Republic adopted Resolution No. 427 of 28th April 2003 on the Draft Institutional Arrangement of the Czech Republic's Membership in the European Union and of Coordination of the Decision-Making Process. The Government of the Czech Republic established by this Resolution a system, by which participation of the Czech Republic's representatives in bodies of the European Union was arranged, and confirmed thus the overall coordination role of the Ministry of Foreign Affairs in this area. Furthermore, the Government established the Committee for the European Union as a main coordination body of the state administration of the Czech Republic towards the European Union and entrusted all the Members of the Government and Heads of other central state administration authorities to establish the Ministerial Coordination Group as a basic level of coordination of the decision-making process. (On the basis of the above-mentioned material, the operation of the Government Council for

[117] Art. 97 para. 1 of the Constitution.
[118] Act No. 166/1993 Coll. concerning the Supreme Audit Office, § 4 para. 1
[119] National Fund is an aggregate of i) financial resources entrusted to the Czech Republic by the European Communities and ii) other resources committed by different bodies for the purpose of realizing common policies of the European Union.
[120] This chapter is based on information from a report by J. Marek *et al*., *Public Administration in the Czech Republic,* (Praha, Ministry of the Interior of the Czech Republic, 2004) p. 23–26., and M. Had *et al*., *Česká republika v Evropské unii* [*The Czech Republic in the European Union*], (Praha, Český institut pro integraci Evropské unie 2005), http://www.euroskop.cz/gallery/2/793-cr_v_eu_clenstvi_prinosy_vyzvy.pdf.
[121] J. Marek *et al*., see n. 117. at p. 23.

European Integration and the Working Committee for Integration of the Czech Republic into the European Union was terminated on 30th April 2003.)

1. In the area of executive power, the **Government** of the Czech Republic is responsible for definition of priority areas in relation to the European Union and for decision-making in matters of substantial importance. As regards the matters of the European Union, the Government concentrates especially on definition of matters of national interest, respectively on analysis of its national or external political dimension, it defines priorities and assistance to the relevant initiatives of the Czech Republic in the European Union and exercises the overall coordination and monitoring functions of the decision-making process in matters of the European Union and approves mandates for negotiation of representatives of the Czech Republic on meetings of the Council and the European Council.
In the preceding governments, the **Ministry of Foreign Affairs** was entrusted by a permanent coordination role in terms of the European Union's matters. In the framework of its coordination role, the Ministry of Foreign Affairs professionally still manages the Permanent Representation of the Czech Republic to the European Union and the Office of Governmental representative for Representation of the Czech Republic before the European Court of Justice. These organisational elements of the Ministry of Foreign Affairs are entrusted by representation of the Czech Republic in the European Union and by keeping of permanent contacts with the European Union's bodies. **New European Union Section** (composed of General Department, two EU policies departments and recently the Department for the Czech EU Presidency) has been established at the Ministry of Foreign Affairs for arrangement of these tasks.
Moreover, in the recent government, a **new Office of the Government** of the Czech Republic deputy prime minister for European affairs was established in 2006 with the main aim to coordinate the preparation and realization of the Czech EU Presidency in the first half of the year 2009. This office, which plays mainly the informative and coordination role, **is composed of** the Executive Office[122], the Czech EU Presidency Section[123], European Affairs Section[124] and European Affairs Information Department[125].
The Compatibility with Law of the European Communities Department of the Office of the Government is a coordination organ in terms of harmonization of legislation with the EU/EC law.
2. Of course, apart from the Government, there are other organs participating in the European integration issues, for example the **ministries** have the main responsibility for following the European Union's policies and for preparation and definition of national positions to it, the **Parliament** approves the ratification of international treaties according to Article 10a of the Constitution, and even the **Constitutional Court** has a new jurisdiction to control the constitutionality of international treaties.

2.1.4. Cooperation and mutual relations

[122] It is directly subordinated to the deputy prime minister for the European affairs, its key activities include preparation and coordination of the vice prime minister's work schedule, coordination of the preparation of reference materials, organisation of communication with the media, other public administration authorities and external entities.
[123] It is responsible for the organisational aspects of the preparations for the Presidency.
[124] It is responsible for the content of the preparations for the Presidency and handles the coordination and analytical aspects related to the preparation of Czech positions for the EU meetings.
[125] It provides information concerning issues of the European Union to the general public. See the recent complete structure at http://www.vlada.cz/en/evropske-zalezitosti/organizace-tvaru/organisation -of-the-office-38331/.

The mutual relations between the highest bodies of the State are one of the most important objects of constitutional regulation. We do not intend to deal with these relations in detail but rather to offer a **concise overview of the most important ones**. It must be borne in mind that these mutual relations form the system of checks and balances and their appropriate regulation is essential for a proper functioning of the constitutional system.

Co-operation of the Parliament and the head of state

In the Czech Republic, the President of the Republic is not held responsible for the performance of his duties. However, this does not mean that his position in the Czech constitutional system is absolutely independent and his relations to the other state bodies are not important. If we think about bodies which can affect the position of the President, it is probably correct to mention the Parliament in the first place.

1. Without major doubts, the election is the most important mutual relation between the President and the Parliament. As has been stated in Article 54 paragraph 2 of the Constitution, the **Parliament shall elect the President** of the Republic at a joint meeting of both chambers. A candidate must be nominated by a group of at least ten Deputies or ten Senators. The position of both chambers of the Parliament is equal during the first two rounds of the election because a candidate must receive majority in both chambers[126] in order to win. In the third round of election, the Chamber of Deputies gains the upper hand because, in order to win, it is enough for a candidate to receive an absolute majority of the votes of the deputies and senators present. The position of the Chamber of Deputies is stronger because it has almost two and a half times more members than the Senate (see 200: 81 ratio). However, a mere fact that the President is elected by the Parliament **does not give rise to the relationship of responsibility** similar to the relation between the Chamber of Deputies and the Government since the President is in principle not responsible for the performance of his duties. There is consequently no general possibility to recall the President.
2. On the other hand, there are certain exceptions from this general principle. According to Article 66 of the Constitution the Chamber of Deputies and the Senate may adopt a **joint resolution** that the **President** is, for serious reasons[127], **incapable of performing his duties**. In such a case, the presidential duties devolve upon the prime minister, the chairperson of the Chamber of Deputies, or – if the office of the Presidency becomes vacant during a period in which the Chamber of Deputies is dissolved – upon the chairperson of the Senate. It is quite obvious that this resolution can be easily abused for political purposes[128].
3. Moreover, the **Senate may bring a charge before the Constitutional Court against the President** of the Republic for high treason. This motion may be submitted by at least one third of senators; the resolution is adopted by the majority of the senators present.

ad) But the relation between the Parliament and the President is double-edged. As well as the Parliament can affect the position of the head of state, the President executes some powers towards the Parliament. It should be mentioned in the first place that the **President calls elections** to the Chamber of Deputies and the Senate and **convenes sessions** of the Chamber of Deputies.

4. On the other hand, the **President may dissolve the Chamber of Deputies**[129] if it does not adopt a resolution of confidence in a newly appointed Government, the prime minister of

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[126] Of all deputies/senators in the first round and of deputies/senators present in the second one.
[127] It is not very clear which reasons could be considered 'serious' for the purpose of this Article. One could think about serious illness, mental incapacity etc., compare Klíma *et al*., see n. 93. at p. 334.
[128] This danger is emphasised by the fact that the effect of the resolution is not time limited. The Constitution thus allows the President to petition the Constitutional Court to annul this resolution.
[129] Art. 62 lit. c) of the Constitution.

which was appointed by the President of the Republic on the basis of a proposal of the chairperson of the Chamber of Deputies, or, if it fails, within three months, to reach decision on a governmental bill with the consideration of which the Government has joined the issue of confidence, if a session of the Chamber of Deputies has been adjourned for a longer period than permissible, or, if for a period of more than three months, the Chamber of Deputies has not formed a quorum, even though its session has not been adjourned and it has been repeatedly summoned to a meeting[130].

