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UNWRITTEN RULES IN THE CZECH CONSTITUTIONAL LAW: A FUNCTIONAL ANALYSIS

doc. JUDr. PhDr. Marek Antoš, Ph.D., LL.M.
Associate Professor
Charles University, Faculty of Law
Department of Constitutional Law
Nám. Curieových 7, 116 40 Praha 1
Czech Republic
antos@prf.cuni.cz
ORCID: 0000-0002-5619-5965

JUDr. PhDr. Filip Horák Ph.D.
Assistant Professor
Charles University, Faculty of Law
Department of Constitutional Law
Nám. Curieových 7, 116 40 Praha 1
Czech Republic
horakfil@prf.cuni.cz
ORCID: 0000-0002-7846-6308

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Abstract: *Unwritten rules are an essential and inherent aspect of any constitutional system, including that of the Czech Republic. However, there are significant differences in opinions regarding their character and importance for the functioning of Czech constitutional law. As a result, the current academic discussion results in persistent uncertainty about what unwritten rules actually are, which term should be used to describe them, and what status they should be assigned within the constitutional legal framework. This article employs the method of functional analysis to identify and define three distinct constitutional legal constructs. Although these constructs share certain common features (unwritten nature, usus longaevus, opinio necessitatis, and relevance to the functioning of the constitutional system), they differ in other respects, with each fulfilling a unique role in the Czech constitutional framework. The first construct, referred to as constitutional custom, has a norm-creating function, enabling it to independently establish new constitutional norms. The second construct, established constitutional practice, is relevant for interpreting the constitution and serves an interpretive and argumentative function by solidifying one of the originally pluralistic interpretations of the written provisions of the constitution. Lastly, the third identified construct, referred to as constitutional convention, has a preventive and moderating function. It is not legally binding or judicially enforceable. However, it can be effectively enforced through extra-legal, typically political, mechanisms. We believe that distinguishing these three separate constructs with their differing functions will help clarify the existing ambiguities surrounding unwritten rules (not only) in Czech constitutional law and prevent potential issues arising from the substitution or hybridisation of these constructs.*

Key words: *Unwritten Rules; Constitutional Custom; Established Constitutional Practice; Constitutional Convention; Functional Analysis*

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1. INTRODUCTION[1]

Unwritten rules appear to some extent in all forms of government. They form the living, dynamic part of the constitutional system, enabling its adaptability to changing social conditions (Killey, 2014). At the same time, they serve (even in systems of written

[1] The authors declare that this work was inspired by an article originally published in Czech (see Antoš, M. and Horák, F. (2024). Nepsaná pravidla v ústavním systému: Ústavní obyčej, ustálená ústavní praxe a ústavní zvyklost. [Unwritten Rules in the Constitutional System: Constitutional Custom, Established Constitutional Practice and Constitutional Convention]. *Právník*, 163(2), 120-136). However, in order to make the Czech legal environment more accessible to foreign readers, some detailed information has been omitted, important explanatory parts have been added and the text has been restructured.

constitutional law) to fill gaps (Baxa, 1917; Neubauer, 1947) and clarify ambiguous and potentially conflicting areas (Killey, 2014) in traditionally austere and abstractly formulated constitutional texts. It seems, therefore, that unwritten rules are an indispensable part of the constitutional system (if it is to function, see Dicey, 1885; Forsey, 1984), and a key tool for studying it (if we are to truly understand its functioning, see Forsey, 1984).

Despite the importance of unwritten rules for the constitutional system, the literature varies significantly regarding their definition and status. Even in the Anglo-Saxon constitutional doctrine, which has dealt with this issue most thoroughly (e.g., Chand, 1938; Cooray, 1979; Dicey, 1885; Dodek, 2011; Forsey, 1984; Heard, 1991; Killey, 2014; Marshall, 2001; Plaxton, 2016; Twomey, 2011) we find several approaches (Heard, 1989). The traditional approach completely excludes the applicability of unwritten rules before the courts and sees the sanction for their violation purely in the political realm or in the form of public disapproval (Dicey, 1885; Heard, 2012). Some authors, however, admit that although the courts cannot directly enforce them, they are recognisable and usable by them as interpretative and argumentative tools through which written constitutional law is shaped (Ahmed, Albert and Perry, 2019; Marshall and Moodie, 1971; Vermeule, 2013). There are also authors who consider them legally binding rules governing the behaviour of constitutional actors (Jennings, 1943), or even sources of constitutional law (Allan, 1993). Various approaches can also be observed, for example, in the German constitutional tradition. On the one hand, there is legally binding customary law (*Gewohnheitsrecht*, see Tomuschat, 1972), on the other hand, there are non-binding rules arising from established practice (*ständige Staatspraxis, unbeanstandet gebliebene Staatspraxis*). However, it seems that in the German tradition, based on written, codified constitutional law, less attention is paid to the issue of unwritten rules and their definition (Morlok, 2002).

