CONSTITUTIONAL COURT OF THE CZECHOSLOVAK REPUBLIC

AND ITS FORTUNES IN YEARS 1920-1948

(Excerpt from the monograph: LANGÁŠEK Tomáš: Ústavní soud Československé republiky a jeho osudy v letech 1920-1948 (*Constitutional Court of the Czechoslovak Republic and its fortunes in years 1920-1948*). Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s. r. o., 2011. 319 s. ISBN 978-80-7380-347-6). Citations omitted.

INTRODUCTION

The year 2011 marks the ninetieth anniversary of the establishment of constitutional justice in the lands of the former Czechoslovakia which is said to have been the first Constitutional Court in the world. It really was the constitutional charter of the Czechoslovak Republic of 29 February 1920 which was the first to lay the foundation for the Constitutional Court as an exclusive specialised judicial body to scrutinise already passed and therefore effective laws with regard to their conformity with the constitution as the highest norm. However, the position of the Czechoslovak Constitutional Court as the first ever institution of its kind remained on paper only. When the Constitutional Court of the Czechoslovak Republic did finally come into existence in the assembly hall of the presidium of the council of ministers at Prague Castle on 17 November 1921, the *Verfassungsgerichtshof* in Vienna – established by the Austrian constitution of 1 October 1920 – had already been working for several months.

This position of the Czechoslovak Constitutional Court as the first ever institution of its kind on paper needs to be explained further. Already on 25 January 1919 the Austrian provisional national assembly established a Constitutional Court of justice in Vienna entrusted with the tasks of the imperial law court (*Gesetz über die Errichtung eines deutschösterreichischen Verfassungsgerichtshofes*, 1919/48 StGBl). However it was still only a Constitutional Court by name (and it is in this sense that it became entitled to be the world's first), and was not yet entrusted with the control of norms. By one of the laws of the provisional Austrian constitution of 14 March 1919 (*Gesetz über die Volksvertretung*, 1919/179 StGBl, art. 15) the constituent national assembly somewhat increased the competences of the Constitutional Court and endowed it with competences to control norms, however only to a limited extent – this was the preventive control of norms (before promulgation) and in relation to the laws of individual lands. In view of these facts Kurt Heller, judge emeritus of the Austrian Constitutional Court, describes this claim of the Czechoslovak Constitutional Court to be the first as inaccurate and the whole discussion of which was first to be totally meaningless (Heller Kurt: *Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart*, Wien: Verlag Österreich GmbH, 2010). However, to be totally accurate it was the Austrian constitution of 1 October 1920 (*Bundes-Verfassungsgesetz*, 1920/450 StGBl, 1920/1 BGBl, art. 140) which endowed the Constitutional Court of justice in Vienna with competences to also revise the laws of the federation, *a posteriori*, namely competences which the Czechoslovak constitutional charter entrusted to its Constitutional Court half a year earlier. Hence, in this limited aspect the Czechoslovak Constitutional Court truly was the first in the world if only on paper.

Unlike its Austrian counterpart, the Czechoslovak Constitutional Court did not leave any significant mark either in the world's or the Czechoslovak Republic's history of constitutional justice, and comparisons of its competences and jurisprudence with those of the then Austrian Constitutional Court as well as of the present-day Constitutional Court of the Czech Republic relegate it to nothing more than a historical curiosity. But as pointed out by Pavel Rychetský, the present President of the Constitutional Court of the Czech Republic, for everyone following the contemporary state and form of constitutional justice in this and other European countries, the fortunes of the Czechoslovak Constitutional Court in 1920-1948 must have seemed current and inspiring: "*The first and particularly the second Czechoslovak Constitutional Court had to deal with nonstandard legislation adopted by ordinances of the parliamentary committee or even by delegation laws. Today we are witnesses to the abuse of standard legislative procedures, either by various legislative riders or even the abuse of speedy procedures reserved for states of emergency*." (foreword of Pavel Rychetský).

JURISDICTION AND COMPETENCES OF THE CONSTITUTIONAL COURT

Summary of the legislation regulating the position of the Constitutional Court and its judges, and its proceedings

The constitution of the Czechoslovak Republic, more precisely the law of 29 February 1920 No. 121/1920 Coll. which establishes the constitutional charter of the Czechoslovak Republic (hereinafter referred to as "the establishing constitutional law" and the "constitutional charter"), dealt with the Constitutional Court only in a few places, although in its classification the Constitutional Court held the most important position – the very first three provisions of the establishing constitutional act are devoted to it:

Art. I

(1) Laws contravening the constitutional charter, its parts and its amending and supplementing laws are null and void.

(2) The constitutional charter and its parts may be amended or supplemented only by laws marked constitutional (Art. 33).

Art. II

The Constitutional Court decides whether the laws of the Czechoslovak Republic and laws of the Diet of Carpathian Ruthenia comply with the principle of article I.

Art. III

(1) The Constitutional Court consists of seven members. Two members are delegated from the Supreme Administrative Court and two from the Supreme Court. The remaining two members and President are appointed by the President of the Republic.

(2) The act lays down the details, especially the manner in which both mentioned courts delegate their members of the Constitutional Court, the proceedings and term of office and the effects of its judgments.

Further in the text of the constitutional charter the incompatibility is embodied in art. 20 par. 6 of the term of office of the constitutional judge and legislator (deputy or senator): "*Members of the Constitutional Court, associate judges of an electoral court and those who are members of administrative units may not also be members of the National Assembly.*" The list of mentioned provisions of the Constitutional Court is concluded by a special competence provision under art. 54 par. 13 of the constitutional charter under which:

> *"The competence of the Constitutional Court applies to ordinances which would otherwise require a law, and also submitted to it by the government with promulgation in the Collection of Laws and Ordinances. The Constitutional Court is entitled to decide whether the ordinance submitted to it complies with par. 8., letter. b).*",

namely whether the provision complies with the fact that the permanent committee of the National Assembly is not entitled by its ordinances with the provisional power of the law *"to amend constitutional laws (art. I. establ. law) and the competence of authorities, though it would concern the extension of the competence of authorities already established by new tasks.*"

The act of 9 March 1920 No. 162/1920 Coll. on the Constitutional Court was passed a few days later by the implementing law which was to regulate further details under art. III of the establishing constitutional law. Under art. 8 par. 5 of this law the details of the proceedings were to be regulated by the procedural rules. The procedural rules of the Constitutional Court were decided by the plenum of the Constitutional Court on 19 May 1922, ratified by President Tomáš G. Masaryk on 29 May 1922 and published in the Collection of Laws and Ordinances under no. 255/1922 Coll.

The Constitutional Court worked under this legislation throughout the First Czechoslovak Republic until 1938. Changes did not come until in the Second Republic, after the painful Munich Agreement and separation of the borderlands. Two constitutional laws of 22 November 1938 (constitutional law no. 299/1938 Coll. on the autonomy of Slovakia and the constitutional law no. 328/1938 Coll. on the autonomy of Carpathian Ruthenia) replaced the existing unified character of the Czechoslovak State with an asymmetrical model of the autonomy of Slovakia and Carpathian Ruthenia, but not the historical Czech lands. However in view of the brief duration of the Second Czechoslovak Republic and occupation of the rest of the Czech lands by Nazi Germany in March 1939, there was not enough time to integrate both constitutional laws into the membership and activities of the Constitutional Court and were not applied otherwise in the proceedings before the Constitutional Court.