5. The mutual relations between the Parliament and the President do not concern only creation and termination of those bodies. Sometimes these two bodies **co-operate**. We can mention the **ratification procedure**: the President needs the assent of the Parliament in order to ratify certain international treaties[131]. The Chamber of Deputies and the President co-operate even during **the formation of the Government**. If the newly appointed Government does not receive a vote of confidence from the Chamber of Deputies for the second time, the President of the Republic shall appoint the prime minister on the basis of a proposal by the chairperson of the Chamber.

Co-operation of the Government and the head of state

The **executive power** in the Czech Republic is **dual**. Whereas the Government – which consists of the prime minister, deputy prime ministers and ministers – is the highest body of executive power, the President is the head of state. The relations of the Government and the President thus constitute examples of **intra-power checks and balances** (in contrast to inter-power checks and balances which are represented for example by the relation between the Chamber of Deputies and the Government). The relation between the President and the Government corresponds also to the fact that the Czech Republic is a typical representative of parliamentary republic.

We can distinguish between **two kinds of relations** between the President and the Government: the President plays a very active role in the procedure of formation and termination of the Government; the Government and the President share certain competences and co-operate while fulfilling them.

1. The latter area is characteristic by the fact that the Government is responsible for certain decisions of the President[132]. **Countersignature** of the prime minister or a member of the Government designated by him is necessary for the validity of the President's decisions issued pursuant to Article 63 paragraphs 1 and 2 of the Constitution. One of the most important areas of shared competences is the foreign policy[133]. It reflects the dominant position of the Government in this domain. We can also mention the commissioning and promoting of generals or appointment of judges. The countersignature is of course necessary only in the case of written decisions. The rather informal 'external representation of the State' can

[130] Art. 35 of the Constitution.

[131] Art. 49 of the Constitution.

[132] i.e. those which require countersignature – Art. 63 para. 4 of the Constitution. Countersignature concerns the decisions pursuant to Article 63 para. 1 (list) and Article 63 para. 2 (decisions pursuant to ordinary statutes). In this context, a very interesting case arose before the Constitutional Court. In the decision no. Pl. ÚS 14/01, the Constitutional Court had to resolve a question whether the decision of the President in which he appointed governor and vice-governor of the Czech National Bank required for its validity the countersignature either of the prime minister or of a member of the Government entrusted by him with that task. According to the prevailing view, this competence was laid down by Art. 62 of the Constitution and the countersignature was not required (the Court used a rather politological reasoning based on the division of powers in this aspect). The dissenting justices however expressed the opinion that the governor and the vice-governor of CNB should be appointed with the countersignature of the prime minister (pursuant to Article 63 paras. 3, 4 of the Constitution).

[133] See also Klíma *at al.*, *op. cit*. n. 93, at p. 317.

naturally not be (counter)signed. The countersignature by a member of the Government transfers the responsibility for the President's decision to the Government[134]. However, the responsibility of the Government does not necessarily mean that the Government can effectively affect the content of the President's decision.

2. After a general description of countersignature, we will focus on one of the most important (and controversial) countersigned decision of the President – **the appointment of judges**. According to Article 63 paragraph 1 lit. i) of the Constitution, the President appoints judges. Judges are appointed by the President acting on proposals of the Minister of Justice and after the Government's deliberation. The Government's decision is final, and this is seen by the fact that Article 63 of the Constitution expressly calls for a governmental countersignature. The Government thus does not have direct influence on the appointment of judges, however, it may help the President with the choice of the candidates. This division of competences ensures that the President can use the Government's information about the prospective judges and that he can extensively consult the Government without the Government being a decisive body in the procedure[135]. The discretion of the President is **not unlimited** – the candidates must meet following conditions: Czech nationality, minimum age of 30 years, legal capacity, probity, necessary experience and moral integrity, university degree in law, preparatory service, professional exam and agreement with the appointment. A very **controversial and still open question** is whether (and how) the President should give reasons to his/her decision on non-appointment (and whether it is a decision). The Supreme Administrative Court has given an affirmative answer[136] but the situation still remains unclear[137].

Co-operation of the head of state and the Constitutional Court

There are several important constitutional relations between the President and the Constitutional Court. Firstly, the President appoints the justices of the Constitutional Court. Moreover, certain procedures before the Constitutional Court concern the President.

Appointment of the justices of the Constitutional Court podrzędne

The Constitution provides that the Court consists of **fifteen justices**. All justices shall appoint the President with the consent of the Senate. Moreover, the chairperson of the Court and two vice-chairpersons shall be appointed by the President (consent of the Senate is not needed). The justices are appointed for a 10-year term of office, and there is no restriction on reappointment. This relation may **seem potentially dangerous** (at least in two aspects). In case of the President's inactivity, the justices cannot be appointed; such a situation may effectively disable the Court's functioning[138], when the number of sitting justices is lower than 10[139]. The combination of the time limited term of office (10 years) and the possibility of

[134] And it may evoke its responsibility to the Chamber of Deputies.
[135] Such a construction arguably helps to ensure the judges' independence.
[136] Judgment No. 4 Aps 3/2005 – 35, www.nssoud.cz.
[137] Despite the court's ruling the President more than one year after the expiration of the given term for his decision has remained inactive.
[138] And thus effectively disable the functioning of the constitutional judiciary because there is no alternative body which would exercise its functions. This is an important difference between the position of the Constitutional Court and the Government which is also appointed by the President (in the latter case, the previous Government shall exercise its powers even if it has been recalled or if it resigned unless a new Government is appointed.
[139] And even if the number is higher, it can be very difficult to adopt certain plenary judgments for which the majority of 9 justices are necessary (such as the constitutional review of legislation or – in this context very important – proceedings concerning the high treason of the President.). Similar situation occurred in the period

reappointment might look quite problematic as well. The justice whose term is drawing to a close may (maybe even subconsciously) decide 'in conformity' with the President's views in order to be reappointed. Such a potential situation naturally gives rise to concerns about the suitability of such regulation, especially from the point of view of independence of the judicial power and the possible intrusion by the executive power.

Proceedings concerning the President before the Constitutional Court (to jest podrzędne)

There are two kinds of proceedings concerning the President before the Constitutional Court. Their significance is potentially great but they have never been activated in the short Czech constitutional history.

1. **A charge against the President**[140] may only be brought for the specific constitutional offence – high treason. This offence is characterised by several facts. It is the only exception from the general rule that the President shall not be responsible for the performance of his duties (Article 54 paragraph 3 of the Constitution) and, on the other hand, only the President and nobody else[141] may be accused of high treason.

> Responsibility for high treason is the example of personal liability which is based on fault. Such examples are very rare in the constitutional law. It can arguably be accused of an act (secret service for a hostile and foreign power), by failure to act or by omission (not taking necessary steps against hostile and foreign power, arbitrary not appointing members of the Constitutional institutions for an excessive period of time). Although it is not very common in the area of the Constitutional responsibility, the facts of the case are clearly defined as the actions of the President directed against the sovereignty and territorial integrity of the republic, as well as actions against its democratic order.

