Does the Czech Constitution Provide a Solid Base for the Nation's Political Health in Comparison with the U.S. Constitution?

The 12th Annual Freedom Lecture Delivered by Petr Pithart

November 17, 2011

Transcript

I do not intend to present to the distinguished audience any news from comparative constitutional law science. However, I hope that you will find interesting some comparisons between how politics works in the US on the one hand, which you are familiar with, and how it works in the Czech Republic on the other hand. In particular, I will speak about two institutions that take care of the Constitution in the Czech Republic more than other ones. First, I will speak about the Senate of the Parliament of the Czech Republic, where I have been active since its establishment in 1996 and was elected President three times. Then I will speak about the Constitutional Court of the Czech Republic, an analogy of the American Supreme Court. We currently live at a time of a crisis that is hard to capture and at a time when public opinion and politics are polarized. The defeated ones, at least in the Czech Republic, are often tempted to refuse to recognize their defeat. They would therefore like to revoke the results of the voting instead of trying to win it next time. And exactly then is the role of the two above institutions absolutely essential, as they serve as protectors of constitutionality, in particular of the stable and unchangeable nature of the Constitution. Such is the role of guardians of freedom. Freedom is unthinkable outside a stable and firmly agreed fundamental framework of rights and duties defined by the Constitution. The Constitution is then guarded by the court, in the United States by the Supreme Court, and in the Czech Republic by the Constitutional Court. And – to close the

logic of interdependence - the final word in creation of both the Supreme Court and the Constitutional Court is given via "advice and consent" to the Senate.

As for the United States, I believe the major role played by courts is the most typical feature of the American political system. I am not sure if it is also the most democratic feature, but undoubtedly it is the most useful one for the freedom of people and citizens. However, I know that there are both academic and political discussions ongoing, even here in the United States, about whether this role is today perhaps too great. We even hear about the risk of *juristocracy*. Not only in the US but currently also in the Czech Republic. The above warning words are most loudly voiced by our President and, every now and then, also by representatives of the executive power. We hear them almost always whenever the Constitutional Court decides against the ruling majority. *Juristocracy* is used as a scare in the Czech Republic simply as needed at a given moment.

However, the intensity of interventions of the Czech Constitutional Court in politics is significantly lower compared with the United States. This is one of the reasons why nobody in the Czech Republic has yet recommended "taking the constitution away from the courts", as Mark Tushnet has done in the US. Nevertheless, we have recently seen one more important new phenomenon. In both countries, there is a clear, undeniable, and steady decline in the authority of directly elected bodies in general, most notably of Parliament or the Congress. Is the authority and public trust, or the remains of trust, shifting away from directly elected bodies to non-elected or indirectly elected ones? This is at least what Fareed Zakaria implies. It is just an understandable or also a healthy trend? Moreover, we have to ask the question if Zakaria would today repeat his opinion again, knowing what role has been played and is still played, for instance, by central banks when financial crises occur and when they are tackled.

What role does the Constitution play in that respect? In relation to constitutional courts in our countries, we have to ask whether a certain degree of this progressing judicialization of politics is a healthy or an unhealthy tendency. It is indeed questionable whether it is right when an outvoted party – say in our Chamber of Deputies –hurries more and more often to Brno, where our Constitutional Court has its seat, to challenge adopted legislation on grounds of being unconstitutional. Where is the fine line that divides political disputes based on values from disputes about constitutionality? Constitutionality is also based on values but on a far deeper level. How can we reliably make a difference between present and presumably shallower positions and more permanently rooted values and attitudes? Americans have been searching for answers to the above questions for a very long time. They nowadays more or less accept that the Supreme Court cannot stand outside of politics.

Over the past weeks and months, we have been lingering in the midst of government attempts to push through a fairly drastic reduction of the welfare state. Provided the defeated parties do not learn to accept their political defeats during voting in Parliament, they will not only flood the Constitutional Court, but they will also rob it of its uniqueness and its irreplaceable value. A constitutional judge cannot deem that the fact that one team was weaker in the elections than the other represents a foul. The same applies to the fact that an Act is not enough socially considerate.