After the occupation of the Czech lands by Nazi Germany in March 1939 the Constitutional Court survived for several more months and was then dissolved. After the war it was not revived. A "blow of certainty" for the Constitutional Court existing only on paper was struck by the Constitution of 9 May of the succeeding communist regime, namely the constitutional law of 9 May 1948 no. 150/1948 Coll., the Constitution of the Czechoslovak Republic. The provision of art. 173 par. 1 derogates from the existing constitutional charter of the Czechoslovak Republic and all constitutional and other laws if they contravene the provision of this constitution and the "principles of the people's democratic system". The history of constitutional justice in the Czech lands came to an end for several decades.

Concept of constitutional justice in inter-war Czechoslovakia

The Czechoslovak constitution of 29 February 1920 vested the Constitutional Court with merely two competences:

1. to decide as to whether ordinary laws passed by the National Assembly or by the diet of Carpathian Ruthenia comply with the constitutional charter and other constitutional laws, with the possible of declaring them void if they are found to contravene it (art. II of the establishing act),

2. to decide whether the ordinances of the permanent committee of the National Assembly that had the provisional power of law did not violate art. 54 par. 8 letter b) of the constitutional charter, namely the prohibition to change the constitution (constitutional laws) or competence of authorities, but this did not concern a change to the competence of authorities if the competence of already established authorities was extended with the allocation of new tasks (art. 54 par. 13 of the constitutional charter).

The Czechoslovak constitution of 1920 had several ideological fathers, however it was Prof. Jiří Hoetzel, the section head at this time in the legislative department of the ministry of interior, who declared his fatherhood with regard to the institution of the Constitutional Court, although he sometimes described his fatherhood with regard to the Constitutional Court as more of a mentor, like a parent whose naughty child is not behaving precisely according to the ideas of its parent.

Besides Jiří Hoetzel, the decisive word in the way in which the Constitutional Court was finally treated in the constitutional charter and implementing law was that of the constitutional committee presided over by Alfréd Meissner and its vice-chairman was František Weyr, who reported on the Constitutional Court bill. Besides deputies Meissner and Weyr and the invited government expert Hoetzel, it was deputies Václav Bouček, Theodor Bartošek and Karel Kramář who influenced the form of the law on the Constitutional Court in discussions of the constitutional committee.

Deputy Bouček, who was the rapporteur at the plenum of the National Assembly on 27 February 1920 on the constitutional charter and initiated its discussion with an opening speech, presented the Constitutional Court as an institution inspired by the US Supreme Court, however with reference to the drawbacks which the American solution had, the Czechoslovak solution was somewhat different:

> *"The drawback of the* [US Supreme Court] *is that a law may apply for about 10 to 20 years and then an American citizen raises an objection of invalidity in a dispute and the validity of the law is decided after 10 to 20 years. We had this model* [however could not] *be inclined to the American system. So we decided to establish a special Constitutional Court which, if a petition is given by the Supreme Court, Supreme Administrative Court, Electoral Court, some chamber, National Assembly or the Diet of Carpathian Ruthenia within a three-year period, it must decide about the constitutionality of this or that law. We therefore have a chamber of deputies with huge political power, huge legislative power, but its corrections and protection against rashness, especially against one-sided and hasty changes to the constitution is given to the Senate and Constitutional Court."*

As regards the competence of the Constitutional Court in relation to the ordinance of the permanent committee, deputy Bouček described it as a totally original institution:

> *"The 24-member committee will also hold a legislative role. We do not want the government to do anything outside the law or against the law, as the Austrian government under art. 14 of the Austrian constitutional law. ... I say: it is an immensely fortunate solution and sets an example to other countries. But violation is also possible. To make sure there is no misuse of art. 54, which is an especially effective weapon against obstruction, guarantees are laid down in the constitutional charter as such. In the first place, as soon as some ruling of this 24-member committee is promulgated in the Collection of Laws and Ordinances, it is submitted to the Constitutional Court which by its official power scrutinises whether this ruling, which would otherwise require a law, complies with the constitution."*

What clearly arises from deputy Bouček's speech is that the already discussed draft of the constitutional charter was an accomplished fact that the implementing law on the Constitutional Court would contain a time clause limiting the possibility of submitting petitions to the Constitutional Court within a three-year period, and that the standing (power to initiate proceedings on the constitutionality of a law) will be provided only to supreme courts and legislative bodies. The procedural system of the analysis of an ordinance of the permanent committee was also clear. Incidentally, the explanatory report to the Constitutional Court bill is dated 24 February 1920.

Although on paper the constitutional charter entrusted the Constitutional Court with very important competence with serious consequences to scrutinise the compliance of laws with the constitution, and in case of conflict, to declare them to be void, the legislative and constituent body intended to restrict this competence in practice from the very beginning. Hoetzel's expert report of 1938 to the Constitutional Court for proceedings on the invalidity of some provisions of the law on the change to delegation laws (Act No. 109/1934 Coll. which amends laws on extraordinary power of 9 June 1933, No. 95 Coll. and of 15 November 1933, No. 206 Coll.) sounds totally credible:

> *"It was I who introduced the institution of the Constitutional Court to the constitutional charter. The petition did not meet with great enthusiasm. Some members of the constitutional committee pondered over the fact that the Constitutional Court should be established above the legislator. Finally ways were sought how to face some undesirable consequences of the new institution. The constitutional committee, when conveying the constitutional charter, had a general picture of the Constitutional Court: some things were incorporated in the constitutional charter while others were referred to ordinary law. This law No. 162/1920 Coll. fully meets the intentions of the constitutional assembly!"*

Some of the safety mechanisms that were to prevent the "undesirable consequences of the new institution" were already pointed out by deputy Bouček during the presentation of the draft constitutional charter in parliament. This was the limitation of the standing only to legislative bodies and supreme court tribunals as a whole, which meant these institutions had to decide on a submission of a proposal for proceedings in a plenary session, and the introduction of a three-year period following the promulgation of a law within which the law

could be impeached before the Constitutional Court. Another limitation was embodied in the intention that the possible decree of annulment should be bound to affect solely the future (*ex nunc*), not the past (*ex tunc*), even when the petition was submitted by one of the supreme courts in connection with a case the court was deciding. The Constitutional Court was preventively tamed indirectly also through the judges' appointment procedure, especially with the strengthening of the role of legislative bodies at the expense of the President of the Republic, the introduction of the institute of judges' substitutes and the requirement of a three-quarter majority vote to declare a law void. It must be said that unlike its Austrian counterpart, the Constitutional Court was not entrusted with the agenda of individual complaints about the protection of political constitutional rights, because this competence of the former imperial court (*Reichsgericht*) was assigned to the Supreme Administrative Court immediately after the origin of Czechoslovakia. Attempts at transferring it to the Constitutional Court were very half-hearted and destined for failure.

The Constitutional Court of the Czechoslovak Republic was made up of seven members. Two members were elected from the ranks of the plenum of the Supreme Administrative Court, two from the plenum of the Supreme Court and a further three members, including the President of the Constitutional Court, were appointed, under the constitution, by the President of the Republic. Each had one substitute delegated to the Constitutional Court in the same manner. In total the Constitutional Court consisted of fourteen judges.

The original draft of the law on the Constitutional Court did not consider substitutes. Incidentally neither did the constitution – only the constitutional laws of 1938, with an 18-year delay, took note of substitutes of the Constitutional Court members (art. II of the constitutional law no. 299/1938 Coll. on the autonomy of Slovakia and art. 1 point 1 of the constitutional law no. 328/1938 Coll. on the autonomy of Carpathian Ruthenia).