This procedure **should not be confused with impeachment** which is nowadays not to be found in the Czech legal order[142], although there are some similarities. The subject that is entitled to deliver the charge against the President is the Senate (i.e. a legislative body), but the judgment is passed by the Constitutional Court (i.e. a judicial body).

The rules of procedure laid down in CCA are quite detailed (in comparison to other examples of the Constitutional responsibility). **Proceedings** on a constitutional charge brought against the President are thus very **similar to criminal proceedings**[143]. The proceeding is instituted by the delivery of the charge to the Court after the Senate delivers the charge to the Court[144]. The constitutional charge must contain a precise description of the conduct by which the President is alleged to have committed high treason, together with a statement of the evidence

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between the 'first' and the 'second' Constitutional Court (2003–2005), when Václav Klaus procrastinated the appointment of the justices.

[140] As laid down in §§ 96–108 of Act on the Constitutional Court (hereinafter 'CCA'). This part is based on Filip and Vyhnánek, see n. 10. at p. 249.

[141] Not even the person performing duties pursuant to Article 66 of the Constitution.

[142] However, the concept of impeachment is not completely unknown in the Czech Republic. Under the 1920 Constitutional Charter (§ 67), the President could be held responsible for high treason; he could be charged by the Assembly of Deputies and tried by the Senate (pursuant to Act No. 50/1923 Coll.). If convicted, he could lose the presidency and the eligibility to reacquire it in the future. The members of the Government (§ 79) were responsible for breach of the Constitution or other laws (ether consciously or from gross negligence). They could be likewise charged by the Assembly of Deputies and tried by the Senate. They could be fined up to 500.000 Kčs, sentenced to 6 months of imprisonment or to the forfeiture of certain things.

[143] That is emphasised by the fact that, provided otherwise, Constitutional Court shall apply the relevant provisions of the Code of Criminal Procedure in a proceeding on a constitutional charge (§ 108 of CCA). Of course, the Criminal Code (esp. the sanctions) does not apply.

[144] If, prior to retiring for its final conference, the Senate delivers to the Court a resolution withdrawing the charge, the Court shall dismiss the charge (§ 98 of CCA).

upon which the charge is based. The President has a right to choose for himself one or more defence counsel, at least one of whom shall be an attorney. The Court must always hold an oral hearing for a constitutional charge. The parties have the right to express their views, question the witnesses and experts, express their views upon the evidence presented and submit proposals for supplementing the evidence. The **decision** of the Constitutional Court has the form of a judgment. The Court can[145] either uphold the charge and declare that the President committed high treason or acquit him of the constitutional charge. The mere fact that the President resigned after the delivery of the charge, is not a title for its dismissal. On the other hand, the Court shall dismiss the charge if the President dies after the proceeding is instituted[146]. As regards the **sanctions**[147], if a judgment upholding the charge is announced, the President shall lose the presidency as well as eligibility to reacquire it in the future. He shall have no right to the remuneration or other benefits that the President should otherwise receive after leaving office. The proceedings may be reopened in the future, but this may not result in regaining the lost presidency.

2. Whereas the first type of proceedings before the Constitutional Court concerning the President is directed against the President, this proceeding on the other hand shields the head of state from the Parliament's intrusion. The Chamber of Deputies and the Senate may adopt a concurrent **resolution pursuant to Article 66 of the Constitution** declaring that, for serious reasons, the **President is unable to carry out the duties of his office**; in such case, the presidential duties devolve upon the prime minister, the chairperson of the Chamber of Deputies or – if the office of the presidency becomes vacant during a period in which the Chamber of Deputies is dissolved – upon the chairperson of the Senate. It is quite obvious that this resolution can be easily abused for political purposes (this danger is emphasised by the fact that the effect of the resolution is not time limited). The President may consequently petition the Court to annul this resolution. The Court shall make a decision upon the President's petition within 15 days of its delivery. This relatively short term ensures the minimalisation of possible intrusion in the President's powers. If the Court decides that, at the time the Assembly of Deputies and the Senate adopted a resolution, there were not any serious reasons which prevented the President from performing his duties or that they ceased to exist while this resolution was in effect, the resolution shall be annulled. However – even in such a case – the acts the bodies upon which the presidential duties devolved shall not lose force and effect.

There are even more proceedings before the Constitutional Court which may concern the President. For example, the President can propose the annulment of the statute. Moreover, certain decisions of the President can be reviewed by the Constitutional Court.

> For example, in case No. Pl. US 18/06, the Constitutional Court reviewed a presidential decision on removal of the chief judge of the Supreme Court. It stated that: 'The office of chief judge or deputy chief judge, as well as that of chairperson of court collegia, should be considered as a career step for a judge (similarly as is the case for the appointment of the chairperson of a court panel), so that neither the chief judge and deputy chief judge of a court should be subject to removal otherwise then on the grounds foreseen in the law and on the basis of a decision of a court'. It accordingly decided that the President was not entitled to remove a chief judge[148].

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[145] This plenary judgment needs at least nine votes to be adopted (§ 13 of CCA).

[146] But if the President's spouse or a relative in the direct line seeks the continuation of the proceeding within one month of the death, it shall be resumed.

[147] The sanctions, as well as criminal code as a whole, are not applicable. Only the procedural provisions of the act on crim. proc. are applicable. These two layers are strictly divided.

[148] In case No. Pl. US 14/01, it dealt with the President's decision concerning the governor and the vice-governor of the Czech National Bank.

2.1.5. Other competences

The list of the above mentioned competences is however not exhaustive. We may mention at least the following important competences of the highest state bodies.

The Parliament

The most important competences of the Parliament have been mentioned above[149], but we will mention some other competences (mostly concerning creation) which may sharpen the image of the Parliament's position and significance.
The **Public Defender of Rights** – which is one of the most important bodies that control the executive power (public administration) – **is elected by** the Chamber of Deputies of the Parliament of the Czech Republic for a term of six years, and is chosen from a group of candidates, two of whom are proposed by the President and two by the Senate of the Parliament of the Czech Republic. The Parliament can hence indirectly influence control over mechanism of public administration.
The Chamber of Deputies and the Senate **elect members of other control bodies, state funds or public institutions** as well. We can mention the following: The Council of the Czech Television, the Council of the Czech Radio, the Council of the Czech Press Office, the Presidium of Land Fund and the members of Board of Trustees of the General Health Insurance Company of the Czech Republic, etc.

The Government

The Government is the supreme body of the executive power. Its tasks and competences in some very important areas such as foreign policy, budgetary policy, emergency situations, European integration issues etc. have been already emphasised. But the sphere of activity of the Government is not limited to these.
It should be mentioned that the Government's role in the legislative procedure is very important – the Government may **introduce bills** and, in fact, the most important laws are usually introduced as governmental bills. It is – of course – due to the fact that the Government has the greatest personal, financial and other resources at its disposal[150]. The introduction of bills forms an integral part of the Government policy-making.
As it is clear from the sphere of activity of respective ministries, the **governmental activity covers** at least the following areas: environment, labour and social affairs, education, agriculture, internal and external security, health care or communication.

