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**A COMPARATIVE ANALYSIS OF THE BODIES IN CHARGE OF
ELECTORAL SUPERVISION, ESPECIALLY THE JUDICIAL ONES –
THE CZECH CASE**

by
Mr Milan PODHRAZKY (Czech Republic)
Chancellor of the Supreme Administrative Court

To define the judicial control of elections in the Czech Republic, it is necessary to begin by mentioning several general points relating to the Czech constitutional system and the position of the courts within this system. In my opinion, the Czech experience in the field of election control could represent a suitable model of a country where electoral cases are primarily tried by the administrative courts, in spite of the existence of the Constitutional Court. As a representative of the Supreme Administrative Court of the Czech Republic, I will, of course, deliver my report specifically from this court's point of view, although the Constitutional Court and the regional administrative courts will also, to some extent, be within the scope of this report.

As the legal regulation of election control in the Czech legal system is not very detailed, the role of the Supreme Administrative Court and the regional administrative courts in this context is really indispensable. I would therefore like to divide my report into two separate parts. In the first part of my report, I would like to present you with some general information about election control in the Czech Republic and especially about the role of the Constitutional Court and the Supreme Administrative Court within this system of control. The second part of my report will give concrete examples of judicial decisions in the field of election control (leading cases).

I. JUDICIAL CONTROL OF ELECTIONS IN THE CZECH REPUBLIC - PRELIMINARY NOTES

The judicial power in the Czech Republic is exercised by the ordinary ("general") courts on the one hand and the Constitutional Court on the other. It is necessary to point out that the Constitutional court in the Czech Republic is a specialised judicial body responsible for the protection of constitutionality. In contrast to the situation during the Czechoslovak period prior to the Second World War (law No. 125/1920 Coll.), no specialised electoral courts in the Czech Republic exist at present.

Before January 2003, justice in electoral matters was significantly fragmented. There were no specific and detailed regulated judicial proceedings in the field of electoral matters and also the general regulation in several electoral acts was incomplete. The highest court in electoral matters was the Supreme Court of the Czech Republic. Since 1 January 2003 (the date the new Code of Administrative Justice – law No. 150/2002 Coll. - came into force), administrative courts have been competent to hear all disputes relating to elections. Although electoral disputes are not strictly speaking administrative law issues per se (they do not involve judicial review of public administration), electoral matters are issues of so called public law, so competence in this area was conferred upon the administrative courts. Consequently, justice in electoral matters as well as justice in matters concerning political parties, became a part (it is necessary to point out - a very specific part) of newly conceived administrative justice in the Czech Republic.

It was the Constitutional Court which, in its decisions from the 1990s, repeatedly pointed out the deficiency of administrative justice in the Czech legal order and eventually – through its decision of 27 June 2001 (published as No. 279/2001 Coll.) – annulled in its entirety Part Five of the Civil Procedure Code, which had been the legal basis of administrative justice in Czech law. However, the Constitutional Court deferred the effect of its ruling until 1 January 2003, thus providing the legislature with sufficient time to pass the necessary legislation. The Court's ruling became the necessary impetus for the new framework of administrative justice to be adopted by both chambers of the Parliament. The Supreme Administrative Court was re-established on 1 January 2003, nearly fifty years after its dissolution.

Today, the Supreme Court is the highest judicial body in the Czech constitution for matters that fall within the jurisdiction of courts, with the exception of matters that come under the jurisdiction of the Constitutional Court, or the Supreme Administrative Court. This means that the highest judicial body on electoral matters within the justice system today is the Supreme Administrative Court.

II. THE SUPREME ADMINISTRATIVE COURT, THE CONSTITUTIONAL COURT AND JUSTICE IN ELECTORAL MATTERS

Under Czech law, the authority competent to certify the electoral results is the State Electoral Commission. This means that responsibility for election control lies primarily with this authority. This commission issues a certificate of election during the elections for both chambers of the Parliament (the Assembly of Deputies and the Senate). In municipal and regional elections, the municipal office and the regional authority issue the certificate of elections. Bodies competent to decide on complaints against the certification of election results are the regional administrative courts (in municipal and regional elections) and the Supreme Administrative Court (in parliamentary elections and elections to the European Parliament).