In the constitutional committee it was deputy Karel Kramář who supported substitutes as he evidently imagined the Constitutional Court in corporatist terms. Under his concept the Constitutional Court would be in session if possible only with all its members present; thus during the decision-making all institutions would be represented which had nominated their judges which was to be ensured with the introduction of substitutes. In other words, Karel Kramář did not perceive the involvement of various institutions in the structure of the judiciary only as a way of ensuring its plurality at the moment of origin, but he considered it totally obvious that individual judges (and substitutes), even after their appointment or election, would interpret and enforce the interests in the plenum of the Constitutional Court of the institutions which delegated them to the Constitutional Court:

> *"It is necessary that a member from this body can be substituted in every way, because he represents the interests of an authority or some chamber or the diet of Carpathian Ruthenia. If he were to be sick for a longer time and not die, it is not possible to appoint a different member in his place, and this would require an institution of substitutes from which only the substitute would always come to represent the same interests.*" (from the shorthand report of a meeting of the constitutional committee).

It evidently did not occur to the deputies that this concept is in sharp contradiction to the warrant of the independence of the Constitutional Court whose judges are to make

decisions about matters not just according to their conviction, but with the awareness of the "interest" which they represent and were delegated to the court to represent.

The term of office of the Constitutional Court, not of the individual judges, was ten years always commencing from the date of the constituent meeting. In today's terms and experience this solution can be described as defective because it brings an element of discontinuity and risk of irretrievable loss of institutional memory into the decision-making of the Constitutional Court – the Constitutional Court in specific membership will end at one moment and will arise in the next moment with a totally different membership (the possibility of appointing the same person again does moderate this risk somewhat, however it is problematical otherwise, in terms of the warrant of judicial independence). The law did not even contain temporary provisions which would ensure at least that both moments – the dissolution of the existing and origin of the new Constitutional Court – would arise at the same moment. As is described further, the judges of the Constitutional Court attempted to at least partly face these risks in the first term of office by an interpretation under which their mandates would be dissolved upon expiry of the ten-year term of office only with the appointment of the new court, however this still did not prevent the fact that the Constitutional Court ceased to exist for almost seven years before judges were appointed for the new term of office.

It has already been mentioned that three of the judges and their substitutes were appointed by the President of the Republic. However the law on the Constitutional Court restricted the President of the Republic in his power to nominate in the sense that he did not appoint his three members and their substitutes at his own discretion, but had to use the listings with three candidates by the Chamber of Deputies, Senate and Diet of Carpathian Ruthenia, or government until the time of its establishment. It must be added that all appointments made by the President of the Republic, as well as his other acts with regard to the Constitutional Court, besides this, had to be countersigned by the prime minister, so rather than presidential nominations, it was more apt to speak of judges delegated by the government – literally in case of judges for Carpathian Ruthenia.

The President of the Republic also appointed the President of the Constitutional Court from the judges appointed to office by the President of the Republic. This decision was also subject to a countersignature. The Constitutional Court elected its own Vice-President from its members (not substitutes) at its constituent plenary meeting. However it must be clarified that during the first election of the Vice-President of the Constitutional Court the rule was accepted by the judges that the Vice-President will be elected only from members delegated by the supreme courts. The objective of this rule was to balance out the unequal position in relation to members of the Constitutional Court appointed by the President of the Republic from whose ranks the President of the Constitutional Court was exclusively elected.

A person eligible to the Senate, namely a citizen of at least 45 years of age and well-versed in the law could become a judge of the Constitutional Court. There was also the condition for judges delegated from both the supreme courts that this is a person elected by these courts "from itself", namely a condition of service competency to one of the supreme courts. According to the later adopted interpretation this condition had to be met throughout the duration of the mandate of the judge of the Constitutional Court, not just at the moment of election.

The court was established as an occasional and not a permanent body to sit in judgement. The judges did not become full-time judges of the Constitutional Court and remained active in their original professions as judges of common courts, lawyers, prosecutors, state officials, mayors, members of municipal and land councils or ministers, to name all the professions that the judges of the Constitutional Court actually exercised in the inter-war period. Incompatibility was considered in relation to the mandate of a legislator, otherwise a judge could be anyone, even a member of the government!

The law on the Constitutional Court did not mention the institutional and budgetary circumstances of the Constitutional Court, with the exception of art. 6, under which the "necessary assistant personnel, rooms and material needs would be provided by the government." This was not just a temporary provision for the first days and months after the appointment of the Constitutional Court. The Constitutional Court did not even have a separate budgetary chapter for several years and was financed from a loan provided by the government's presidium. Throughout its existence the Constitutional Court did not have a separate official apparatus – it "shared" clerical workers, including the accounts department with the government presidium. In combination with the absence of the obstacle of incompatibility to offices in the executive the legal warrant of the independence of the Constitutional Court can be described as totally inadequate even in the circumstances of the time. The link of staff between the Constitutional Court and the government reached a deterring maximum in December 1938 when the President of the Constitutional Court, Jaroslav Krejčí, became the minister of justice in Beran's Czecho-Slovak government; he remained its President in the next Eliáš government of the Protectorate of Bohemia and Moravia under the supervision of Hitler's Nazi occupation regime.

The President of the Constitutional Court took a solemn oath from the hand of the head of state in the presence of the government. At this point he assumed his office. After this he had to convene a constituent meeting of the court within eight days. The rest of the judges took their oath at the constituent meeting, or outside to the court's President.

The members and substitutes of the Constitutional Court met at the constituent and plenary meetings to deal with organisational issues (to adopt the procedural rules, election of the Vice-President, etc.). Only members of the Constitutional Court were called to discuss or decide individual cases for which proceedings were held in camera or at a public oral hearing; the substitute attended them only in place of an absent member. The substitutes were "non-transferable" – they could only substitute "their" member, not a different member – this fully met the intentions of Karel Kramář and the constitutional committee when drawing up the law on the Constitutional Court, as was discussed above.

In camera or in a meeting after the oral hearing the court decided by a majority of those present, however a qualified majority of at least five votes, namely the majority of the full court membership of almost three-quarters, was required to declare a law or provisional ordinance void. In the discussion of the constitutional committee some (such as Hoetzel) also considered the requirement of unanimity to declare a law void "*in view of the importance of the case"*, however in the end the deputies acknowledged that the consequence – veto of one judge – could make it impossible to declare a law unconstitutional (such as deputy Bouček speculated that the judge for Carpathian Ruthenia could, when scrutinising a law of the diet of Carpathian Ruthenia, feel loyalty and make it impossible to pass a derogatory judgement by his single vote).

In view of the fact that the constitution distinguished only two competencies of the Constitutional Court, only two types of proceedings before the Constitutional Court complied with these – proceedings on compliance of laws with the constitutional charter, or with the provision of art. I of the establishing law to the constitutional charter and proceedings on scrutinising provisions of the ordinances of the permanent committee in terms of compliance with art. 54 par. 8 letter b) of the constitutional charter as mentioned above. Both were proposed proceedings, however the proceedings on scrutinising an ordinance of the permanent committee were obligatory proceedings which the Constitutional Court had to initiate *ex officio* even in case that the relevant petition had not been made by the government for scrutinising the provisional ordinance.