The head of state

The **competences concerning the judiciary** are amongst the most important ones. Arguably, they are entrusted to the President in order to ensure the independence of the judiciary in relation to the Government. We have already mentioned the procedure of appointment of judges. The President can further **pardon and mitigate penalties imposed by a court**, order that criminal proceedings should not be initiated and, if already initiated, should be

[149] It is worth repeating that we consider competences in the following (already mentioned) areas to be the most important: constitution making, legislation, budgetary policy, creation of the highest state bodies (*inter alia* the Constitutional Court, the President, the relation to the Government will be described below) or the competences concerning the armed forces.
[150] For example the Legislative Council of the Government.

suspended, and that previous sentences should be expunged or grant **amnesty**. This competence, which is a result of a 'monarchical' concept of the head of state, represents one of the few examples of other state powers' intrusion in the judiciary.
The President participates in creation of other state bodies as well. The President appoints the president and the vice president of the Supreme Audit Office and members of the Bank Board of the Czech National Bank.
The President is the **supreme commander of the armed forces** and **appoints and promotes** generals. The position of the President as the supreme commander of the armed forces is a classical one[151]. On the other hand, the competences of the President in this area are not unlimited[152]. On the contrary, the other state bodies have a very important position. For example, it is not the President who declares a state of war, the mobilization may be declared only after the Government's proposal, the Parliament decides on the Czech Republic's participation in defensive systems of an international organisation of which the Czech Republic is a member, the Parliament gives its consent to the sending of the armed forces of the Czech Republic abroad etc.
Moreover, the President – although this competence is rather ceremonial – **awards and bestows state decorations**.

2.2.. Mandate of the Government and responsibility

1. The **formation** of the Government, as well as its termination, is affected by its relation to the Chamber of Deputies. The relationship of confidence reflects the fact that the Government is responsible to the Chamber of Deputies[153]. The formation of the Government is a complex procedure in which mainly the President and the Chamber of Deputies take part. The process is **initiated** when the old Government reaches the end of its term. The President shall designate the prime minister. As to the choice of the prime minister, the President can designate anyone, but he must respect the structure of the Chamber of Deputies. This does not mean that the prime minister must be a representative of the strongest political party[154]. Other members of the Government are designated by the President on the prime minister's proposal. The member of the Government must fulfil various criteria: he or she must be a state citizen of the Czech Republic, at least 18 years old and cannot pursue any activities which are discordant with the position in the Government. Pursuant to Article 68 paragraph 3 of the Constitution, the Government shall go before the Chamber of Deputies and **ask for a vote of confidence** within thirty days of its appointment. If the vote is successful, the whole process is finished. In the other case the process starts again. In the third attempt the chairman of the Chamber of Deputies proposes the prime minister. Should this third attempt turn out to be unsuccessful, the President can dissolve the Chamber of Deputies. More than half the members of the Chamber of Deputies must assent to the confidence. If this positive sanction is not asserted (i.e. if the newly appointed Government does not receive a vote of confidence from the Chamber of Deputies), the Government must resign[155]. This positive sanction is thus necessary for the very existence of the Government. This relationship of **positive responsibility can be renewed**. The Government may submit a request (which can be joined with a governmental bill) for a vote of confidence to the Chamber of Deputies pursuant to Article 71 of the Constitution. The use of this renewal of responsibility is thus left at the

[151] Compare Klíma *et al*., see n. 93, at p. 320.
[152] And, in fact, the President does not effectively influence the ordinary functioning of the armed forces.
[153] Art. 68 para. 1 of the Constitution.
[154] Even if such a situation is quite frequent. But in a situation where the representative of a winning party would have no real chance to gain confidence in the Chamber of Deputies, such conduct would be meaningless.
[155] Art. 73 para. 2 of the Constitution.

Government's command and cannot be initiated by the Assembly of Deputies. This is very important because once the Assembly has adopted a resolution of confidence in a newly appointed Government, it may only adopt a resolution of non-confidence in the Government whose conditions are more rigid[156].

2. The Government may be **terminated** either by resignation or by recall. The Government **shall** for instance always **submit its resignation** after the constituent meeting of a newly elected Chamber of Deputies. The Government **must resign** if the Chamber of Deputies rejects the Government's request for a vote of confidence or if it voted no confidence in the Government. These two situations may be described as examples of constitutional-political responsibility.

According to Article 72 of the Constitution, the Chamber of Deputies may express **non-confidence** in the Government when a written motion to express non-confidence in the Government is issued in by not fewer then fifty deputies (qualified minority). The majority of all deputies must approve the motion in order to express non-confidence in the Government.

The occurrence of responsibility does require neither unlawful conduct of the Government nor the existence of fault. It is therefore almost impossible to establish some causation. For example the resolution of non-confidence constitutes a mere expression of political dissent; it does not need to be linked to certain specific conduct. Similar sorts of responsibility are hence often denoted as constitutional political responsibility.

As the **responsibility of the Government** is collective, the conduct of some particular member of the Government may result in a resolution of non-confidence and fall of the Government, although the other members did not contribute to it. It is also very hard to identify the object of the responsibility because the facts of the case are not set out. In fact, it is up to the Chamber of Deputies to decide why the resolution of non-confidence should be adopted. On the other hand, the relationship of confidence may sometimes be double-edged and negatively affect even the Chamber of Deputies. The **President** of the Republic **may dissolve the Chamber of Deputies** if it does not adopt a resolution of confidence in a newly appointed Government whose prime minister was appointed pursuant to Article 68 paragraph 4 second sentence, or if the Chamber of Deputies fails, within three months, to reach decision on a governmental bill with the consideration of which the Government has joined the issue of confidence. These sanctions reflect the concern over the existence of the Government and over the execution of its policy.

The **President** of the Republic shall **recall a Government** which has not resigned although required to do so (see above).

3. Besides the relation of confidence, the Chamber of Deputies (especially the minority/opposition) has some other means to control the Government's activity. The **interpellations** are amongst the most important ones. Pursuant to § 110 and following the Rules of Procedure[157] every deputy is entitled to question the Government or any of its members about the issues falling within their competence. Interpellations may be presented by the deputies verbally at the Chamber's meetings (on the set day and time) or in writing to the Chamber's chairman. Each **verbal** interpellation shall be answered by the prime minister or another questioned member of the cabinet immediately after its presentation. After that, additional questions may be asked by the same deputy. All such questions are also answered immediately. All **written** interpellations are answered by the Government or the relevant cabinet member verbally at the Chamber's meeting or in writing within 30 days following their presentation.

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[156] Art. 72 para.2 of the Constitution.

[157] Rules of Procedure of the Chamber of Deputies, Act. No. 90/1995 Coll.

3. Safeguarding the Constitution

One of the basic principles defining the Czech Republic as a state respecting the rule of law is that all the state bodies are bound by the law. They have to abide by the law entirely, which means they have to respect the hierarchical structure of the legal order, the superiority of the constitutional order and the supremacy of *acquis communautaire* and international agreements over the Czech ordinary laws.
The accordance and coherence of such a complicated structure, which includes enforcement of ordinary laws being in conformity with constitutional norms, is secured mainly by the 'positive' legislative power (e.g. when the Parliament discusses ordinary laws or another state or self-government authorities discuss secondary normative legal acts) or by the 'negative' legislative power (that is represented by the Constitutional Court, as it will be furthermore explained).

> As we pointed out elsewhere:[158] 'In the Czech Republic there has not been a dispute concerning who should be the guardian of constitutionalism. As early as 1920, the institution of the abstract control of constitutionality was enshrined in the Constitution, the first constitution in the world to explicitly so provide, and a specialised Constitutional Court was created. Following the experience with the communist regime, the constituent assembly took an entirely different approach to the problem of the protection of the constitution. The Constitution proclaims that, under certain circumstances, the protection of constitutionalism is the right of every person. Apart from the means traditionally employed under normal circumstances[159], extraordinary states of affairs and extraordinary means are regulated on the constitutional level (Constitutional Act of 1998 on the Security of the State). Finally, there is the means *ultima ratio* – the right of citizens to put up resistance[160]'.