The Constitutional Court is a competent body in electoral matters firstly as it makes decisions about complaints against the certification of election results as a court of second instance in parliamentary elections, and secondly because it operates as a court for extraordinary relief in other matters. A remedial action against a decision concerning the certification of the election of a deputy or a senator may be brought by a deputy, a senator, or the electoral party for which the deputy or senator stood as a candidate, against a decision claiming (s)he was not elected. A remedial action may also be brought by a person against a decision of the appropriate chamber of the parliament, or a body thereof, concerning the certification of the validity of a deputy's or senator's election. If the court grants the remedial action, it shall declare in its judgment that the deputy or senator was validly elected. Upon the announcement of such judgment of the Constitutional Court granting the action, the decisions of other authorities, which are in conflict with the judgment, shall lose force and effect.¹ As a court of extraordinary relief the Constitutional Court then decides about the constitutional complaints. A constitutional complaint (which, under certain circumstances, could also relate to election control) may be submitted by a natural or legal person, if (s)he alleges that his/her fundamental rights and basic freedoms guaranteed by the constitutional order have been infringed as a result of the final decision in a proceeding to which (s)he was a party, or through a measure, or some other encroachment by a public authority.²

Furthermore it is necessary to mention that, under Czech law, no specific constitutional provisions stipulating the judicial control of elections exist. Article 20 of the Czech Constitution lays down solely that other conditions of exercising the right to vote, the organisation of elections and the scope of judicial review shall be set by law. The only constitutional provision related to judicial control of elections regulates the above-mentioned jurisdiction of the Constitutional Court over remedial actions concerning the certification of elections of a deputy or a senator (article 87).

The Czech electoral courts are not involved in certifying electoral results. Consequently, the electoral court trying a case (with the exception of the Constitutional Court dealing with the review of a certificate of election of a Member of Parliament) only makes a decision in response to an election complaint and then its decision only cancels the challenge decision. From the point of view of proceedings in electoral matters, it is also important to mention that the electoral courts can collect evidence which they judge to be necessary in order to make a decision. The parties can present evidence as well but the courts are not bound by the scope of the evidence presented by the parties. Administrative courts in election cases decide in principle on an *ex tunc* and not on an *ex nunc* basis, therefore if they cancel the election results, the apparently elected candidate is apprehended as though s/he had never been elected, even if s/he were already installed or taking part in any activities of the body to which s/he had apparently been elected.

¹ See paragraphs 85 and f. of the Act on the Constitutional Court (law No. 182/1993 Coll.).

² See paragraphs 72 and f. of the Act on the Constitutional Court (law No. 182/1993 Coll.).

As will be stated in more detail below, under the Code of Administrative Justice, administrative courts are competent to hear disputes relating to the keeping of the electoral register, the registration of a candidate list for the election, the removal of a candidate from the candidate list, or challenges to the registration of a candidate list. Administrative courts may furthermore hear actions concerning the validity of elections, the validity of individual ballots and, finally, protection in matters relating to the duration of the mandate of a member of a municipal council. In electoral matters, administrative courts are required to decide within strict time limits. Four statutes regulate various types of elections in the Czech Republic and other conditions relevant to the judicial control of elections. More precisely, law No. 491/2001 Coll. applies to elections to municipal representative bodies (councils); law No. 130/2000 Coll. applies to regional representative bodies (councils); law No. 247/1995 Coll. applies to Parliament (the Chamber of Deputies and the Senate); law No. 62/2003 Coll. applies to the European Parliament. Each statute also stipulates its own terms for dealing with electoral control.

In the Czech Republic, courts in electoral matters not only assess the activities of individual candidates or political parties, but also take into account the activities of others.

III. TYPES OF JUDICIAL CONTROL OF ELECTIONS

Under the Code of Administrative Justice, it is possible to distinguish several types of proceedings focused on the judicial control of elections. These types differ with respect to the subject competent to submit a complaint, or with regard to the various time points of the election process and so on.