Only legislative bodies (the Chamber of Deputies, Senate or the Diet of Carpathian Ruthenia, if it was ever established) and the supreme courts, namely the Supreme Court, the Supreme Administrative Court and the Electoral Court could file a petition for initiating proceedings. All these bodies had to decide about the petition at the plenary meeting, active procedural legitimacy was not entrusted to minority groups of legislators, or adjudicating panels of the supreme courts. Legislators intended to intentionally exclude incidental control of norms; an explanatory report to the government bill of the establishing constitutional law did not conceal this in any way:

> *"The government when conveying the implementing law will attempt to resolve such a problem so the Constitutional Court could fulfil the mission that the establishing law grants it. Already at this stage it is pointed out that it is not recommended for the parties of court or administrative proceedings to demand that court or administrative proceedings be suspended by criticising the lack of constitutionality of a law."*

On the other hand, supreme courts were not bound to apply the provision of a law which they proposed to declare void to a case they were deciding. They could make an entirely abstract petition:

> *"The supreme court and the two other courts will not file a petition for the repeal of some law only when deciding a specific case, but ... these tribunals should and may, regardless of a specific case, when they find some law contradicts the constitution, to make such a petition.*" (František Weyr from the shorthand report of a meeting of the constitutional committee).

It has already been mentioned that the petition could be raised only within three years as of the date when the contested law was promulgated in the Collection of Laws and Ordinances. According to the explanatory report the constitutional committee was motivated here *"in the interest of legal safeguard and economy of the work of the Constitutional Court"*, which, in view of the experience of further years, sounds somewhat like a cynical euphemism concealing the endeavour for the Constitutional Court to have as little opportunity as possible to fulfil its constitutional role. Legal safeguard was also used as an argument in the constitutional committee when rapporteur deputy Weyr justified shortening the time of the originally proposed five years to three years: "*due to legal safeguard so it is known whether a law is valid or not. A three-year period will certainly suffice for these three court tribunals to clarify whether some law contradicts the constitution or not.*"

The constitutional committee was deeply mistaken in this together with Weyr as the practice of future years showed. Only four years later the experienced practitioner and President of the Supreme Court, Popelka, remarked that the possibility of the Supreme Court to file petitions to the Constitutional Court is, in view of the short three-year period, only theoretical. Another problem was also determining the start of the period from the promulgation of a law, not from its effect, which usually came later. So it is not surprising that the Constitutional Court did not receive any petition from the legislative bodies and Electoral Court throughout the period, and only one from the Supreme Administrative Court and two from the Supreme Court. The reason for such a low number is certainly not that the parliament of the First Republic would show an unusually high level of respect for the constitutional charter during its legislative activity.

The actual proceedings before the Constitutional Court consisted of several stages. In camera for which the justice rapporteur would prepare his news report as a document, a petition could be rejected in a ruling by the Constitutional Court, if filed late, by an unauthorised person, or if it did not fall under the jurisdiction of the Constitutional Court. The petitioner could also be invited by the Constitutional Court to remove flaws. Otherwise a public oral hearing was ordered to discuss the petition.

The parties of proceedings, namely the petitioner, government and participating legislative bodies (Chamber of Deputies and Senate, theoretically also the Diet of Carpathian Ruthenia) were summoned to the public oral hearing. If this concerned scrutinising the ordinance of the permanent committee, also the permanent committee. The justice rapporteur prepared a document for the public oral hearing – a report – now dealing with the merit or draft of a judgment which the rapporteur proposed to the court for approval.

The proceedings on scrutinising the provisional ordinance of the permanent committee took place in the same way with the only difference that the Constitutional Court in camera, usually at the proposal of the rapporteur, firstly defined *ex officio* any doubts of the parties of the compliance of a scrutinised ordinance with art. 54 par. 8 letter b) of the constitutional charter. The proceedings of the public oral hearing incorporated these doubts, or the conclusion of the absence of doubt in the ruling which was intimated to the parties of the proceedings. At the hearing the parties could raise further doubts, however if they did not do so, the Constitutional Court was engaged in scrutinising the ordinance merely to the extent of its predefined doubts. If the Constitutional Court or the parties did not raise any doubts, a simple judgement was passed on compliance of the scrutinised ordinance with art. 54 par. 8 letter b) of the constitutional charter with brief reasoning for the absence of any doubts in this respect.

There were extensive discussions in the constitutional committee of the revolutionary National Assembly about the competencies of the Constitutional Court in relation to the permanent committee. The institution of the permanent committee was a novelty in the constitution. Rapporteur Bouček speaking about *"immensely fortunate solution"*, may have officially claimed that the authors of the draft were motivated by the unwillingness to deal with the need of a quick normative reaction to a specific urgent social problem using the traditional method of delegating the creation of norms to the executive bodies as was the case under the Austrian constitution (see the quote above from his speech at the plenum of the National Assembly of 27 February 1920), however the true reasons were less noble. Hoetzel, the author of this concept, did not conceal this in any way during discussions of the draft for the constitutional charter in the constitutional committee:

"The government has a vested interest in being able to adopt ordinances required in an immediate situation for contingencies because our constitutional charter does not recognise a state of emergency. If the government hoped to enforce something similar as was art. 14 in the Austrian constitution, it would probably be in favour of this solution, but in view of the conditions of power in our country this would come up against strong resistance, so the government looked for a way out in this committee."

Instead of the delegation of the creation of norms, the method was applied of the substitution of a standard legislative body with a body directly derived from it however which would be far more flexible in taking action. This was the 24-member committee elected by parliament from the ranks of legislators always for one year which was to supervise the executive and take immediate ordinances which would otherwise have required a law, for the period when these tasks could not be met by a full legislative body because, for example, the electoral period had expired and a new one had not convened after the elections, or it had been dissolved or its session had been postponed. The permanent committee was to execute all legislative and administrative powers which under normal circumstances were carried out by a regular parliament, besides the mentioned matters (could not elect the President of the republic and his Vice-President, could not amend constitutional laws and the competence of authorities, unless it would concern extending the competence of authorities already established by new tasks, could not lay down new financial obligations to citizens, extend conscription, permanently burden state finances or appropriate state assets and finally was prohibited from giving permission to declare war).

The discussions of the constitutional committee showed that it was considered whether the permanent committee was to issue legal regulations with the legal force of ordinances which would represent a certain combination of a model of substitution and delegation, and would be of indisputable advantage (or disadvantage) in that the validity of an ordinance of the permanent committee could be judged by any applicable court in a individual case (in accordance with art. 102 of the constitutional charter). However in the end the authors of the draft of the constitutional charter recognised the strength of the law by an ordinance of the permanent committee the validity of which could not be examined by common courts, so a space appeared here for the involvement of the Constitutional Court in the system of checking that the powers of the permanent committee were not being abused.

In the words of Jiří Hoetzel the government was against this. Deputy Karel Kramář – in agreement with Hoetzel – expressed great mistrust in this respect:

"I am afraid of the Constitutional Court in this matter. ... I would remove the Constitutional Court from this and submit it only to the parliamentary bodies, as this is sufficient control and corresponds to the constitutional principle. If you were to want a Constitutional Court, then let it decide only about constitutional matters."

However Weyr finally enforced in the constitutional committee that the Constitutional Court would obligatorily scrutinise ordinances by power of law. The government accommodated the deputies at least in the Constitutional Court not having general jurisdiction of control over ordinances of the permanent committee by power of

law. It was not to be engaged in whether the procedural conditions were met of their adoption, whether there was an urgent situation here and the like, but only in "jurisdictional" matters, namely only whether an ordinance does not contradict the constitution in its content. The Constitutional Court only represented one of the control policies. The second, and in Hoetzel's or the government's opinion, was the more important political policy involving the necessity to have the ordinance of the permanent committee approved by both chambers of parliament by the nearest opportunity, within two months at the latest from their sessions, otherwise the ordinance would become void.