3.1. Organisation and overview of the competences of the Constitutional Court

3.1.1. Organisation of the Constitutional Court

The Constitutional Court of the CSFR was in operation from February 1992 until 31 December 1992 when the CSFR dissolved. The Constitution of the Czech Republic, adopted on 16 December 1992, made provision in Chapter 4 for the establishment of the Constitutional Court of the Czech Republic (hereinafter the Constitutional Court or Court). The statute regulating its operations in detail[161] was adopted on 16 June 1993, after which in July 1993 the **first 12 members** were appointed and the Court began to operate. By January 1994 **three other members** were appointed making up the total number of members of 15 provided for in the Constitution. All members are appointed by the President of the Republic

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[158] For details see Filip, see n. 5, at pp. 53–75.
[159] Such as a general duty to observe constitutional enactments (derived by means of an interpretation *a contrario* of Article 23 of the Charter); instruments for the control of legality and constitutionality such as administrative justice; direct applicability of the Constitution. For details about the administrative justice as a guarantee of constitutionality and legality of public administration see P. Molek, *Judikatura ve správním právu* [*The case law in Administrative law*], in Z. Kühn, *et al.*, (eds.), *Judikatura a právní argumentace* [*The case law and legal argumentation*], (Auditorium, Praha 2006) pp. 200–213., P. Molek and V. Šimíček, *Soudní přezkum voleb* [*Judicial review of elections*] (Linde, Praha, 2006).
[160] It arises only in the situation where the ordinary means and mechanisms have failed. Art. 23 of the Charter provides: 'Citizens have the right to put up resistance to any person who would abrogate the democratic order of human rights and fundamental freedoms established by this Charter, if the actions of constitutional institutions or the effective use of legal means have been frustrated'.
[161] Act No. 182/1993 Coll. on the Constitutional Court.

with the consent of the Senate (so-called 'confirmation'). The **chairperson** of the Constitutional Court and **two vice-presidents** are appointed by the President of the Republic (consent of the Senate is not required). The justices are appointed for a 10-year term of office, and there is no restriction on reappointment. The **minimum qualifications** for appointment as a justice of the Constitutional Court are that the person has a character beyond reproach, is eligible for election to the Senate (which means they have reached the age of 40 and is eligible to vote), has a university legal education and has been active for at least ten years in a legal profession. There is no limitation on a person's eligibility to be appointed merely because he was a member of the government or of the Parliament prior to his nomination. However, while holding office, a justice may not be a member of a political party. In addition, a justice is restricted from holding any other compensated position or engaging in any other profit-making activity with the exception of managing his own assets and engaging in scholarly, teaching, literary or artistic activities. Justices **assume** their office upon taking the following oath of office administered by the President of the Republic: **'I hereby swear on my honour and conscience to protect the inviolability of man's natural rights and the rights of citizen, to uphold constitutional laws and to make my decisions independently and without prejudice to the best of my belief'**. Justices enjoy a general **immunity** from criminal prosecution[162]. A justice has a **privilege to refuse to testify** concerning matters about which he learned in connection with his judicial duties and otherwise has a positive obligation to maintain confidentiality about such matters. A justice may be **deprived** of his seat only in a very limited number of cases[163]. The Court **acts** in its plenum or in three-justice panels (of which there are four)[164]. **Oral hearings** are not mandatory if parties agree to dispense with them. For the plenum to make a decision, at least 10 justices must be present. A supermajority of 9 Justices is required to vote in favour of a decision to annul an Act of Parliament, as well as for decisions concerning the impeachment or incapacity of the President. The Court **administration** is directed by the chairperson of the Constitutional Court. Each justice has his own staff made up of a legal assistants and a secretary[165].

3.1.2. Position of the Constitutional Court in the constitutional system

The fundamental starting point for determining the Constitutional Court's position in the system of state bodies is the definition of the Court found in Article 83 of the Constitution[166]. First and foremost, this article defines a distinct function of the state, designated as the **'protection of constitutionality'**. This function must be understood as an important component of the concept, the state respecting the rule of law. Further, the bearer of this

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[162] They may not be prosecuted for misdemeanours and may be prosecuted for felonies only if the Senate consents to the prosecution (failing which, they are forever exempt from prosecution for the act at issue). They may be arrested only if caught in the act of committing a felony (*flagrante delicto*) or immediately afterwards.

[163] Loss of eligibility for the Senate, final conviction for an intentional criminal offense, or a decision by the Court's Plenum to terminate his office due to a disciplinary infraction. The definition of a disciplinary infraction is any conduct which 'lowers the esteem and dignity of the office or tends to undermine confidence in the independent and impartial decision-making of the Court, as well as any other culpable violation of the duties of a justice' or any conduct qualifying as a misdemeanour.

[164] Only the Plenum may decide to annul an Act of Parliament or another generally applicable enactment, or make decisions concerning the impeachment or incapacity of the President or the dissolution of a political party. All other matters are heard by panels: constitutional complaints by persons or municipalities, electoral or eligibility disputes concerning a Member of Parliament, and conflicts of competence between central state authorities and local autonomous bodies.

[165] More detailed rules are contained in Act No. 182/1993 Coll.

[166] This part is based upon J. Filip, *The Czech Constitutional Judiciary in the period of transition*, in Segado, F. F. (eds.): *The Spanish Constitution in the European Constitutional Context*, (Dykinson, Madrid 2003) pp. 907–926.

responsibility for the state is the Constitutional Court, the sole state body which applies constitutional norms as the fundamental measuring tool for the evaluation of specific cases.
The Constitutional Court has even declared that it is competent to review an act designated as a constitutional act. It stated that the Constitution's material core according to Article 9 paragraph 2 of the Constitution must be (by the Constitutional Court) protected even against the action of the Parliament and thus that the last word in the cases concerning the material core of the Constitution belongs to the Constitutional Court without respect to the designation of the Parliaments act[167].
The Constitution framers emphasised that it is a judicial organ, one, however, not forming part of the system of courts which, pursuant to Article 91 paragraph 1 of the Constitution, is composed of the Supreme Court, the Supreme Administrative Court, superior, regional and district courts. Several important features of the Constitutional Court's status follow from this fact. The Constitutional Court carries out its work as a distinct and separate judiciary, even though it moves in the field of political law and politics with the possibility, with which the ordinary courts are not endowed, of effecting events. Just as any judicial organ, the Constitutional Court makes decisions by formally prescribed procedures, the main standard for its decision-making being the duty to protect the natural rights of man and of citizens (office oath of justices) and to follow constitutional acts. The functional perspective concerns whether the Constitutional Court is dependent on other state bodies as regards the content and direction of its work.
The **initiation** of a proceeding before the Constitutional Court is dependent upon one of the authorised subjects submitting a petition, which rules out the possibility that the Constitutional Court could, on its own initiative, intervene into relations or disputes between other state bodies or even between other subjects such as natural persons, but especially political parties or movements.
As we said elsewhere: 'The elementary linkage upon which the Constitutional Court's relations to other state bodies may be played out is the issue of the protection of constitutionality and of the fundamental rights and basic freedoms[168]. This concerns the Constitutional Courts ties both to executive bodies but also, and especially, to the ordinary courts'[169].