As mentioned above, electoral disputes are not strictly speaking administrative law issues per se. Consequently, there are several specific provisions dealing with the judicial control of elections that are common to all types of that control,³ but that differ from the traditional type of protection granted by administrative courts (action against a decision of an administrative authority), for example:

- the petition whereby the proceedings in electoral matters are initiated (or acts by which the proceedings or their subject matter are dealt with) can be made only in writing or orally by transcription at a court competent locally and according to subject-matter (in my opinion this rule is in fundamental discrepancy to modern trends relating to e-Justice),
- no party is entitled to reimbursement of costs of proceedings in electoral matters,
- the courts also post their resolutions in electoral matters upon the official notice board of each court. Such resolutions come into force upon the day of posting.

III.1. PROTECTION IN THE MATTERS OF THE REGISTER OF ELECTORS

The first type of judicial control of elections, relating to the opening part of the election process (pre-election stage) deals with the registers of electors.⁴ It applies when an administrative authority which keeps a regular electoral register under a special law fails to correct errors and shortcomings in the regular electoral register and its addendum. In that case, an affected person may address the court competent, according to the seat of the administrative authority, with a petition for the correcting or the supplementing of the register or its addendum. In such cases, the court shall decide in without a hearing within three days of the petition being submitted.

³ See paragraph 93 of the Code of Administrative Justice.

⁴ See paragraph 88 of the Code of Administrative Justice.

III.2. PROTECTION IN THE MATTERS OF REGISTRATION

While the protection mentioned in the previous section (III.1.) concentrates on the electors, this type of judicial control of elections favours the candidates. Under Czech law it is also possible to seek judicial protection in a case where the administrative authority under the special laws (that is the election laws mentioned above) has rejected a list of candidates or an application for registration, deleted a candidate from the list of candidates, registered the list of candidates or the application for registration. The court shall decide in such cases within fifteen days from the date the petition was submitted. It is possible to distinguish the following sub-types of this protection:⁵

1. The administrative authority has rejected a list of candidates, or rejected an application for registration. Under these circumstances a political party, political movement, or their coalition, independent candidate or association of independent candidates, could seek a decision for registration by the administrative authority.
2. The administrative authority has deleted a candidate from the list of candidates. In such cases, the subjects mentioned above may seek a decision on keeping the candidate on the list.
3. The administrative authority has registered the list of candidates, or application for registration. In such cases, the subjects mentioned above may seek a decision on cancellation of registration of other candidates.

III.3. INVALIDITY OF ELECTIONS AND VOTING

Under conditions provided by special laws (that is the election laws mentioned in section II.) a competent person may file a petition for the invalidity of elections or invalidity of voting or the invalidity of a vote for a candidate.⁶ This type of election control is related to the election act itself (casting a ballot). Following a judicial decision could, under certain circumstances, result in the cancellation of election results. This type of election control could therefore be considered the most important.

The Supreme Administrative Court pointed out that election results may be cancelled only if three cumulative conditions of election review are fulfilled. The first condition is a violation of law and the second condition is a causal nexus between the violation of law and the election results. The last and most important condition for cancelling the election results is the fundamental intensity of the violation of law, which could have influenced the election results. The Czech legal system does not distinguish between the compulsory and the facultative cancellation of the election results. The cancellation of election results is not the only possible consequence of a violation of law. In its review of the election results, the court proceeds with regard to the individual circumstances of each case. The invalidity of the elections, the invalidity of voting or the invalidity of voting for a candidate may only be declared if the violation of law influences the election results.

The Supreme Administrative Court also noted, in one of its significant judgments on electoral matters, that a court makes a decision in electoral matters not only on the basis of a violation of the electoral laws, but also taking into account the violation of other laws related to the elections. The Supreme Administrative Court named this theory "relevant unlawfulness".⁷ The cases which resulted in the cancellation of electoral results were generally based on two separate

⁵ See paragraph 89 of the Code of Administrative Justice.

⁶ See paragraph 90 of the Code of Administrative Justice.