Finally a formulation would be chosen that the Constitutional Court would only decide whether an ordinance by provisions power of law complies with art. 54 par. 8 letter b) of the constitutional charter. It was therefore excluded that the Constitutional Court would be engaged in the conditions and manner of passing an ordinance and it was also excluded that the Constitutional Court would scrutinise whether the permanent committee did not exceed other bans under art. 54 par. 8, for example under letter c) whether an ordinance by the provisional power of law did not lay down for citizens new permanent financial obligations, whether it did not extend conscription, whether it did not permanently burden state finances or appropriate state assets.

Also in proceedings on scrutinising laws the Constitutional Court could merely scrutinise the compliance of contents of a law with the constitutional charter, not the manner of its adoption (i.e. formal flaws). Deputies in the constitutional committee expressly wished to exclude this possibility – according to their ideas the Constitutional Court was only to meet an interpretative role, although they admitted that the principle according to which *"nobody – even courts – has the right to scrutinise validity of published laws* [,] *introduces into each state, even if it were all the more constitutional, an absolutist element.*" Weyr also argued practically – it was not possible to place on the shoulders of the Constitutional Court to decide how many deputies were present, how they voted because *"it would then have to scrutinise everything possible, ... then it would be above parliament and these few people would again make decisions about everything.*" According to Hoetzel, who was in agreement, it would be contrary to the principle that courts could only scrutinise if a law was duly promulgated – however he remained silent about the fact that this principle understandably applied to the decision-making of common courts whereas in relation to the Constitutional Court the reasons for its application weakened.

The Constitutional Court made decisions in a case by a judgement. If, after a public oral hearing, the Constitutional Court concluded that a petition is justified, it expressed by a judgement which provisions of a specific law contradict which provisions of a specific constitutional law, or which provisions of a law of the National Assembly have exceeded its constitutionally defined competence and these provisions are void. Such a judgement was published in the Collection of Laws and Ordinances without reasoning, in official journals in their full version and reasoning. The publication of the judgement in the Collection of Laws and Ordinances should have had this effect and from this day the legislative bodies, the government, all the authorities and courts were bound by the judgement.

The idea that the Constitutional Court could scrutinise merely the compliance of the contents of a law with the constitutional charter, but the manner of its adoption, was based on the conviction of the constitutional committee that constitutional justice, as an exceptional institution, is "breaking" into the principle of the sovereignty of the legislator which means that art. I par. 1 of the establishing constitutional law must, as an exception, be

interpreted restrictively, which was also projected into the regulation of the effect of the Constitutional Court's judgement:

> *"no law, even if it would clearly contradict the constitutional charter in content, is not void any longer, but only becomes so after a verdict of the Constitutional Court (art. 18 of the draft), with the effects ex nunc.*" (an explanatory report to the bill on the Constitutional Court).

The language of procedure of the Constitutional Court even externally was Czechoslovak (sic!). The rules of procedure also laid down that the President of the Constitutional Court was to submit to the President of the Republic "a statement of his activity" every year, namely something like an annual report.

It is appropriate at this point to make a comment about the competence of the Constitutional Court in relation to the laws of the Diet of Carpathian Ruthenia which in the end also closely relates to the question of the membership of the Constitutional Court. In this point the constitutional charter remained a dead letter. The Diet of Carpathian Ruthenia was never established; the competence of the Constitutional Court in relation to the laws of the Diet of Carpathian Ruthenia was therefore never fulfilled and the three candidates for a member and substitute of the Constitutional Court who were to be elected by the Diet of Carpathian Ruthenia, were appointed throughout the existence of the First Republic in its place by the Czechoslovak government.

THE CONSTITUTIONAL COURT IN ITS FIRST TERM OF OFFICE

The Constitutional Court of the Czechoslovak Republic was constituted for the first time on 17 November 1921, and its President became Karel Baxa (lawyer and city mayor of Prague), Vice-President Antonín Bílý (judge of the Supreme Court in Brno) and judges Konstantin Petrovič Mačík (Vice-President of the court in Košice), Josef Bohuslav (judge of the Supreme Administrative Court in Prague), Václav Vlasák (judge of the Supreme Administrative Court in Prague), František Vážný (judge of the Supreme Court in Brno) and Bedřich Bobek (a high official of the ministry of interior). Each one also had a substitute in case he could not attend a meeting of the Constitutional Court, or his mandate had ended prematurely (lawyer Mořic Eckstein, judge of the Supreme Court Antonín Latka, lawyer Emanuel Löwy, deputy high state prosecutor in Košice Nikolaj Mašika, judges of the Supreme Administrative Court in Prague Josef Čapek and Bedřich Říha and judge of the Supreme Court in Brno Ivan Jurecký). The secretary of the Constitutional Court from the start of its activity was Jaroslav Krejčí, a high official of the office of the government presidium, later an important constitutionalist who also became the President of the Constitutional Court in its second term of office in 1938 and later also the minister of justice.

Karel Baxa – first President of the Constitutional Court

Karel Baxa was born on 24 June 1863 in Sedlčany as the first-born son of the local headmaster. He was the nephew of poet and journalist Karel Havlíček Borovský. After graduating from the Academic Grammar School in Prague he studied law and after gaining his law doctorate at Charles University took up a career as lawyer and politician. He undertook his legal traineeship in Tábor and Cheb. In 1891 he returned to Prague and opened his own law office in Štěpánská Street in the New Town. He gained public awareness

as a defender of the Omladináři (a group of young radicals) in the famous trial of 1894. In 1895 he was elected deputy to the land diet and remained so until 1913. In the years 1901-1918 he also became a member of the Chamber of Deputies of the Imperial Council in Vienna. He was chairman of the constitutional radical party for ten years (1898-1908) and also held one of the leading roles after it merged with the constitutional progressive party. As of 1911 he permanently became a member of the Czech National Socialist Party. He was known for his radical nationalism and anti-German and anti-Jewish views. He also made his mark in history as an opponent of Tomáš G. Masaryk in the role of lawyer of the murdered Anežka Hrůzová in the case of the Polná murder in which he defended the theory of a ritual Jewish murder (the so-called Hilsneriada); besides this case Masaryk and Baxa were long-term representatives of two marginal poles of the Czech political scene at the turn of the twentieth century.

In the first municipal elections held after the establishment of Czechoslovakia Karel Baxa was elected to the body of municipal elders and in June 1919 he became mayor or Lord Mayor of Prague. Besides holding the office of Lord Mayor and President of the Constitutional Court, Karel Baxa became chairman of the board of directors of the Czech Bank in 1923. As of 1928 he was also a member of the land council for Bohemia. He resigned from the office of mayor on 5 April 1937 and died on 5 January 1938.

Proceedings before the Constitutional Court of the Czechoslovak Republic

The Constitutional Court initiated its activity by preparing and approving the rules of procedure and dealing with organisational and material issues. To begin with it was based in the offices of the government presidium at Prague Castle. Its first public hearing was held on 7 November 1922 provisionally at Prague Old Town Hall, undoubtedly due to the President of the Constitutional Court and Prague Lord Mayor being one and the same person. Later the Constitutional Court found its permanent seat in the rooms of the so-called unification ministry (the ministry for unifying laws and administrative organisation), in Prague I on the corner of the streets Dušní and Bílkova.