This observation naturally applies to the Czech constitutional tradition as well, which is also based on a system of written and codified constitutional law. Despite several important works (Kindlová, 2008; Kysela, 2008; Píša, 2014), there is still a lack of comprehensive systematic analysis of unwritten rules in the Czech constitutional system. As a result of this gap in our knowledge, the doctrine, and even the case law, diverge not only in terms of the definition and status of unwritten rules but also in diverse and often overlapping terminology (Antoš et al., 2024). It can thus be stated that unwritten rules in the constitutional system, regardless of the terms used to describe them, can be characterised in the Czech constitutional legal environment as so-called empty shells (Arendt, 2006; Horák, 2019), essentially fillable with any content.

The unified and clear terminology, however, serves to ensure mutual understanding. When everyone talks about something different but uses the same term, or conversely, talks about the same thing but uses different terms, it is difficult to find common ground; we simply do not understand each other. The aim of this article is therefore not only to highlight the prevailing conceptual ambiguity but also to propose a new terminological distinction. We would like to bring order to the outlined dismal situation by using functional analysis, a method based on examining the role that individual constructs play in the constitutional system and especially in constitutional legal argumentation (i.e., their functions). This methodological tool was created precisely to enable systematic analysis of constructs that are too vague to be examined and defined in terms of content and has so far been applied to human dignity (Horák, 2022a), as well as other constitutional legal values (i.e., freedom, equality, and justice, see Horák, 2022b). We are convinced that unwritten rules in the constitutional system are another ideal candidate for the application of this approach.

After a brief theoretical conceptualisation and demonstration of the conceptual ambiguity of unwritten rules in the Czech constitutional law (Chapter 1), we apply the method of functional analysis to both, the Czech case law and academic literature (Chapter 2) and identify three distinct constructs which all share the characteristic features of unwritten rules (unwritten nature, *usus longaevus*, *opinio necessitatis*, relevance for the functioning of the constitutional system) but differ in other respects (Chapter 3). The first of them is constitutional custom, which is characterised by a normative, respectively norm-creating function, and is therefore capable of creating new constitutional norms independently of the text of the constitution. The second construct is established practice relevant to the interpretation of the constitution (hereinafter referred to as "established constitutional practice") with an interpretative and argumentative function, which fixes one of the possible interpretations of the written provision of the constitution. Finally, the third identified construct is constitutional convention, which serves the function of preventing and moderating conflicts between relevant constitutional actors. Constitutional convention is not legally binding but can be very effectively enforced by extra-legal, typically political instruments. At the same time, it differs from mere constitutional traditions, which, unlike it, lack a sufficient degree of relevance for the functioning of the constitutional system.

2. AMBIGUITY OF UNWRITTEN RULES IN THE CZECH CONSTITUTIONAL LAW

In this paper, we use four constitutive parameters to clearly define unwritten rules and to distinguish them from other similar concepts. Hence, for us, the unwritten rules are certain established rules of behaviour formed as a result of long-term[2] and repeated use (i.e., *usus longaevus*), which create the conviction of relevant constitutional actors about the need to follow them for the future (i.e., *opinio necessitatis*). These rules of behaviour, although not explicitly prescribed by any provision of written constitutional law (i.e., *unwritten nature*), have a sufficient degree of relevance for the functioning of the constitutional system (i.e., *non-negligibility*).

We thus leave aside the construct we refer to as constitutional tradition, which includes only such irrelevant rules of behaviour that their possible non-compliance would not affect the functioning of the system and would not be sanctioned in any way (cf. Pavlíček, 2015). Among constitutional traditions in the Czech Republic, we can include, for example, the use of presidential fanfares during official public events, the fact that the President's portrait is depicted on stamps or hangs in the classrooms in primary and secondary schools, or that the government, after its appointment, comes to the grave of the first Czechoslovakian president Tomáš Garrigue Masaryk.

However, even excluding the constitutional traditions from the scope of unwritten rules and focusing solely on the rules that fulfil all the four aforementioned characteristic features does not solve the problem of ambiguity which can be clearly demonstrated using several examples of the Czech Constitutional Court's case law.