⁷ See judgment of the Supreme Administrative Court of 4 July 2006, case No. Vol 36/2006, <http://www.nssoud.cz> (Collection of the Decisions of the Supreme Administrative Court No. 960/2006).

cancellation reasons. One reason was errors in the voting procedures (for example, incorrect calculation of election results, or fundamental errors in the organisation of elections),⁸ the second was breach of the pre-election campaign rules (for example, a dishonest and unfair campaign or abusing the state-owned media, or by the self-governing units in campaign).

III.4. PROTECTION IN MATTERS CONCERNING THE TERMINATION OF A MANDATE

This specific type of protection in electoral matters is relevant only to elections for local or regional representatives.⁹ Under conditions provided by special laws (covering municipal and regional council elections) a councillor (or political party, or association of independent candidates...) whose mandate has been terminated may seek a cancellation of a council's or administrative authority's decision on the termination of the mandate of the councillor. The court shall decide in such cases within 20 days from the petition's submission.

IV. ELECTION CONTROL IN PRACTICE OF THE COURTS

The system of the judicial control of elections in the Czech Republic, as described above, led in several cases to some discrepancies in the adjudication of the election courts in recent years. Such discrepancies mostly lie in different approaches to the legal interpretation of particular issues of election law. It is necessary to comment that such discrepancies are not very common; however, to achieve understanding of the entire concept of the election control under Czech law, it is useful to mention at least two cases that are of cardinal importance (leading cases).

Those cases could also cast light on the specific situation in the Czech Republic in the field of judicial control of elections where, under certain circumstances, both the Supreme Administrative Court (previously the Supreme Court) and the Constitutional Court deal with election matters. I would like to point out cases that were decided by the Supreme Administrative Court (the Supreme Court) but where these decisions were ultimately – for various reasons – revoked by the Constitutional Court. It is also not coincidental that the cases described in the following sections of this report deal with issues relating to the pre-election campaign. These issues are without doubt in the scope of election control (amongst the most frequent and most important ones).

IV.1. JUDGEMENT OF THE CONSTITUTIONAL COURT - CASE LASTOVECKA, (CASE No. I. ÚS 526/98)¹⁰

In this case, the Constitutional Court decided in the matter of the petitioner, the Civic Democratic Party (*Občanská demokratická strana*), on the appeal against the decision of the Senate of the Parliament of the Czech Republic and the Mandate and Immunity Committee of the Senate of the Parliament of the Czech Republic in the matter of verification of the election of the senator and against the decision of the Supreme Court of 3 December 1998 (case No. 11 Zp 54/98). The Constitutional Court decided that D. Lastovecka was a validly elected senator (so the Constitutional Court concluded that the appeal was justified).

The petitioner appealed against the decision of the Supreme Court. In the appeal he defined the points which the Supreme Court decided incorrectly: that the election of the above-mentioned senator in Parliament elections was invalid and the petitioner could not be given a certificate of election as senator. The petitioner in the proceedings before the Supreme Court (the Czech

⁸ See judgment of the regional court in Hradec Králové on 20 November 2006, case No. 52 Ca 71/2006 (Collection of the Decisions of the Supreme Administrative Court No. 1055/2007), judgment of the regional court in Brno on 14 November 2006, case No. 30 Ca 206/2006, or judgment of the regional court in Brno on 10 November 2006, case No. 30 Ca 203/2006 (this judgment was finally revoked by the Constitutional Court).

⁹ See paragraph 91 of the Code of Administrative Justice.

¹⁰ Judgement of the Constitutional Court of 18 February 1999, case No. I. ÚS 526/98, <http://www.usoud.cz>.