In its first term of office (1921-1931) the Constitutional Court held only obligatory proceedings on scrutinising ordinances of the so-called permanent committee of the National Assembly with the provisional power of law. In the years 1922-1923 it firstly discussed a series of 9 ordinances passed in 1920 before the appointment of the Constitutional Court. At the end of the first term of office, in 1930, it decided on a further 9 ordinances of autumn 1929. No other proceedings were held before the Constitutional Court, and it did not receive any petition for scrutinising the constitutionality of a law. In the years 1923 to 1929 it was virtually inactive and the judges met only once a year for a plenary meeting in the pre-Christmas period (the “advent” Constitutional Court) which was more like a social occasion.

The Constitutional Court did not find any of the scrutinised ordinances in contradiction to the constitutional charter and the lay or professional public did not register the absolute majority of its judgements. An exception was only the first of these of 7 November 1922 (Judgement Const. 2) concerning an ordinance on the incorporation of Vitorazsko and Valčicko (small territories gained at the Paris peace conference at the

expense of neighbouring Austria). Although the ordinance was passed by the Constitutional Court, in the reasoning of its judgement the court substantially criticised the possibility of delegating legislative power to executive power. Even as early as this time, the practice of the delegation of legislative power started to spread in Czechoslovak political life. Therefore, the Constitutional Court's decision was met with a hostile reception and aroused fierce criticism in the professional press.

Hoetzel, who represented the government in the proceedings and whose arguments were rejected by the Constitutional Court, responded to this first judgement of the Constitutional Court, "of his child", by a long polemical article in the magazine Právník (Lawyer) in which – referring to himself "*as a sort of live motivated report"* – described the court's judgement as *"totally dubious"*. On the contrary, the secretary of the Constitutional Court, Jaroslav Krejčí, defended the position of the Constitutional Court and received unprecedentedly sharp, even denunciatory, criticism from Hoetzel on the pages of Právník. To verify the opinion of the Constitutional Court to permit the delegation of legislative power the suddenly uncertain Constitutional Court had expert opinion drawn up by renowned constitutional lawyers and theoreticians, Prof. Duguit, Prof. Hauriou and Prof. Hans Kelsen. Hoetzel also made contemptuous remarks about them – "*They have one merit and that is that they are brief.*" He described Prof. Hauriou as a "*typical representative of mixing together legal and political (sociological) views"* and Kelsen would do better *"if he would come to terms with what we did in the constitutional committee and National Assembly.*" (magazine Právník, 1923, pages 390-392).

The following passage also aroused a hostile reception which dealt with the impermissibility of the delegation of legislative power to executive power. In the reasoning of its judgement the Constitutional Court stated:

> *According to art. 6 (1) of the constitutional charter the National Assembly executes legislative power. There is no mention in art. 6 or in any other provision of the constitutional charter that the National Assembly would be constitutionally justified to transfer this right and obligation to delegate legislative power to another functionary, namely to the government. Nor is it possible to remove the power even from art. 55 of the constitutional charter to delegate legislative power to the government. The constitutionality of the ordinance is only conditioned by the fact that it was issued to execute a certain law, but also within its limits. The ordinance, issued on the basis of the delegation law, would be issued to execute this law, but would not be issued within its limits, because the delegation law, generally empowering the government, would use the ordinance to regulate a certain section by arranging the legal circumstances requiring a legal enactment, does not define the limits in which the arrangement of the legal circumstances is to take place.*

Under the impression of this judgement the government refrained for a while from the practice of using delegating clauses in laws, however in later years this method began to be enforced again to a greater extent. This practice reached its climax during the Great Depression in the form of the passing of the delegation law – law on the extraordinary power of ordinance of 9 June 1933 No. 95/1933 Coll. – by which the government had unrestricted power to deal with many issues which would otherwise be dealt by the National Assembly by government ordinances. This law also played an important role in delays in the second term of office of the Constitutional Court.

INTERLUDE 1931-1938

After the expiry of the first term of office of the Constitutional Court on 17 November 1931, political representatives did not manage to bring together the Constitutional Court for a new term of office for 7 years. By an unanimous opinion of the plenum of the terminating Constitutional Court the judges remained in their offices until the constituent meeting of the newly appointed or elected members and substitutes, but as the years passed the panel of judges naturally diminished. Even if the Constitutional Court would want to adjudicate under its existing membership, it was so decimated by the mid 1930s that it would be difficult for it to constitute a quorum.

Just as when constituting the Constitutional Court in the first period, so in the second period its appointment foundered above all on the three members and substitutes appointed by the President of the Republic by the motions of the Chamber of Deputies, Senate and Diet of Carpathian Ruthenia, or the government. The cause was the bickering of the political parties which wanted to enforce persons favourably inclined to them, and later also the government's real fear of the Constitutional Court's decision. At the time the government had at its disposal the already mentioned general delegation law of 1933. Therefore, it did not feel any need to revive the permanent committee of the National Assembly for passing ordinances with the provisional power of law, and whenever the need arose, it dealt with everything necessary simply by resorting to using its ordinances. Aware of the Constitutional Court's stance expressed in its first judgement on the unacceptability of the delegation of legislative power, the government began to fear for the future of the delegation law as well as of the ordinances passed on the basis of this law. These fears intensified in 1937 when both supreme courts submitted a proposal to the Constitutional Court to abolish parts of the delegation law. Nevertheless, there was no Constitutional Court to decide the matter and the government coalition was deftly manoeuvring to postpone its appointment.

The President of the Republic, Edvard Beneš, did not appoint the new Constitutional Court judges until 11 June 1937. Karel Baxa was to be re-appointed President. The prime minister had to countersign the appointment hence the letters of appointment were submitted to him for signing and delivery. However the letters of appointment were not delivered to the judges for several months. It would seem that they were intentionally withheld at the office of the government presidium. The government office finally acceded to the delivery of the letters of appointment in November 1937, but there was still a delay in ceremonially convening a session of the government at which the appointed President of the Constitutional Court was to take the oath from the President of the Republic.

The topic of the non-appointment of the Constitutional Court came to be discussed more vociferously in the possible context with the delegation laws by some deputies for whom it served as an illustrative example of one of the symptoms of the apparent undemocratic government.

By this time the already seventy-five year old Karel Baxa did not live to take the oath. He died on 5 January 1938.

THE CONSTITUTIONAL COURT IN ITS SECOND TERM OF OFFICE

Finally, the Constitutional Court was appointed for its second term of office on 10 May 1938. Jaroslav Krejčí, the Constitutional Court's secretary, replaced the deceased Karel Baxa as its President. The court further consisted of František Novák (a high official of the ministry of agriculture), Ilja Hadžega (President of the regional court in Užhorod in Carpathian Ruthenia), Rudolf Procházka (judge of the Supreme Court in Brno), Josef Tuček (judge of the Supreme Administrative Court in Prague) and František Zikán (judge of the Supreme Administrative Court in Prague). Adolf Záturecký, the vice-President of the Supreme Court in Brno, was elected vice-President of the Constitutional Court by the plenum. Josef Pliml (a high official of the land office in Prague), Theodor Nussbaum (a judge of the Supreme Court in Brno), Josef Orglmeister (head of the district court in Děčín), Karel Loyka (a high official of the land office in Užhorod), Maxmilian Pokorny (a judge of the Supreme Court in Brno), Vladimír Mrazík (a judge of the Supreme Administrative Court in Prague) and Václav Dusil (a judge of the Supreme Administrative Court in Prague) were elected substitutes. Gejza Zigo, a high official of the government presidium, was appointed the secretary of the Constitutional Court.

