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REPORT

"PROVISION OF ACCESS TO AND PUBLICATION OF DECISIONS OF CONSTITUTIONAL COURTS"

by

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Introduction

On its webpages, the Constitutional Court of the Czech Republic runs a free database in which, in the same manner as the HUDOC database in Strasbourg, it publishes all of the decisions of the Constitutional Court in real time. The decisions can be searched via full-text search in combination with a string of key words, docket number, date of the decision, judge-rapporteur, dissenting judge, contested act (decision or legal regulation), type of proceeding, type of verdict, pertinent provisions of the constitution, the European Convention for the Protection of Human Rights and Fundamental Freedoms, including links to decisions of the European Court of Human Rights in Strasbourg or the Court of Justice of the EC.

The database, just like the decisions contained therein, is naturally in Czech which many of you do not understand. I will thus not bother you with details or a technical description; if anyone is interested, I would be happy to provide you with detailed information outside this presentation. Instead, I would like to outline certain legal bases for a complete and timely provision of access to all decisions of the Constitutional Court. The debate on this topic did take place in the Czech Republic and preceded the launch of the database which initially did not enjoy unreserved support. I will naturally draw primarily on Czech constitutional law. However, I am convinced that similar provisions can be found in other countries' constitutions, and moreover, a certain role is played also by Articles 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, applicable to all of us.

Constitutional law bases

Pursuant to Article 17 (5) of the Charter of Fundamental Rights and Freedoms (the "Charter"), government agencies are supposed to provide information on their activities; details are to be stipulated by law. Just like any other court, the Constitutional Court is also a government agency at which the afore-cited provisions of the Charter is directed; the implementing guideline in this area, Act No. 106/1999 Coll., on Free Access to Information, does not give rise to any doubts in this regard.

As regards the Constitutional Court, both the general and professional public seeks in particular information as to how the Constitutional Court fulfils its role of the protector of constitutionality, i.e., how it decides in proceedings conducted before it, and what awards and resolutions, or other forms of decisions, it produces.

In addition to the general formulation in Article 17 (5) of the Charter which classifies the right to information on the activities of government agencies as one of the fundamental rights, the Constitution contains a more specific provision on judgments: pursuant to Article 96 (2) of the Constitution: "Proceedings before courts [shall be] oral and public; exceptions to this principle shall be provided for by statute. Judgments shall always be pronounced publicly."

A similar provision can be found in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"): "*Judgment shall be pronounced publicly.*" The European Court of Human Rights, and formerly also the Commission on Human Rights, interpret this provision, including the term "*rozsudek*" (*judgment)* in the Czech translation, autonomously. One thus needs to bear in mind that the term "judgment" in Article 6 (1) of the Convention does not have the same meaning as judgment within the meaning of national procedural orders. After all, in the French original, the term "*jugement*" is used, in the English, "*judgment*", both of which are terms that have, according to dictionaries, a broader meaning that judgment as one of the procedural forms of a court decision. The terminology used in the Convention naturally has to reflect the various procedural forms and different terminology found in individual legal orders of the member states of the Council of Europe. Otherwise we could all be lost in translations. Decisions of the European Court of Human

Rights in Pretto and others v. Italy of December 8, 1983, paragraph 29, and Axen v. Germany of the same date can serve as examples. The court in the latter case did not consider itself bound by a verbatim interpretation of Article 6 (1) of the Convention. The German *Beschluss*, i.e., a resolution, was deemed to be a "judgment" within the meaning of Article 6 (1) of the Convention in the matter concerned.

The Czech Constitution also uses the term "judgment" autonomously, and in the narrow sense as one of the forms of a court decision only. Therefore, a judgment within the meaning of Article 96 (2) of the Constitution must be deemed to mean any court decision on the protection of a right or guilt or punishment for criminal acts. In this sense, Article 96 (2) of the Constitution and the requirement of public pronouncement applies to other forms of court decisions as well, for instance, on decisions of the Constitutional Court which are not referred to as judgments but as awards. The provision of Article 96 (2) of the Constitution interpreted in this manner can apply to numerous purely procedural resolutions because they also pertain to the protection of rights, albeit only procedural ones.