Social Democratic Party, *Česká strana sociálně demokratická*), in the adjudicated matter identified five events as evidence of violation of the Election Act (No. 247/1995 Coll.): on the first day of the second round of elections a daily newspaper published an article on the front page with the headline “Brno mayor Lastovecka has a chance to become chairman of the Senate”. On the same day, the above-mentioned newspaper published a pre-election poll, in which it designated D. Lastovecka as the clear favourite. One day later, the same newspaper published in an article dedicated to the electoral campaign a section with the sub-heading “ČSSD candidate Božek acted immorally”. In the first round of the senate elections, D. Lastovecka allegedly had access to the district election commission, before the protocol on the termination of its work was signed. During the first day of the elections, D. Lastovecka appeared in a television news programme, where she allegedly spoke about and evaluated her election campaign. Her election materials were allegedly distributed on the second day of the elections. In this context, the Supreme Court pointed to § 16 paragraph 2 of the Election Act, under which an election campaign must take place honorably and honestly. In particular, untrue information may not be published about candidates and political parties, or coalitions on whose candidate lists they stand. Paragraph 5 of this provision specifically forbade election campaigning for political parties, coalitions and candidates in the period of 48 hours prior to elections and on election days (this provision was changed later). It also banned the publication of the results of pre-election public opinion polls, “provided that they may be published no later than the seventh day before election day”.

In my opinion, it is useful to remember that in this case, in the opinion of the Supreme Court, the Election Act was violated, specifically § 16 concerning regulation of an election campaign. The violation was to have occurred for the following reasons: (1) On the first day of the second round of elections (20 November 1998) the daily newspaper *Lidové noviny* published an article on the front page with the headline “Brno mayor Lastovecka has a chance to become chairman of the Senate”. On that same day, the same daily paper published a pre-election poll, in which it identified D. Lastovecka as the clear favorite. (2) On 21 November 1998, the same daily paper published, in the article “Commissions discussed campaign” a section with the sub-heading “ČSSD candidate Božek acted immorally”. (3) On 20 November 1998, that is during the first day of the elections, D. Lastovecka was able to appear on the television news programme *Jihomoravský večerník*, where she allegedly spoke about and evaluated her election campaign.

Concerning the objection about the alleged interference of D. Lastovecka with the work of the district election commission, the Supreme Court stated that this fact had not been proved in any way. With regard to the complaint about the distribution of election materials from D. Lastovecka on the second day of the elections, the Supreme Court stated that if this did actually occur, it could have been a violation of the Election Act, nonetheless, “in view of the conclusions cited above and the shortness of the time available to the Supreme Court for decision making, it no longer considered it useful to deal with this question”. The Supreme Court stated that, in terms of the degree and seriousness of the violation of the Election Act, it is of course important whether the violation occurred through the active actions of the candidate or her party, or through another entity without her knowledge. In the case of isolated, less significant interference of third entities with the election, there would clearly not be such violation of the law leading to the invalidity of the elections. Nonetheless, if such interference is committed by the mass media (a national daily considered “trustworthy” and state-wide public television) “the question of some sort of fault or participation by the candidate in such election campaigning in these cases is irrelevant”. At the same time, the obligation to refrain from election campaigning in the statutorily defined period cannot allegedly be considered to be interference with freedom of speech and the right to information, as it is in the interest of the free decision-making of voters just before elections and during elections to have an opportunity to consider their decision in peace. Likewise, the absolute ban on publishing results of pre-election public opinion polls during the specified period cannot be circumvented in the way that *Lidové noviny* did, as this would cast doubt on its very purpose. Thus, although in the opinion of the Supreme Court “there is no discussion” about the fact that D. Lastovecka did not subjectively cause violation of the

rules of elections – with the exception of the television appearance – (and there is no evidence that she instigated the articles or the television programme), the Election Act is based on the fact that it is to be objectively observed, and, if it is not observed, it can have only one consequence – invalidity of the elections. The media are also required to observe the law, and if they violate it, they should bear the liability, including criminal liability.

The Constitutional Court's described decision primarily expressed that in these proceedings this court decided on an appeal against a decision in the matter of verifying the election of a deputy or senator, and because it acted as a – *sui generis* – appeal level, it had to evaluate the particular case not only in terms of protection of constitutionally guaranteed rights or freedoms, but primarily in terms of the trustworthiness of the democratic election process. The argument concerning objective or subjective violation of the Election Act is considerably misleading. Generally, it should not be exclusively under the jurisdiction of the Constitutional Court whether the Election Act was violated objectively or subjectively, but it is necessary to take into account the circumstances of the specific case and the degree and manner in which the Election Act was violated. Thus, it cannot be generally stated that each violation of the Election Act results in the invalidity of the election, or that the penalty of invalidity of the election cannot be applied to the violation of the Election Act at all.