Jaroslav Krejčí – second President of the Constitutional Court

Jaroslav Krejčí was born in Křemenec in Moravia on 27 June 1892; he was thus 45 years old at the time of being appointed President of the Constitutional Court, i.e. precisely the age required for a judge of the Constitutional Court. He studied at the Czech grammar school in Uherské Hradiště which he completed in 1911, went on to study law at Prague University and graduated in 1916. He practised law as a candidate of law up to 1918 and entered the civil service after the establishment of the Czechoslovak Republic. In the years 1918 to 1920 he worked at the state political administration in Moravia and from 1920 at the government presidium in Prague throughout the First Czechoslovak Republic. At the wish of Karel Baxa he was also entrusted with the office of the Constitutional Court's secretary before the Constitutional Court was established in November 1921 by the then prime minister, Edvard Beneš, in which he remained until he became the President of the Constitutional Court in its second term of office. He was also a member of the land council for Bohemia on behalf of the National Socialist Party and a substitute member of the land committee from 1928 to 1938. In the inter-war period he was also presented with a foreign award – knight of the order of the Honorary Legion and Commander of the Order of the Yugoslav Crown. He firstly became a private senior lecturer of constitutional law at the law faculty of Masaryk University in Brno and soon afterwards – on 31 January 1938 – he was appointed extraordinary honorary professor of Masaryk University; he could not receive his full professorship because of the closure of the universities by the Nazis (Krejčí Jaroslav ml.: *Mezi demokracií a diktaturou. Domov a exil*, Praha: Masarykův ústav – Archiv AV ČR v nakl. albis international, 2006, page 33; Tomeš Josef: *Odboj či přežití? Osudové dilema Jaroslava Krejčího*, in Dějiny a současnost, 3/1999; Koudelka Zdeněk: *Život a dílo Jaroslava Krejčího*, Brno, Masarykova univerzita, 1993).

After the Munich crisis and the constitutional changes that followed, Jaroslav Krejčí, at the wish of the newly elected President of the so-called Second Czecho-Slovak Republic, Emil Hácha, was elected a member of Rudolf Beran's government as minister of justice on 1 December 1938. The appointment of Krejčí as a member of the government did not result in

a state of direct incompatibility of offices according to some explicit provision of the constitutional charter – the constitutional charter did not explicitly allow one person to hold the mandate of deputy or senator and be a Constitutional Court judge simultaneously. In the case of the Constitutional Court, which was not a court in the true sense of the word, and its members continued to perform their main profession as judges, lawyers or officials, the borderline between powers was even less clear. Jaroslav Krejčí at least surrendered his salary of Constitutional Court President for the time he held the office of minister of justice; otherwise he held both offices simultaneously.

The Constitutional Court in the So-called Second Republic and during the Protectorate of Bohemia and Moravia

The Constitutional Court firstly had to end the already initiated proceedings on the petitions for scrutinising laws, however in view of the precipitous events that culminated in September 1938 with the Munich crisis, this proved unsuccessful up to the dissolution of the First, or the Second Republic. At the turn of 1939 the Constitutional Court at least scrutinised 28 ordinances of the permanent committee as its official duty. Needless to say, it approved the absolute majority of them without much ado.

After the establishment of the Protectorate of Bohemia and Moravia in mid March 1939, the Constitutional Court surprisingly still worked for several more months. The breakup of Czechoslovakia and loss of extensive territory understandably affected the membership of the Constitutional Court – judges of German nationality left to join the services of imperial justice (Orglmeister, Pokorny), persons of Slovak nationality went to serve the Slovak state (Vice-President Záturecký, court secretary Gejza Zigo); even judge Hadžega, who had remained in the territory of Carpathian Ruthenia occupied by Hungary, stopped attending the meetings of the Constitutional Court. The plenum elected Josef Tuček Vice-President of the Constitutional Court.

It remains a paradox that at this time it backed two judgements which expressed a legal regulation to be void for the first time. This was by the judgement of 23 May 1939 (Judgement Const. 60) in the case of the ordinance of the permanent committee of 16 November 1938 no. 291/1938 Coll. on expropriation in which the Constitutional Court repeated its stance on the impermissibility of the delegation of legislative power to executive power without the express authorisation of the constitution, and the judgement of 28 June 1939 (Judgement Const. 27) in the matter of law no. 147/1933 Coll. on the prosecution of anti-state activities of civil servants which the Constitutional Court partly abolished on the grounds of violation of the constitutional warrant of judges' independence. However, with the advancing Nazi totalitarianism these judgements were of little practical importance.

However the Constitutional Court did not manage to end proceedings on the delegation laws of the mid 1930s, which were one of the main causes for delays in appointing the Constitutional Court for a second term of office. Firstly, the government devoted extraordinary attention to these proceedings. It brought in Prof. Hoetzel, as an expert in constitutional law and the father of the constitutional charter, and attempted to convince the Constitutional Court at the very start of the proceedings that it had nothing to discuss because the validity of the authorisation had already expired and the verdict of the

Constitutional Court would only be of academic importance. The government hoped that its objections could *"lead to the dissolution of the entire matter before the public oral hearing"*. In his expert opinion Hoetzel categorically denied that the Constitutional Court could scrutinise the constitutionality of law already void. Besides the legal arguments, however, he warned the judges of the political consequences of the possible decision of the Constitutional Court: "*At a time when our enemies are awaiting for every opportunity to criticise our state for not upholding the law, the denunciation of the delegation law would mean the significant disqualification of our country.*" However what arises from the records of internal meetings of the Constitutional Court judges is that, as twenty years previously, so even now they were not convinced by Hoetzel's authoritative interpretation and despite his emphatic speech they prepared to subject the delegation laws to meritorious scrutiny.

However the government later lost all interest in the result of these proceedings because it safely insured itself against a possible verdict of the Constitutional Court. The parliament passed a totally new delegation regulation at the government's proposal on 15 December 1938, the constitutional law no. 330/1938 Coll. on delegation to changes in the constitutional charter and constitutional laws of the Czechoslovak Republic and on extraordinary ordinance power (hereinafter referred to as "the Great Delegation Law"). This Great Delegation Law immediately brought two new things as opposed to existing delegation practice. The President of the Republic (at the unanimous government proposal) was empowered directly to make changes in the constitution; he could even suspend it. Secondly, it took the form of a constitutional law; incidentally this was essential if the executive was empowered to make changes to the constitutional charter. This new Great Delegation Law had a simple solution for the still incomplete proceedings before the Constitutional Court on earlier "small" delegation laws. The provision of art. III by the power of the constitutional law retroactively and all-inclusively covered the delegation laws and their amendments of 1933 to 1936, and all the government ordinances issued on their basis by the cover of constitutionality. What is poignant about the circumstances of the adoption of the Great Delegation Law is the fact that it was presented by the government of which one of the members at this time was the President of the Constitutional Court, Jaroslav Krejčí.