3.1.3. Overview of competences of the Constitutional Court

Article 87 of the Constitution enumerates in its paragraph 1 that the Constitutional Court has jurisdiction:

- to annul statutes or individual provisions thereof if they are inconsistent with the constitutional order;
- to annul other legal enactments or individual provisions thereof if they are inconsistent with the constitutional order, or a statute;
- over constitutional complaints by the representative body of a self-governing unit against an unlawful encroachment by the state;
- over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;

[167] Compare judgement n. Pl. ÚS 27/09 and B. I. 1. C.
[168] Fundamental rights and freedoms are not set forth in the Czech Constitution (1992) but in the particular part of the constitutional order – the Charter of Fundamental Rights and Freedom (1991) as the act of the former federation. Filip and Gillis, see n. 34.
[169] Filip, see n. 163 at pp. 907–926.

- over remedial actions from decisions concerning the certification of the election of a deputy or senator;
- to resolve doubts concerning a deputy or senator's loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of deputy or senator;
- over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2;
- to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66;
- to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented;
- to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws;
- to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body;
- to review the decision of the President of the Republic that the referendum about the accession to the European Union will not be held;
- to decide whether the referendum about the accession to the European Union was held in a manner consistent with the constitutional act about the referendum and the implementing act related thereto;
- to decide jurisdictional disputes concerning the conformity of an international treaty under Article 10a or Article 49 with the constitutional order, prior to its ratification.

Let us now focus on the basic competences of the Court in more detail: the *ex ante* control of international treaties, the *ex post* control of domestic acts[170] and the constitutional complaint.

3.2. Main competences of the Constitutional Court

3.2.1. *Ex ante* control of international treaties

The first of these two abovementioned competences was introduced to the Constitution in 2001, when the Czech Republic adopted the so-called Euro-amendment to the Constitution of the Czech Republic[171]. This amendment brought about a number of significant changes into the constitutional order from the points of view of international and domestic law (Article 1 paragraph 2 and Article 10 of the Constitution), and, at the same time, the amendment provided a possibility of transferring powers of bodies of the State to international organisations or institutions, thereby setting the constitutional prerequisites for an accession of the country to the European Union. It also vested the Constitutional Court with the power of preventive review of the constitutionality of international treaties, which previously had not been regulated in the Czech legal system. In this connection and on the basis of its amendment No. 48/2002 Coll. which regulates the procedure that has to be followed by the

[170] As it can be seen from the overview, the Constitutional Court has two main competences which can be designated as a norm control: the objects of the first one, established by of Article 87 paragraph 2 of the Constitution and concretized by §§ 71a–71e of the Act on the Constitutional Court, are international treaties which are being ratified – and therefore we can speak about an *ex ante* norm control, although the 'norm' itself is in the time of the proceeding already 'finished', but only from the international point of view, not from the domestic one – by the Parliament according to Art. 10a or Art. 49; and the objects of the second one established by para. 1 lit. a) and b) of Art. 87 of the Constitution and concretized by §§ 64–71 of the Act on the Constitutional Court are statutes or other legal acts or individual provisions thereof.

[171] Constitutional Act No. 395/2001 Coll.

Constitutional Court during its preventive review, a new part II (Article s 71a-71e[172]) was included in the Act on the Constitutional Court.
However, this possibility of judicial review, which thus became available for authorised subjects (which means both chambers of the Parliament as a whole, group of at least 41 deputies or 17 senators, or the President of the Republic) from 1 June 2002, remained unexercised for a long time. It took whole six years before the Senate, in April 2002, finally decided – after complicated discussions over the government proposal to approve the ratification of the Lisbon Treaty, amending the Treaty on the European Union and the Treaty establishing the European Community – to file a petition to the Constitutional Court to assess the **conformity of the Lisbon Treaty with the constitutional order**.

> Thus, this petition (although it was rather a fuzzy petition, because it did not demand the Constitutional Court to decide in either positive or negative way, but merely demanded that the Constitutional Court decides on the conformity of the Lisbon Treaty with the constitutional order, without unequivocally pointing out the direction in which a decision should be made, and therefore, as we stated elsewhere, it 'gives the impression that the Senate does not consider the Constitutional Court as a court but as to be some kind of constitutional council – a sort of advisory body[173]'), submitted to the Constitutional Court on 30 April 2008, became the very first motion for the preventive review of an international treaty to be admitted to the Constitutional Court. Naturally, owing to the progress of the ratification of this treaty in other EU states, the decision of the Constitutional Court was eagerly anticipated, not only by Czech authorities, politicians, and the public, but also the EU bodies and those states where the process of ratification has not been finished yet[174]. Therefore, when this judgment No Pl. ÚS 19/08[175] was pronounced on 26 November 2008 it was commented by media all around Europe and can be easily estimated, that it will be commented by the European academic sphere later on too, but since at the time of writing this chapter there has not been an academic commentary and because of the extraordinary importance of this judgment, it may be useful to sum up the main conclusions of it.
>
> As to the procedural questions, the Court especially pointed out that it concentrates its review only on those provisions of the international treaty whose accordance with the constitutional order the petitioner expressly contested, and in which, in an effort to meet the burden of allegation, it supported its claims with constitutional law arguments. The Constitutional Court also stated more precisely that in this review it did not intend, for a number of reasons, to distinguish between the provisions of the Treaty of Lisbon described as 'normatively' old or new, i.e. it reviewed all those provisions of the Treaty of Lisbon that the petitioner properly contested. An additional statement of the Constitutional Court, stating that the Court can review whether acts of the European Union bodies exceed the power that the Czech Republic transferred to the European Union under Article 10a of the Constitution, however, only in utterly exceptional cases, is important as well.
>
> The findings themselves (in a narrow sense) sound as follows: 'The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in Article 2 paragraph 1 (originally Article 2a paragraph 1), Article 4 paragraph 2 (originally Article 2c), Article 352 paragraph 1 (originally Article 308 paragraph 1),

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[172] For commentary on this part of the Act on the Constitutional Court see Filip *et al.*, *Zákon o Ústavním soudu. Komentář* [*Commentary to the Act on Constitutional Court*], (Praha, C. H. Beck, 2007), pp. 457–489; and E.Wagnerová *et al.*, *Zákon o Ústavním soudu s komentářem* [*The Act on Constitutional Court with a Commentary*], (Praha, ASPI, 2007) pp. 298–315.

[173] J. Filip, *Procedure of Preventive Review of the Lisbon Treaty in the Czech Republic.* 3 Časopis pro právní vědu a praxi [Legal studies and practice journal research revue] (2008).

[174] For more details about the proposal itself and about possibilities and questions before the decision of the Constitutional Court was taken, see Filip, *loc. cit*. n. 169.

[175] For English translation of the abstract of the judgment, see http://www.usoud.cz/scripts/detail.php?id=613 (26.12.2008).

Article 83 (originally Article 69b par. 1) and Article 216 (originally Article 188l) of the TFEU, as amended by the Treaty of Lisbon, in Article 2 (originally Article 1a), Article 7 and Article 48 paragraph 6 and 7 of the TEU, as amended by the Treaty of Lisbon, and the Charter of Fundamental Rights of the European Union is not in conflict with the constitutional order'.