In my opinion, it is also useful to point out that, under this ruling of the Constitutional Court, it is clear from the nature of the matter that in the "moratorium period" of 48 hours before elections begin and during the election itself, it is not possible to completely ban any election campaigning whatsoever. Therefore, section 16, paragraph 5 of the Election Act must be interpreted rather restrictively, in the sense that the legislature intended to ban active election campaigns, that is intentional and purposeful campaigning, specifically targeted to political parties, coalitions and candidates. In this ruling, the Constitutional Court also added that, although proceedings on an appeal in the matter of verifying the election of a deputy or senator are specific proceedings – whose primary task is to protect the function of elections in a democratic society, in terms of the "objective" constitutional law, it is necessary for them to reflect the protection of fundamental rights and freedoms of natural persons and legal entities. Although the Election Act bans active election campaigning in the statutorily defined period, the intended aim of this restriction may not violate other fundamental rights and freedoms, in particular freedom of expression and the right to information. Thus, even in the statutorily protected period, the media have the right to provide information, and may present their own opinions; they are only forbidden to campaign actively for any particular candidate. Freedom of expression and the right to information are among the main pillars of a democratic society, which the media, in particular, naturally use in their work. This fundamental right and its exercise are necessarily a prerequisite for their free existence. The right to freedom of expression and the right to information are cornerstones of a democratic state, as only free information and its exchange and free discussion make a person a citizen of a democratic country. It is the press, radio and television, which spread and provide the information; in this context, freedom of information has extraordinary importance. Thus, the principle of honorable and honest election campaigns and the ban on campaigning in the period of 48 hours before elections and during them cannot be interpreted so widely that the act would create a social vacuum making the existence of freedom of expression and the right to information (in connection with elections) impossible.

In the case described here, the Constitutional Court concluded that consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is judicial body which – although it does not have a classical precedential nature – interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court, which is the supreme judicial body in the field of the general judiciary. This, of course, does not contradict the fact that judicial case law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions. According to this decision, the purpose of section 16 paragraphs 2 and 5 of Act No. 247/1995 Coll. was undoubtedly the

protection of honorable and honest elections. It can be agreed that – institutionally speaking – it would generally not be appropriate to concentrate exclusively on the question of whether it was only a candidate (political party) who violated the cited provision. On the other hand, however, it is difficult to accept a strictly objective criterion comprehensively and to ignore the fact that the candidate did not subjectively cause the violation of the election rules. The opposite interpretation would necessarily lead, under this decision of the Constitutional Court, to a situation in which any subject could achieve the invalidity of the election of any candidate completely without his fault, which could significantly interfere with elections.

IV.2. JUDGEMENT OF THE CONSTITUTIONAL COURT - CASE “NADVORNIK” (CASE No. Pl. ÚS 73/04)¹¹

In this case, the Constitutional Court decided on an appeal filed by the Civic Democratic Party. The Constitutional Court eventually decided that J. Nadvornik was a validly elected senator in Senate elections.

According to the resolution of 3 December 2004,¹² the Supreme Administrative Court decided on a petition from A. Zapotocky, that the Senate elections held in election district Prague 11 were invalid. In proceedings before the Supreme Administrative Court the petitioner, A. Zapotocky, claimed that the election campaign in that election district was not conducted honorably and honestly, because untrue information was repeatedly published about him in the local press.