Public court hearings and public pronouncements of court decisions are thus a constitutional principle. Historically, the right to a public hearing of the matter appeared in the catalogue of fundamental rights and freedoms as a subjective right of the party to the proceeding intended to prevent unlawful manipulations on the part of cabinet justice. However, the public nature of a court hearing is not only a subjective right of the parties to the proceeding but moreover represents an objective constitutional principle, the purpose of which is to subject the judiciary to public supervision. This double focus of the principle of public court hearings is also manifested, in an illustrative manner, in the Czech legal order: as a subjective right of the party to the proceeding, public court hearing is guaranteed by the provision of Article 38 (2) of the Charter, pursuant to which "*everyone has the right to have their case considered in public",* and "*the public may be excluded only in cases specifiedby law",* and as an objective constitutional principle set forth in the afore-cited provisions of Article 96 (2) of the Constitution. Public court hearing is thus guaranteed both in the interest of the party whose matter is heard before the court, and in the interest of the public (the people, or the sovereign, as the case may be), for whom the public nature of court hearings is one of the checks against the abuse of judicial power, and undoubtedly also a means of educational influence and social control.

While both the Constitution and the Convention permit exceptions to the public nature of court hearings, for obvious reasons, both documents categorically insist on public pronouncement of judgments and do not permit any exceptions. This is certainly due to a number of good reasons. The judgment can be deemed to be an important source of interpretation of the law, or a source of legal arguments (in some legal systems, even the precedent is a source of law), and its public pronouncement strengthens legal certainty in the society and predictability of the application of the law. Many awards of the Constitutional Court that apply the doctrine of the prohibition of unforeseeable (or surprising) court decisions, and employ the principles of predictability of and trust in the law, testify to the fact that both these principles are cornerstones of the democratic rule of law.

Interpretation difficulties are posed by the answer to the question what exactly the requirement of *public pronouncement* of the judgment means, whether the requirement is satisfied by reading the judgment loud in the courtroom (theoretically) open to the public, or whether it is sufficient to public the judgment in the pertinent official collection of court decisions, or some other unofficial collection, including commercial databases, and finally whether perhaps the judgment needs to be provided to anyone on request.

The argument of verbatim linguistic interpretation is sometimes encountered: that the constitutional requirement of public pronouncement needs to be understood verbatim, i.e., that to satisfy the requirement, it suffices to have the judgment actually pronounced in the courtroom. According to such interpretation, the verdict on the right and the rationale therefore

would be noted solely by persons present in person, and moreover, the court could, in accordance with Czech procedural regulations, although subject to highly restrictive terms, prohibit them from making a sound recording. Upon completion of pronouncement, the judgment is placed on file, and one can acquaint oneself with same only via the process of file viewing in accordance with applicable procedural regulations. One usually needs to be able to have a special legal interest, be a party to the proceeding or have a certain relationship to the parties to the proceeding.

Such interpretation, however, completely misses the principle of public pronouncement of the decision as mentioned earlier. Historical circumstances have changed greatly: judgments are no longer pronounced at market places to the accompaniment of drums, and this form of publication certainly is not the only one at our disposal. To restrict the public pronouncement of a decision only to persons in attendance at the beginning of the third millennium, in an era of dynamically developing information technologies, would be backward, to put it mildly.

This view is supported by the view of the European Court of Human Rights on the corresponding provision of Article 6 (1) of the Convention. Article 14 (1) of the International Covenant on Civil and Political Rights is more apt in this regard: "*any judgement rendered in a criminal case or in a suit at law shall be made public*", save for cases listed.

In its decisions, the European Court of Human Rights distinguishes the right to a public hearing and the right to a public pronouncement of the judgment. The court stresses that unlike the former, the right to a public pronouncement of the judgment cannot be restricted implicitly (see Cambell and Fell v. the United Kingdom dated June 28, 1984, paragraph 90).