3.2.2. *Ex post* control of domestic acts[176]

In the Czech Republic, an *ex post* constitutional review of legal enactments may take place only by the annulment of domestic legal enactments that **are already in force**. The basic means is the abstract constitutional review where the review is not connected with the resolution of any particular dispute. An exception to this last statement is constituted by petitions for the annulment of legal enactments which are submitted in connection with the proceedings on a constitutional complaint, or with a petition submitted by an ordinary court pursuant to Article 95 paragraph 2 of the Constitution. One can refer to proceedings on these petitions (submitted by ordinary courts) as a concrete constitutional review.
The standing requirements for the submission of a petition initiating a proceeding in abstract constitutional review are different for statutes and for sub-statutory legal enactments. However, once such a proceeding is initiated, there is no distinction between the way how the Constitutional Court deals with statutes and how it deals with other enactments. There is no time limit for submitting such petitions.
Petitions proposing the **annulment of a statute** may be submitted by the President, a group of at least 41 deputies or at least 17 senators, a panel of the Constitutional Court, the plenum of the Constitutional Court, ordinary courts under Article 95 paragraph 2 and individuals who submit a constitutional complaint. **Petitions proposing the annulment of sub-statutory enactments** may be submitted by the Government, a group of at least 25 deputies or 10 senators, a panel of the Constitutional Court, the plenum of the Constitutional Court, individuals submitting a constitutional complaint and the representative body of higher self-governing region. The President, the Government and groups of deputies and senators may submit such petitions for whatever reason they choose. Panels and the plenum of the Constitutional Court, as well as individuals, may submit such petitions only in connection with a proceeding on a constitutional complaint, and only on condition that the application of a legal enactment caused the situation which is the subject of the constitutional complaint. An ordinary court may submit a petition only if it concerns a statute which is necessary to apply to resolve a case before the court, and only if it concludes that the statute is inconsistent with a constitutional act.
The Constitutional Court may assess the constitutionality of an enactment both in respect of substance[177] and the observance of the procedure for the adoption of enactments prescribed by the Constitution.

This is in contrast to a power of ordinary courts which, in the case of statutes, may only determine whether the formal requirements for promulgation have been observed, but not whether the bill was properly submitted and duly debated by the Parliament.

The impact of Constitutional Court decisions in the area of legislation is not restricted to the annulment of legal enactments. One can speak of the prophylactic effect inspired by the Constitutional Court's very existence. The fact is that statutes are subject to constitutional

[176] This part is based mainly on contribution Filip, see n. 5, at pp. 53–75.
[177] The conformity of all enactments with norms of a higher order, as well as the observance of jurisdictional limits set by the Constitution (e.g. Art. 79 para. 3 of the Constitution).

review forces, both the legislature and the executive (when acting as a norm creator) have to take into consideration all aspects of the content and form of a legal enactment before it is issued. In practice it means that Constitutional Court judgments are taken into consideration every time a new statute or an amendment to a statute is drafted (or at least should be taken). The Constitutional Court has even dealt with cases in which the mere fact that a petition has been alleging a particular statute as unconstitutional, finally led to a reformation of the statue by the legislature. On this account, cases in which a petition proposing the annulment of a particular statute has been submitted to the Constitutional Court and at the same time a legislative procedure concerning the same statute is in process of evaluation in the Parliament, the Constitutional Court postpones its decision until the Parliament concludes, thereby gives the Parliament an opportunity to resolve any constitutional problem which could be associated with the statute.

At this point, nevertheless, a **question arises**: Does the law merely consist in the text of statutes or could be the way in which a statute has been continuously interpreted over a certain period of time, included as well? This fact is all the more significant as in the Czech Republic there is no prescribed time limit within the Constitutional Court should decide. Neither the Constitution, nor the Act on the Constitutional Court recognises any pre-constitutional law or statute which would be immune from constitutional review. As we stated elsewhere[178], the Constitutional Court may review the constitutionality of all legal enactments, including statutes, not only those adopted after 1 January 1993 (the day the Czech Constitution came into effect), but also those originated in the pre-constitutional periods (prior to the valid Constitution) that includes the post-1989 period, the period prior to 1989, the era of socialism and the people's democracy (1948–1989), the pre-Munich period (1918–1938) or even the Austro-Hungarian Empire period. Indeed, it concerns only matters of substantive law, not the legal form or competence to pass a regulation.

And finally, it is necessary to mention that the **constitutionally conforming interpretation of a legal enactment** is highly significant as well. In the event of existence of various admitted interpretations of a statute, the Constitutional Court determines to use an interpretation which is in conformity with the constitutional order.

3.2.3. Other competences laid down in the Constitution and in the Act on the Constitutional Court

The other competences of the Constitutional Court, as are enshrined in Article 87 paragraph 1 lit. c) – m) of the Constitution, were already enumerated (see sub I.3). Because of the limited scope of this paper, we cannot deal with all of them in detail; therefore, we rather focus on the most important and frequent ones – to recognize a constitutional complaint as a form of a concrete constitutional review of decisions and official acts.

4. Constitutional complaint[179]

Article 87 paragraph 1 lit. d) of the Constitution provides that the Constitutional Court has jurisdiction to review 'final decisions and other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms'. This provision confers on the Constitutional Court an authority to review all exercises of state power, including particular interpretations and applications of a statute by ordinary courts, and it has done so quite frequently.

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[178] J. Filip, *The Czech Constitutional Judiciary in the period of transition*, in F.F. Segado (ed.), *The Spanish Constitution in the European Constitutional Context*, (Dykinson, Madrid 2003) pp. 907–926.

[179] This overview is based on Filip and Gillis, see n 34, at part 6 II 2.

Many ordinary courts have reacted either by criticizing the Court's decisions as legally incorrect or by denying the Constitutional Court has jurisdiction to revise their decisions. The Constitutional Court has often made, in its judgments on constitutional complaints, a disclaimer to the following effect: 'The Constitutional Court is not an ordinary third level appellate body in the general court system. It is not its role to concern itself with the possible violation of a natural or legal person's ordinary rights protected by the Civil Code, Criminal Code, Civil Procedure Code or other acts, as long as such violation does not also represent a violation of that person's fundamental rights and basic freedoms guaranteed by a constitutional act or by an international treaty under Article 10 of the Constitution'[180]. This disclaimer was originally meant defensively as an explanation for why the Court had no jurisdiction to hear most cases on the merits. Later, in the ensuing period it has become more a statement justifying its intervention into matters that otherwise belong to the exclusive jurisdiction of ordinary courts.

A further issue is what significance or effect decisions about constitutional complaints have. Article 89 paragraph 2 of the Constitution states that '[e]nforceable decisions of the Constitutional Court are binding on all authorities and persons'. Many experts interpret this provision means only that decisions in abstract review proceedings annulling a statute have *erga omnes* effects because, as a result of them, a generally binding statute or regulation ceases to be a valid part of the legal order and can no longer be applied by any state authority. Other experts claim that Article 89 paragraph 2 asserts that Constitutional Court decisions are generally binding: the judgment as well as its reasoning. This controversy is of most significance in relation to constitutional complaints, both because resolution of the question is vital for determining the purpose and significance for the legal system of the constitutional complaint and, since they represent 95% of the Court's caseload, it is consequently of great importance for the significance of the Constitutional Court generally.

Our solution of this controversy was expressed already elsewhere in such a sense that if Article 89 paragraph 2 is **interpreted broadly**, constitutional complaints would be understood as providing state institutions with objective, general and binding as to what sort of conduct state authorities are permitted to engage in by the Constitution.

The ordinary courts especially, but also most legal experts, reject this view because they see it as incompatible with the basic principles and traditions of a continental legal system, entailing as it does the introduction of binding case-law precedents.

The **narrowest reading** is that a constitutional court decision annulling a court's decision is binding only in the respect that the original decision is null, thus obliging the deciding court to decide anew and nothing more. According to this reading, the Constitutional Court's reasoning is not part of the 'decision' and thus is not binding on anyone, not even on demand for the court whose decision was annulled.