The Supreme Administrative Court granted the petition to annul the elections. It relied on its case law, which, in order to grant a petition in election matters (see also chapter III.3. of this report), requires firstly unlawfulness, secondly a relationship between this unlawfulness and the election of the candidate whose election is contested by the election complaint and thirdly a fundamental intensity of that unlawfulness, the consequences of which must, at least, cast considerable doubt on the election of the candidate in question. It concluded that section 16 of the Election Act (No. 247/1995 Coll.) does not exhaustively regulate election campaigns, but applies only to their final, or “hot” phase. An election campaign is one of the ways of exercising fundamental rights, including primarily freedom of speech, the right to information, freedom of association, freedom of assembly, and so on. The provision of section 16 of the Election Act makes these fundamental rights and constitutional principles concrete – above all, the principle of free competition of political forces in a democratic society and the principle of equal entitlement to the right to vote. Although section 16 paragraph 1 of the Election Act mentions only the use of surfaces for posting election posters, in the Supreme Administrative Court’s opinion it is clear, without any substantial doubts and in view of the cited constitutional principles, that this is only one example of a generally valid approach to the means of communication which a municipality has at its disposal. It follows that the principle of equality of candidates must be observed in the use of all means of communication owned by the municipality. In this particular case, however, the Supreme Administrative Court believes that this principle was not observed. It was violated by the publication in the *Uhříněves Reporter* No. 10/2004 and the special issue of the *Petrovice Reporter* directly before the first round of the senate elections. In the Supreme Administrative Court’s opinion, the nature of the information published in these publications was such that it was capable of significantly harming the petitioner, A. Zapotocky, in the eyes of potential voters. The particular circumstances of the case, the publication of these periodicals just before the elections, the clear one-sidedness of the opinions presented, the manner of distribution, the significantly higher print run of the special issue of the *Petrovice Reporter*, and so on, persuasively show that this was the intention of the publisher of these periodicals.

¹¹ Judgement of the Constitutional Court of 26 January 2005, case No. Pl. ÚS 73/04, <http://www.usoud.cz>.

¹² Resolution of the Supreme Administrative Court, case No. Vol 10/2004, <http://www.nssoud.cz>.

The Supreme Administrative Court also concludes that the nature of the information published in these periodicals does not meet the requirements for fairness in an election campaign formulated in section 16, paragraph 2 of the Election Act, whereby it has in mind specifically the printing of the anonymous letter from 2001, especially as it was presented without any commentary whatsoever, as a letter from members of the representative body of *Prague-Petrovice*, although the authorship of these members was not verified. The Supreme Administrative Court also concluded that there was a relationship between the violation of the Election Act and the election of J. Nadvornik. What is also important here is that in the case in question, the petitioner ended in third place in the senate elections, by a margin of 325 votes behind the candidate who was in second place. In the Supreme Administrative Court's opinion, the narrow margin of votes, which meant that the petitioner did not advance to the second round, could in fact have been caused by circumstances which the Supreme Administrative Court sees as violating the Election Act. If this unlawfulness had not occurred, the petitioner could realistically have advanced to the second round of elections, in which the possibility that he might have been elected could not be ruled out; therefore, a "certain relationship" exists between the violation of the Election Act and the election of the candidate. Finally, the Supreme Administrative Court considered the issue of evaluating the intensity of the unlawfulness. It said that in a situation where the petitioner did not advance to the second round of senate elections because of a relatively narrow margin of votes, the degree of unlawfulness necessary for declaring the elections invalid is naturally lower than in a case with a large margin of votes.

As mentioned above, the Constitutional Court in this case did not share the opinion of the Supreme Administrative Court dealing with the issue of the pre-election campaign. The Constitutional Court pointed out firstly that, with regard to the content of an election campaign, arguments are often presented to voters in a very emotional and heightened form, and are intended to influence their electoral behavior and their decision on whom to vote for. However, the purpose of an election campaign in a pluralistic democracy is undoubtedly also to evaluate the most controversial issues in the manifestos of political parties and candidates generally, as well as their personal qualities and capability to hold elected public office. Only then will voters be able to make informed decisions, and only thus can the fundamental constitutional principle that the people are the source of all state power be fulfilled. Insofar as the Election Act under this ruling speaks of the requirement for honorable and honest conduct of an election campaign, it is pointing to what was previously called the cleanness of elections. However, these concepts cannot be interpreted in terms of private law and general morality, because they are being applied in the context of an election campaign, which is nothing more than a fight for voters' votes. Its negative effects can be regulated, but cannot be ruled out by law. The lack of effective protection in the Election Act for the conduct of elections will always lead to an effort to resolve such disputes through election complaints. The Constitutional Court concluded in this chapter, however, that the protection of individual rights in these proceedings can only play a supporting role in terms of guaranteeing and observing the rules for the proper conduct of an election campaign.