The result of the proceedings before the Constitutional Court was predetermined by the Great Delegation Law. The concept of the judgement survived in the file by which the motions of the Supreme Court and Supreme Administrative Court should have been rejected. The arguments were simple:

> *In view of the legal state created by the provision of art. III of the constitutional law no. 330/1938 Coll., the* [Constitutional Court] *does not have more options to pronounce the law as void in order to comply with the submitted motions contesting it. ...* [*If*] *the government ordinances have the validity of a law, based on said delegation law issued by the power of the quoted constitutional law, from the beginning of their effect, then these valid norms must be regarded in all their aspects as valid norms. ... If this is the case, then the only reason has passed for which said motions were submitted to the Constitutional Court at their time.*

It is not clear why the proceedings were not concluded with the adoption and promulgation of this judgement. Either way, the existence of the Constitutional Court was questioned even before the occupation of the Czech lands by Nazi Germany and the

establishment of the Protectorate in this respect no longer brought any significant qualitative change. The very adoption of the Great Delegation Law in its consequences, even though not immediately and visibly, removed the idea of constitutional justice in its essence, because the executive could, on the basis of delegation, issue constitutional laws directly that were outside the cognition of constitutional justice.

During the war years the Constitutional Court in effect ceased to exist. Besides being at the head of the ministry of justice throughout the period of the Protectorate, Jaroslav Krejčí was raised from the office of Deputy Prime Minister after the arrest of Prime Minister Alois Eliáš to the Prime Minister of the Protectorate government. Just before that he had sworn an oath of loyalty to the Leader of the German Reich, Adolf Hitler, as the President of the Constitutional Court and member of the Protectorate government – as was done by all the other Constitutional Court judges after him. Jaroslav Krejčí firstly unofficially represented the sick State President, Emil Hácha, in the office of Prime Minister of the Protectorate government from 1943, and then from May 1944 he officially represented the sick State President Hácha. On 19 January 1945 he was replaced as head of the Protectorate government by Richard Bienert and continued in the office of deputy prime minister until May 1945. After liberation Jaroslav Krejčí was arrested on 12 May 1945 and was sentenced by the National Court in Prague, together with other members of the Protectorate government, under the so-called great Retribution Decree (Decree of the President of the Republic No. 16/1945 Coll. on the punishment of Nazi criminals, traitors and their helpers and on extraordinary people's courts) for collaboration with the Nazi regime to 25 years imprisonment. He was given a high sentence despite agreeing with the resistance activity of his son and up to a certain extent also concealed it, while a number of people testified in his favour. He died in Pankrác prison in Prague on 18 May 1956.

Epilogue

In the short post-war period the Constitutional Court was not re-appointed. The period was precipitous. The law could not obstruct the confrontation and judgement of traitors and collaborators, and revolutionary changes, especially the revival of the post-war economy in which the elements of a controlled economy were increasingly appearing. The institution of the Constitutional Court had no place in the already deformed circumstances of the liberated Czechoslovak Republic slowly moving towards a different form of totalitarianism. After the elections to the Constituent Assembly and especially after the February coup in 1948 the preparations for the new constitution came fully under the control of the Communist Party of Czechoslovakia. The days of constitutional justice were numbered. Ideologically, the idea was enforced of the united execution of state power, or "people" power in the spirit of cooperation which was to replace the traditional concept of the division of power in which individual power was maintained in mutual equilibrium.[1] The

[1] The revolutionary "idea of the single execution of state power in the spirit of cooperation" inspires some even today. In his ceremonial speech to commemorate the 15th anniversary of the Constitutional Court of the Czech Republic, President of the Republic, Václav Klaus recalled the explanatory report to the Constitution of 9 May and its stance about cooperation between state authorities, and though he remarked that nobody probably supports this opinion in this form now, he did point out that *"its softer variants have its advocates even today*". Apparently he considers himself as one of them, because as he continued, *"searching for the right »division of labour« among the supreme constitutional bodies [is]* ***just as pressing today as it was then****."* – the personal website of Václav Klaus http://www.klaus.cz/clanky/795.

Constitutional Court could not function by this logic. However, because the post-February regime intended at least to visually maintain a hierarchical structure of the rule of law and distinguish constitutional laws endowed with higher legal force and ordinary laws, the office of the constitutional court was formally entrusted to the presidium of the National Assembly which was to also fulfil the role of the former permanent committee (art. 65 of the Constitution of 9 May: *"The Presidium of the National Assembly presents a binding interpretation, if a case is disputed, of laws and decides solely whether the law or the law of the Slovak National Council contradicts the constitution or the ordinance of the law.*"). The controlled merged with the controller and antagonisms were removed even before they could arise. Communist deputy Vladimír Procházka expressed this poetically when he presented to the National Assembly the bill of the new constitution which was later passed and entered into history under the title of the Constitution of 9 May:

> *"Above all, we are introducing the control of the people and responsibility to the people at national committees where it is already exercised and where it is almost obvious, but we are also introducing it for parliamentary bodies of which there are two, the National Assembly and Slovak National Council. According to the new constitution the National Assembly really does become the supreme body in the state. We are removing all special bodies which were more or less of a bureaucratic nature and would have held greater power than the National Assembly. I am thinking above all of the Constitutional Court and Electoral Court. Our concept is based on the idea that these three bodies, namely the parliament, President and government, are to cooperate as bodies of single people's power, not to continue against each other as representatives of some special powers. Therefore, we are introducing in the chapter of the National Assembly ... a new thing which is very important, whereby we are considerably expanding the office of the presidium of the National Assembly. To the office that the presidium had hitherto exercised we are adding the office of the permanent committee and the office of the Constitutional Court. The purpose of this important change is better cooperation with the government, more flexible and effective legislation.* (Shorthand record of the discussion of the so-called "Constitution of 9 May" of 7 May 1948).

Deputy Gustav Burian added that the extension of the office of the presidium of the National Assembly will remove the deficit of the hitherto implemented model of the division of labour when the legislative body made decisions on legal norms however the interpretation of its will was entrusted to other bodies who often wrongly interpreted its intention:

> *"The possibility of presenting a binding interpretation of the law, namely the constitution, places the presidium of the National Assembly above all judicial and executive bodies. A binding interpretation means literally that every court and every public authority will be bound by a legal opinion when applying the law which will be expressed by the presidium of the National Assembly. It will continue to decide alone whether an ordinary law contradicts the constitution or not, so its verdict will be final in this respect. No other state authority will scrutinise its verdict."*

The adoption of the Constitution on 9 May was the culmination of the dissolution of constitutional justice in the Czech lands and in Slovakia. The Constitutional Court

disappeared for a long period of more than 40 years from the system of state authorities and from the rule of law. At the time of the Prague Spring the institution of the Constitutional Court did reappear on the scene, as it had already done several times in the past, but only on paper – the Constitutional Court of the Czechoslovak Socialist Republic, regulated by the Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation, or by this constitutional law simultaneously assumed the constitutional courts of both socialist republics, were to be quietly forgotten during the period of normalisation. There is nothing to regret in today's point of view. Just as in the eyes of some people, the idea of a constitutional court was compromised by its brief association with the exponents of the administration of the Protectorate. Fortunately the never appointed socialist constitutional courts were saved from a similar perception – it can certainly be imagined what sort of judgements they could have made during normalisation. However, after the fall of the totalitarian regime the revival of constitutional justice was not easy to enforce. Constitutional courts are always an obstacle to some people. It is good to observe who such people are in a lesson from history.

For further information see also monograph: OSTERKAMP Jana: *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920-1939)*. Frankfurt am Main: Vittorio Klostermann, 2009. ISBN 978-3-465-04073-6.