Against the background of this lingering, let me now discuss the similarities and differences between the American and Czech systems of constitutional courts. The formation of our Constitutional Court has been inspired by a similar process in the United States. In the Czech Republic, the President also nominates candidates to serve in the Constitutional Court and subsequently appoints them upon prior consent granted by the Senate. In other words, the Senate actually elects constitutional judges out of those proposed by the President of the Czech Republic. In my opinion, there is no greater similarity in the constitutions of our countries than this procedural one. Besides, our senators are just like yours, elected for a six-year term, always a third at a time in a two-year interval. However, the Senate in the Czech Republic does not represent the states of a federation, but rather 81 electoral districts with a two-round majority system.

Let me just note in this context that elections into the Chamber of Deputies, which is the lower chamber of our Parliament, follow the principle of representation of self-governing territorial units. Elections into the Chamber of Deputies take place in 14 electoral districts that reflect our administrative regions and the capital city of Prague. However, the system there is proportional. To elect or rather to confirm constitutional judges nominated by the President is actually one of the greatest powers of the Senate, which has been proven well over the past fifteen years. The Constitutional Court, verified by the Senate, has already several times intervened in a major way in attempts to amend the Constitution or to evade it. I will go back to this issue later. However, it is clear that the Constitutional Court may not have intervened had its composition been different.

Your Constitution, including its 27 Amendments, has been in force and effect already for 223 years. The last of the twenty-seven Amendments was ratified in 1992. The American Constitution has thus been in force and effect ten times longer than our Constitution, and even the latest Amendment has been in force and effect longer than our Constitution, which is effective as of 1 January 1993. However, even our Constitution has seen only minor changes over the hectic times. Those who prepared the Constitution aimed to have a "short" and concise one, similar in type to yours. We wanted it to be as stable as possible or

as rigid as possible, as constitutional lawyers say. If proven over time, this would be a similarity of our constitutions that may be perhaps the most important one. Such constitutions may or even should be amended. However, the question is by whom: whether by the ruling majorities in Parliament or by somebody else, for instance, by the judicial power. It seems to me, in any case, that the decision about the leeway for amending the Constitution was actually provided for by the persons who prepared the Constitution. The more detailed the Constitution is, the smaller leeway there is.

Whereas the Constitution of inter-war Czechoslovakia was inspired by the United States by using the same diction only in the Preamble, the Constitution from 1992 was inspired by the United States mainly by provident conciseness and in-built difficulty to amend it. I believe that it was a very good inspiration. It is enough to allow us to speak about the positive impact of American constitutionalism on Czech constitutionalism. However, this also means that we face similar problems like you, which naturally do not always have an easy solution. The United States has gradually started to regard the Supreme Court as a court that is not apolitical. That means, as a court that is not and cannot be absolutely neutral towards the struggle for power and that is not just an entity that interprets and decides purely legal disputes about the interpretation of words and sentences. Its interventions in politics as a sphere of the struggle for power are therefore not illegitimate. Americans were the first ones to take this extremely difficult and even painful decision about the apolitical or political nature of the Supreme Court and did this exercise also for us. They had two centuries to tackle the issue. In the Czech Republic, we are also getting used to the fact that the illusion of the virgin-like apolitical nature of the Constitutional Court is not only unpractical because it is too elusive, but that it is furthermore not correct. I am not saying that this debate is already over. Quite the opposite: we are in the midst of the sharpest controversies. These controversies have immediate implications for the Senate. It is not only up to the President but in the end, also up to the Senate what judges will in their ten-year term decide or refuse to decide disputes that have more or less political implications.

Concise and rigid constitutions need a constitutional court that would not turn away with aversion from rulings, which have immediate or indirect implications for politics as such. Provided a single step of the executive or legislative power is not prescribed by the Constitution in detail, there is open space for an entity such as a court. The court will then rule whether this or that step not prescribed by the Constitution is nevertheless in compliance with it and, therefore, legal. Provided the Constitutional Court has authority and trust, such a step may be deemed legitimate. For instance, in 2001, our Constitutional Court thwarted the attempt of the two strongest political parties to change the election

system applicable to the lower chamber, i.e. the Chamber of Deputies, by a mere amendment to the Elections Act. They wanted to do so by ignoring the Constitution, which lays down a system of proportional representation in the Chamber of Deputies. It was an extremely serious decision against a vast political majority. That majority was back then formed in a bizarre relationship between the two strongest political parties and was called an "opposition treaty". Its aim was to marginalize and subsequently, in practice, exclude the remaining political parties forever. The treaty between these two parties guaranteed in writing that provided the current opposition wins the following elections, the two strongest parties would then just exchange their position. It was understood all the arrangements of both parties should be valid hereafter. In other words, it was an attempt to introduce a bipartisan political system, sometimes referred to as the "Westminster" system, by means of force and not natural development, and do so without amending the Constitution. At that time, President Václav Havel and a group of senators turned to the Constitutional Court, which subsequently rejected a majority of already enacted amendments as anti-constitutional. You can imagine how bitter some of the strongest politicians and their party formations were as a result.