The essence of proceedings before the Constitutional Court in this case lies in guaranteeing protection for the fundamental provisions of the constitutional order, which give rise to the principle that the people are the source of all state power, and in this role, among other things, they share the aim of establishing the state through free and democratic elections. The statutory framework for the election judiciary disputes and verification of elections corresponds to this. In terms of the procedural regulation of the election judiciary disputes and the conduct of such proceedings, this gives rise to the presumption that election results correspond to the wishes of the voters. Presenting evidence to rebut this presumption is the obligation of the person who claims that there was an error in elections. According to the Constitutional Court, our election judiciary does not recognise absolute defects in election proceedings (so-called "absolute confusion of election proceedings"), that is, such violation of a constitutional election regulation which would result in the automatic annulment of elections, the election of a candidate, or voting. In this sense, all possible defects and doubts must be considered relative, and their

significance must be measured by their effect on the results of elections to a representative body, as such, or on the result of the election of a particular candidate, or on the result of voting, according to the proportionality principle. Proceedings are thus based on the constitutional principle of protection of a decision which resulted from the wishes of the majority, manifested in free voting and taking into consideration the rights of the minority, as the Constitutional Court has already pointed out in another context. The framework for verifying elections is based on the prerequisite of an objective causal connection between an election defect and the composition of a representative body, or at least a possible causal connection (the principle of potential causality in the election judiciary disputes). However, this possible cause, as established in section 87 of the Election Act, must not be interpreted as a mere abstract possibility.

The Constitutional Court derived from the Charter of Fundamental Rights and Basic Freedoms the right of an elected candidate to uninterrupted exercise of his office during the specified period, which emphasised the right of candidates, if elected, to exercise these offices without obstacles. The judicial branch can change the decision of the voters, as a sovereign, only in exceptional cases, where defects in the election process resulted in or could demonstrably result in voters having made a different decision and a different candidate having been elected. However, the essential thing is that the annulment of elections cannot be seen as a punishment for violating election regulations, but as a means to ensure the legitimacy of an elected body. It is the probability of influence of an election defect or an election offence on the election result in particular elections, with particular voters, that is decisive. A mere abstract possible causal connection is not sufficient. In such a case, the threat of annulling the result of elections as the only possible consequence is inconsistent with the constitutional principle of proportionality of interference by public authorities. This certainly does not rule out disqualifying a candidate who committed a serious election offence. In this regard, the Constitutional Court is obliged to say that, compared to other countries, the legal regulation of defects in the election process, election offences, and the rules for conducting an election campaign in general, is, for one thing, very fragmentary, and for another, basically rooted in conditions which correspond to "elections" during the previous regime. Therefore, the legislature will have to weigh up whether the election culture of voters, candidates and public officials is on such a level that regulation of these issues is unnecessary, or whether it will guide electoral behavior through pre-set rules that will create a situation of legal certainty for the subjects of the election process and which will be at least a prerequisite for electoral economy.

The Constitutional Court concluded that neither an objective nor potential causal connection was proved between the content of the cited publications and their distribution among voters and the election of J. Nadvornik. Under this ruling, the Supreme Administrative Court only considered the question of whether A. Zapotocky could advance to the 2nd round of senate elections. However, in terms of the aforementioned presumption that election results are valid, it was not proved that the elements of the fundamental substantive law of our election judiciary were present, that is, whether under section 87, paragraph 4 of the Election Act the provisions of the Act were violated in a manner which could influence election results. Therefore, the data provided does not lead to any logically or statistically documentable conclusion that, applying the principle of an absolute majority, there was a high degree of probability that anything would have changed in the election results of the second round and that J. Nadvornik would not have been elected senator. Therefore, the presumption that the voters' decision in an election is valid was not cast in doubt. There is no dispute that the printed materials published as municipalities' newspapers because they are in the hands of the public authorities, must remain correct and neutral. Elections can be annulled only as a consequence of fundamental and substantial violation of state neutrality in the course of elections.