As regards the form of public pronouncement of a decision, the European Court does not feel bound by the verbatim wording of Article 6 (1) of the Convention (see Axen v. Germany of December 8, 1983, paragraph 31, or Cambell and Fell v. the United Kingdom dated June 28, 1984, paragraph 91). The form of publication as provided for by the specific country's domestic law is always assessed by the European Court of Human Rights with a view to the nature of the proceeding in which the decision was rendered, and with a view to the objectives and purpose of Article 6 (1) of the Convention, which is, to put it briefly, to ensure public supervision over the judicial power, with a stress on observance of the right to a fair trial and on determining how courts generally approach individual case and what principles they apply in their decision-making. The court recognizes the fact that in many member states, different methods are traditionally used for the publication of decisions: oral pronouncement or filing of the decision into a court registry which is accessible to the public, whereby any interested party can obtain a copy of the decision (e.g., Axen v. Germany of December 8, 1983, paragraphs 31, 32, Pretto and others v. Italy of December 8, 1983, paragraphs 26, 27. Cambell and Fell v. the United Kingdom dated June 28, 1984, paragraph 91, Szücs v. Austria dated November 24, 1997, paragraph 43, B. and P. v. the United Kingdom dated April 24, 2001, paragraph 47).

Yet, the number of cases concerning this issue shows that the European Court of Human Rights prefers the latter approach as the most effective fulfillment of the right to public pronouncement of a decision. For instance, in its judgment in Sutter v. Switzerland dated February 22, 1984, paragraphs 31-34, the European Court noted that the right to public pronouncement of a decision does not necessarily entail the requirement that the same be pronounced publicly and out loud. The condition of public pronouncement is adequately satisfied by the fact that anyone with a legitimate interest is able to obtain a copy of the decision of a military cassation court, together with the fact that the most important decisions of said tribunal are published in an officially published collection of rulings.

By way of an illustration, decision of the European Court of Human Rights in Szücs v. Austria of November 24, 1997, paragraphs 41 – 48, lent support to the establishment of a complete and publicly accessible database of decisions of the Constitutional Court. I would like to note that

Austrian and Czech procedural regulations have much in common. The court found a violation of Article 6 (1) of the Convention by Austria consisting in the fact that a decision of Austrian courts in a proceeding concerning compensation for damage caused by detention was not publicly pronounced, although it was, or rather was not, effected in accordance with the applicable procedural regulation. The publicity of the decision was not, in the opinion of the European Court, ensured in some other manner. The court noted that in Austria, a court decision can be obtained virtually only in cases where the decision is that of the supreme court, the supreme administrative court and the constitutional court, but not where the decision was rendered by an appellate court or a court of first instance. The provisions of the Austrian Rules of Criminal Procedure to which the Austrian government referred and which permitted only those who can prove their legal interest to the court to view the file and obtain a copy, was found to be inadequate in this regard by the European Court, as they gave substantial discretion to courts, and as a result, the text could not be made available to anyone on request.

This decision shows that the European Court of Human Rights takes it more or less for granted that decisions of the supreme judicial instances are publicly accessible, and tends to extend this principle to courts of lower instances as well.

Public access to judgments is undoubtedly important also with a view to the right to equal treatment and ban on arbitrary treatment: if the same decision is to be rendered in the same cases, and different decisions in different cases, one has to be able to pose the question in the first place. The principle of equality of the parties to the proceeding could otherwise be violated. This principles, sometimes also referred to as the principle of equality of arms, is one of the basic components of the right to fair trial within the meaning of Article 6 of the Convention. It means that the parties of the proceeding much have the same opportunity to propose and evaluate evidence. In addition to that, they must have the same opportunity to convince the court and provide it with arguments in support of their positions. That necessarily means that they must have the same opportunities in terms of access to sources of legal arguments. Publicity of binding sources of law (legal regulations in our system) is not only a basic prerequisite for their binding effect, or an attribute of their “legality”, bur also a “physical” condition for their actual application. This undoubtedly equally applies to secondary sources of law, or other sources of legal arguments. It would certainly be absurd if only one party to the dispute, or the court, had access to learned, theoretical treatises on let’s say civil substantive law, while the other party would be completely unable to become acquainted with such doctrinal source of law, and to offer its own critical view of the interpretation of the provision of law. Yet, as regards court decisions, courts often do act in this ridiculous fashion: regardless of formal publication in special collections, they quote earlier decisions in their rationales and refer to them. And that does not apply only to courts. Bodies of public power take part in many judicial proceedings, and their apparatuses have a unique opportunity of systematically observing the decision-making activities of courts. They often make a selective or even purpose-driven use of their extensive information databases of this kind in support of their procedural positions. The other party, a citizen, an individual, however, does not enjoy free access to unpublished rulings. He/she is unable to comment on a ruling referred to by the other party or the court, and is unable to defend itself if such ruling is interpreted in an incorrect or misleading fashion. He/she naturally does not enjoy the same opportunity to find and submit other rulings in support of his/her position.