This narrow reading has very **serious consequences** as it inevitably results in a constitutional stalemate: if the ordinary court on remand rejects the Constitutional Court's

[180] See Constitutional Court Judgment of 30th November 1994, I. ÚS 108/93. The Court has also made other statements some of which sound as if the Court is claiming a more restricted role in deciding constitutional complaints: 'As it has already declared in the most of its decisions, the Constitutional Court is not a court that stands in a position of superiority to the ordinary courts, it is not the pinnacle of their system, for which reason alone it may not arrogate to itself the right of supervisory review over their decision making, provided these courts proceed in accordance with the provisions of Chapter Five of the Charter'. Constitutional Court Judgment IV ÚS 98/97 of 30th June 1997.

reasoning and decides again on the same grounds[181], the party in the case has an unquestioned right to submit a further constitutional complaint seeking from the Constitutional Court legal protection of his fundamental right. In a second such decision, which has not yet occurred, in addition to reaffirming its original finding that some particular provision of the Constitution or Charter was violated by the ordinary court's decision, the Constitutional Court could in addition find a violation of Article 36 paragraph 1 of the Charter, in that the ordinary court on remand denied the complainant judicial protection.

The Constitutional Court and ordinary courts **have not yet come to agreement** as to what the relevant constitutional provisions regarding jurisdiction of courts mean and, more to the point, which court has the authoritative and decisive view on this matter[182].

3.3. Constitutional Court as a guarantor of democracy

Because of the focus of this volume on governmental systems in Central and Eastern Europe, we would like to finish this section about the position of the Constitutional Court in the governmental system of the Czech Republic by some rather practical examples of its functioning as a guarantor of the re-established democracy in the Czech Republic[183]. Its jurisprudence in this area rests on an elaboration of the specific meaning of Article 1 of the Constitution which declares that 'the Czech Republic is a ... democratic state respecting rule of law'. In contrast to those states which have not gone through a period of absolutism and totalitarianism, the Czech Republic has learned from its past, therefore a number of provisions characterising the State as law-abiding, which appear elsewhere only as general postulates, could be found in its constitutional texts. That explains why Constitutional Court judgments do **not usually make reference to the characteristics of the rule of law**, since they are contained directly in more specific provisions of the constitutional text without any need to construe the concept of the rule of law itself. The Constitutional Court does this only in cases concerning the principle of law-abiding State, which, although not being explicitly laid down in the constitutional order, can be derived therefore by the interpretation, e.g. Articles 1 and 2 of the Constitution and Articles 1 through 4 of the Charter.
In this field, the Constitutional Court has **contributed to the protection of the individual** from state actions by the form of normative acts which do not meet the requirements laid down in the Constitution and Charter[184]. Furthermore, it has formulated a **principle** concerning **minimal intrusion** into decisions for which other state bodies are competent[185], as well as the requirement of the **constitutionally conforming interpretation**, which enables

[181] This actually happened in relation to Constitutional Court judgment I ÚS 184/96, decided 20 March 1997. As the Constitutional Court annulled the decision of the Supreme Court, the case returned to that court for further proceedings, and that court explicitly rejected the Constitutional Court's reasoning and affirmed its earlier decision.
[182] Filip and Gillis, see n. 34, at part 6 II 2.
[183] This subsection is based on Filip, see n. 163, at pp. 907–926, part 3.4.
[184] This concerns, for example, the issue of insufficient publication, prohibited sub-delegation of the issuance of implementing regulations.
[185] In this connection, the Constitutional Court has, for example, quashed a court decision only in relation to the violation of procedural rules without, in that case, expressly stating how the court should decide on the merits of the case itself. It leaves such a decision to the ordinary courts which will decide again in the matter following the Constitutional Court's judgment in cassation. Of course, this signifies that the Constitutional Court is assuming the role of a 'paper tiger', which, while it quashes a large number of ordinary court decisions, the ordinary courts once they have cured the procedural defects decide the merits of the dispute in the same manner. In such situations, however, the Constitutional Court's view of the legal issues is sometimes quite important (in particular in the area of criminal procedure).

one in practice to bring legal norms into conformity with constitutional texts without the necessity of annulling particular statutes or other legal enactments[186]. The Court has **rejected the strict positivist conception of law** which consists, among other things, in the assertion that there is no right to something if such has not been explicitly laid down by the law[187].

The Constitutional Court's judgments **on the constitutionality of electoral statutes** are a significant part of the Court's jurisprudence. For example, we can mention a judgment from 1997 in which the Court confirmed the constitutionality of the 5% threshold clause for access to the first scrutiny in an election to the lower chamber of Parliament, the Assembly of Deputies, as well as the constitutionality of the provision limiting state financial contributions to parties which obtained at least 3% of the vote[188]. In addition, the Constitutional Court played a significant role in maintaining the **free competition of political forces** in 1996 on the occasion of the first election to the Senate when, by delivering a series of judgments annulling resolutions of the Supreme Court[189] and the Central Electoral Commission, it returned a number of candidates into the election contests[190] since it rejected a positivistic conception of the electoral right and emphasised the significance of the free competition of political forces for the development of democracy.

A certain number of its decisions also concerned **the protection of political parties** from excessive intrusion on the part of the State. In particular, the Constitutional Court annulled in 1995 certain provisions of the amended Political Parties Act 1991[191] which provided for the state to audit the management by political parties of their assets. In the same judgment[192], the Constitutional Court annulled a provision introducing an absolute prohibition on entrepreneurial activities by political parties, deeming it to be disproportionate and inappropriate (see the above-written principles of the law-based state). For the same reason it annulled the provision which allowed the possibility of suspending the activities of a political party or movement, or even dissolving it altogether, because of failing to submit a suitable report on the management of its assets. In addition, the Court extended protection to political parties from interferences by state electoral bodies which had wished to determine whether a party that registers for the election is in fact a disguised coalition of parties[193].

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[186] This practice is problematic, however, in cases where the ordinary courts do not accept such an interpretation. In such cases, the Constitutional Court modifies its legal view, retreats from the demand of a constitutionally conforming interpretation and annuls the enactment whose interpretation is contested. In 2001 it annulled the entire regulation of the administrative judiciary and the Parliament was forced to adopt a new Code of judicial administrative procedure.

[187] For example, the Act on the Police does not contain a provision providing that persons, when making a statement to the police, have the right to the assistance of counsel. However, the Constitutional Court derived that requirement from the principle of the law-based state.

[188] See Judgment Pl. ÚS 25/96 from 2nd April 1997.

[189] Which in that time functioned as a court for electoral matters too, since 2003 this jurisdiction has been realized by the Supreme Administrative Court. For more information see Molek and Šimíček, *op cit*. n. 156.

[190] A curious situation came about in the Senate elections when, due to its literal interpretation of the Electoral Act, the Central Electoral Commission disqualified a full 101 of the total number of 587 candidates for failure to meet certain formal requirements of registration. The Supreme Court granted the complaints of most of these candidates, and the Constitutional Court judgments enabled the majority of the rest to take part in the election. The Court decided the cases on the basis of Art. 22 of the Charter which underscores the importance of free elections (in essence, the preferred rights and freedoms doctrine).

[191] Act No. 117/1994 Coll.

[192] Pl. ÚS 26/94 – No. 296/1995 Coll.

[193] In the Czech Republic, the number of members in a coalition has consequences concerning the threshold percentage of votes required for entering the Parliament. Two-member coalitions must receive at least 10% of the vote, three-member one at least 15%, while individual parties need to obtain only 5%.