Two years ago, the Constitutional Court ruled that the way how the Chamber of Deputies itself shortened its term of office was anti-constitutional. At that time, it seemed again to the two decisive political parties that it would be better for them to hold elections as soon as possible, and not on a date stipulated by the Constitution. They, therefore themselves tried to choose an election date that would be suitable for them. They tried to do it by means of an Act that they called "constitutional" even though it neither changed nor amended the Constitution, but merely stood next to the Constitution. It was as though the Constitution did not exist for them for a certain period of time. The subsequent decision of the Constitutional Court again caused upheaval and indignation among the strongest political parties because they again strived to significantly change the political system by this move – in the same direction as ten years ago at the time of the "opposition treaty".

Those calling for an amendment to the Constitution could be heard even louder back then. Their aim was to weaken the powers of the Constitutional Court so that it could next time no longer interfere in their struggle for power. Again, the loudest voices came from the Prague Castle. Warnings against *juristocracy*, saying that the Constitutional Court was allegedly becoming a "third parliamentary chamber", also grew louder. I am one of those who reject those arguments. On the contrary, I believe that we can still find inspiration in the United States as regards the position of the system of justice in the constitutional and political systems. In spite of all significant differences (in the United States, there is a presidential system in a federation), a strong and independent justice system serves as a

relatively most reliable guarantee of democracy and civil rights. In your country, not only the Supreme Court but also any court may judge whether this or that Act is or is not in compliance with the Constitution. Even though the dispute nearly always ends up at the Supreme Court, this is an achievement I admire.

It is often thought that the most important guarantee of freedom is the division of power, such as the system of checks and balances, which was for the first time brought to life by your Constitution. But even this system has to be protected by someone in specific disputes concerning its interpretation. However, the above is not the only inspiration. Nowadays we also have to finalize the structure and internal relationships within the public prosecuting office system. The independence of the justice system as a whole of the executive power, specifically of the Ministry of Justice, is insufficiently guaranteed in the Czech Republic. Public prosecuting offices are currently the weakest link of independent justice. The public prosecuting offices are, unfortunately, a rather impenetrable sieve, which should, however, be permeable from the police to courts. This is one of the reasons why the Czech public is increasingly disenchanted by unresolved cases, which imply corruption even in the highest places.

Twenty-two years ago, we could see the sign "Soviet Union - our pattern" almost on every corner. Our people are thus oversensitive to any analogies of this motto. That is why I am presenting to you purely prosaic and practical ideas about the American inspiration in some areas of political and constitutional life. The United States is not the pattern that the USSR used to be, and constitutional concepts are not transferable. Americans know that best, after the experience from a number of countries, namely Latin American ones, which took over the US constitution model or directly its diction and ended up in a lengthy series of dictatorships. Democracy is not a commodity that can be exported easily, which, however, does not mean that there can be no inspiration. Today I am, therefore, simply talking about an inspiration, which I see as highly topical and practical.

When I accepted your invitation, I thought that the friends of the Czech Republic and Slovak Republic should be informed about our concerns and our interest in the American experience. In particular now when we find ourselves in a situation in which representative democracy is more or less everywhere, losing credibility and trust. Undoubtedly, it has not lost it as yet. On this occasion, I have therefore decided not to speak only on a festive note and rather talk about how a stronger, self-confident, and naturally also more independent system of justice can help representative democracy regain trust.
How can it be achieved? The system of justice can do so by more rigorously and efficiently guarding it against attempts at changing it, mainly by limiting the powers of the

Constitutional Court. It can also be done by refusing to strengthen control, albeit indirect one, exercised by the executive power over the whole system of justice. However, our deputies and your congressmen and congresswomen, may not like that at all. We have to take that into account. This task is not only up to politicians. It is a task for the whole society, for everybody who tries to raise legal awareness. A self-confident and strong system of justice requires also self-confident and mainly morally strong judges and public prosecuting officers who will not take heed of the interests of political parties or governments.