Access to key information on the legal system thus remains selectively reserved only to a certain narrow group of parties. Until recently, our supreme court instances (the Supreme Court and the Supreme Administrative Court) were also implicated in this situation, and generally published only those decisions they deemed fit. What is worse, judges, court staff and various other “*amici“ curiae* who, thanks to their professional status or client links, have access to such valuable information, frequently use it for their own fame and profit in their private practice, scientific study or publishing. Such practice thus may collide even with the freedom of scientific research and ban on discrimination in the exercise of fundamental rights.

A standard exemption from the laws on free access to information, i.e., the protection of decision-making activities of courts, cannot be used against the publication of decisions. What is protected is the decision-making process, i.e., the activities of the court that lead to the decision, rather than the actual outcome of the process. This exemption protects merely the court's deliberations, i.e., information, evidence, draft decisions, notes, etc. gathered during the proceeding. The purpose of this exemption is to guarantee the impartiality and independence of the court rendering the decision. Once the decision is rendered, the court's *activity* is over; the purpose of the exemption attained, or rather no longer jeopardized.

Arguments concerning the protection of personal data or increased operating costs of government agencies and courts can be dismissed: judgments can be made anonymous, if need be (by taking out any information that cannot be provided pursuant to the law), and reasonable costs related to the provision of the judgments can be charged to the applicants. This argument naturally completely disappears in the case of operation of a database.

Special provisions of procedural regulations on the publication of special printed collections of decisions, or on forms of publication of selected decisions, cannot serve as an argument against the provision of access to court decisions. Such provisions explicitly regulate certain special, in a way authoritative, higher-quality form of publication of selected decisions. By publishing collections of judicial decisions, supreme courts fulfill their systemic task of unification of case law of courts of lower instances, strengthening of the legal certainty in the society and the degree of predictability of the law. By publication in a special collection, that branch of justice lets both the general and professional public know which of its decisions it deems to be of key importance, fundamental or groundbreaking, what determines the direction of case law development, or rather what courts should observe in particular in their decision-making activities. In other words, publication in a special collection merely makes a court decision more convincing, strengthens its binding effect in terms of its effect, as a precedent, on future decisions of courts. Publication in a special collection does not mean that it was decided to "de-classify" a piece of information, but that it was made accessible to the public in a special, official form of a higher quality.

Specific legal regulation of the publication of decisions of the Constitutional Court of the Czech Republic

At the time of its enactment, in 1993, the Act on the Constitutional Court, relied only on the traditional form of publication of decisions – via a printed Collection of Constitutional Court Awards and Resolutions, in which all the awards but only selected resolutions are to be published (I am not going to mention the duty to publish certain significant awards, in particular on constitutional review of laws, in the official Collection of Laws). Only awards, not resolutions, are publicly pronounced. Although resolutions are less significant than awards, they account for approximately 93% of the decision-making activities of the Constitutional Court; most often, these are quasi-meritorious resolutions, i.e., resolutions rejecting a complaint not on formal procedural grounds but as manifestly unfounded in terms of content. As a constitutional complaint is rejected by a resolution, resolutions in particular (aside from isolated cases of dismissing awards) "trip up" the Constitutional Court, or rather the Czech Republic, in Strasbourg, if for instance the European Court concludes that as a result of the rejection of the constitutional complaint, the complainant was denied access to the Constitutional Court. In combination with the absence of public pronouncement of the resolution, the risk of an objection based on the violation of Article 6 (1) of the Convention was increased, also due to the fact that such resolution (viewed as a judgment) was not publicly pronounced. There was a specific case where the complainant expressly raised such an objection; however, the matter was resolved amicably by the state.

This risk disappeared with the launch of the database mentioned earlier because all the resolutions of the Constitutional Court are now published in the database a few days after they are rendered