Let me now go back to a fairly recent past to further explain what I refer to as inspiration. How was it manifested? Soon after November 1989, several American constitutional lawyers went to the Czech Republic and offered their help with preparing a new Constitution. I would like to mention a few names here, for instance, Lloyd Cutler, Lawrence Tribe, Dick Howard, and William Coleman. One of them, our compatriot Eric Stein, one of the founders of the European law teaching, who passed away aged almost a hundred years this summer, wrote a poignant analysis of the disintegration of Czechoslovakia. For the first two years, we followed the old socialist Constitution because we wanted the new one to be a federal one. At least I was one of those who wanted that. We were obsessed with defining relationships between a federation and the republics because, without that, it was impossible to proceed further. Then, in the summer of 1992, when it was clear that we would not agree on the definitions of the relation between the two republics and the federation, it was decided that our joint state would be divided. So, a Constitution of the yet non-existent Czech Republic started to be prepared, in great haste and a much-improvised manner. Center-right-oriented conservatives participated in the process, but there was only a minimum of constitutional lawyers. Those were actually hard to find back then if you wished to have experts with fairly clean hands at the same time. No Federalist Papers were written at that time. The Constitution had to be ready in just a couple of months. The independent Czech state, which had not originally been foreseen, had to be hastily provided with a Constitution. I am afraid that the American constitutional lawyers, who had been willing to share their advice and experience, did not have much say given the pragmatic terms of reference. Nevertheless, that does not mean that they do not deserve our thanks, albeit belatedly.

However, in the end the result was surprisingly good even without their contribution. I believe that it was so mainly because we agreed that the Constitution would be concise, i.e. open to future development throught judicial interpretation. It was also important that it incorporated into the constitutional system the Senate as well as the Constitutional Court and that the Senate was granted a major say in appointing members of that court. The

American inspiration was clear in that respect. Now after almost twenty years, I can say that this has proven to be the most important feature. However, haste also played a role. There was simply no time to write a detailed Constitution, which at that time, weak left-wingers wished to have and which would be similar to the one written by the cautious Portuguese after the fall of the authoritarian regime.

The American inspiration was followed largely thanks to the late constitutional judge Vojtìch Cepl, my former colleague from the Department of the Theory of the State and Law at the Faculty of Law in Prague during the 1960s. (The above Department was disbanded after the occupation of our country). I am sure that many of you may have known Vojtìch Cepl. After November 1989, he lectured at several American universities, and he became familiar with the US approach to law that follows from natural law. He was one of the greatest admirers of the United States, among other things on the waves of Radio Free Europe when it relocated to Prague. I just wanted to pay tribute to him in front of this audience.

Our Constitution has proven well, among other things, also because of the reason that the first fifteen judges of the Constitutional Court were appointed by Václav Havel, who precisely understood its meaning. Judges are appointed in the Czech Republic for a ten-year term, and not for life, as it is done, for instance, in the United States. The people who prepared the Constitution decided to limit their mandate, presumably because they were rather cautious. After half a century of undemocratic conditions, nobody could be sure if the first appointed judges would be the right ones. Today we more or less agree that Constitutional Court judges should be appointed only once. This means that nowadays, our "third" Constitutional Court representatives will start to be nominated gradually in the forthcoming weeks and months by the incumbent President. New judges will be nominated after the present ones resign, pass away or after their mandate simply comes to an end. "Havel's court", as it used to be called naturally with a bit of exaggeration, laid down solid and healthy foundations of the constitutional court system inspired by the United States. For the first time, it started to follow also the principles of natural law, at least in certain disputes. This was not and still is not common at all in continental law, in particular in the sphere of German, mostly positivist- and normativism-oriented law.

I have already mentioned that our Constitution will in one year celebrate twenty years. I am glad we have it as it is, including its American inspiration. In times of growing unrest, uncertainty, and tension not only in both our societies, it is a relatively reliable guarantee that we will not lose the freedoms that are dear to us and that our constitutional institutions will survive also under worse weather conditions. In the end, constitutions are not written

just for bright and sunny days.

The foundations of our Constitution are healthy. I would say that they are even healthier than our society and the world of our present politicians, who are still recovering from half a century of non-democratic conditions. Provided we know how to use the Constitution, provided we are not afraid to use it, and in particular, provided we resist the attempts to rob it – to exaggerate slightly – of its American features, freedom in general, as well as the freedom of people and citizens, does not need to be at risk even in the hard times ahead. Not even our future needs, therefore to be at risk. Besides, it is true that only free people find a way out of the economic crisis and a crisis of democracy.