The first and arguably most important example is the Judgment of the Czech Constitutional Court,[3] in which the Court ruled on the dispute between the President of

[2] One of the anonymous reviewers rightly pointed out the ambiguity of the term "long-term" and raised the question of how long a period is necessary for such a practice to become established, especially concerning presidential powers where 10 years might represent only two successive terms of a single officeholder. We believe that no specific minimum time duration can be definitively established, but we consider it crucial that the creation and application of the rule must involve more than one specific actor (i.e., it cannot be established and consolidated solely during the term(s) of one specific officeholder).

[3] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).

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the republic and the Prime Minister (and the government) regarding the way in which the three of the seven members of the Bank Council (namely the Governor and the two Vice-Governors) of the Czech National Bank should be appointed.

The President relied on the Art. 62 (k) of the Constitution of the Czech Republic (hereinafter "**the Constitution**"), which states that the President appoints all members of the Bank Council without the need of countersignature of the Prime Minister or a member of the government designated by him. The Prime Minister disagreed since according to him the Constitution does not specify the number of members of the Bank Council nor their status and competencies. This can be learned only from the ČNB Act,[4] which states that *"the Bank Council shall consist of seven members, comprising the Governor of the Czech National Bank, two Vice-Governors of the Czech National Bank, and four other members of the Bank Council of the Czech National Bank"*[5] and that *"the Governor, Vice-Governors, and other members shall be appointed and relieved from office by the President of the Republic."*[6] The Prime Minister therefore argued that the power of the President to appoint the Governor and Vice-Governors does not follow from the Art 62(k) of the Constitution, but from the Art. 63, para 2 of the Constitution, which states that the President has (besides the powers explicitly enumerated in the Art. 62 and 63, para. 1 of the Constitution) also powers entrusted to him by a statute. The powers included in the Art 63, however, require a countersignature of the Prime Minister or a member of the government designated by him to be valid, which did not happen in the disputed case.

In solving this dispute, the Court, among other arguments adopted also the reasoning based on unwritten rules. However, the Court was not able to agree on a single understanding and use of unwritten rules (for details, see Brunclík et al., 2023). The majority opinion admitted that both (i.e., the President's and the Prime Minister's) interpretations of the Constitution are possible and used the unwritten rule as an interpretational tool helping the majority of the Court to decide in favour one of them. Consequently, the majority opinion held that, *"The interpretation of Art. 62 to the effect that it grants the President of the Republic the right to appoint all members of the Bank Council without the need for countersignature, has been respected and followed in practice without interruption since 1993 until the debate, in the year 2000, on the act amending the ČNB Act. This interpretation has been confirmed, and is even gradually developing into a constitutional convention."*[7]

In contrast, the dissenting opinion by Justices Güttler, Holeček, Janů, Zeněk Kessler, and Malenovský came to the conclusion that the written law can only be interpreted in one way, i.e., that the countersignature is required for the appointments to be valid. Consequently, the dissenting judges argued that the mentioned unwritten rule stating that the countersignature is not required is *contra constitutionem* rather than *praeter constitutionem*. However, according to dissenting opinion even such an unwritten rule *"cannot be a priori ruled out, as a constitutional convention can be a norm of constitutional law capable of derogating basically any written constitutional rule. The quantity and quality of practice that should lead to the emergence of convention contra constitutionem must, however, be significantly higher than the volume and quality of practice leading to the emergence of convention praeter constitutionem, because convention-creating practice does not enter a legally indifferent space as a concentrated expression of generally permitted behaviour, which is the case of practice praeter*

[4] Act No. 6/1993 Coll. on the Czech National Bank (ČNB Act), Czech Republic.
[5] Act No. 6/1993 Coll., on the Czech National Bank (ČNB Act), Czech Republic, para. 1.
[6] Act No. 6/1993 Coll., on the Czech National Bank (ČNB Act), Czech Republic, para. 2.
[7] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

constitutionem, but must overcome the feeling of the bindingness of a constitutionally valid countersignature requirement."[8] For dissenting judges, therefore, the unwritten rules are not only mere interpretational tools, but potentially also the self-standing sources of new constitutional norms.

The second example which illustrates yet another understanding of unwritten rules is the judgment of the Czech Constitutional Court,[9] in which the Court ruled on the dispute between the President of the Republic and the Chairperson of the Supreme Court who proposed the Court to quash the President's appointment of the second Vice-Chairperson to the Supreme Court (for details, see Brunclík et al., 2023). She argued that by appointing the second Vice-Chairperson the President acted *ultra vires*, since although the Art. 62(f) of the Constitution states that the President appoints Vice-Chairpersons (in plural), this provision has been in accordance with Art. 15 of the Act on courts and judges,[10] in a way that there is only one Vice-Chairperson of the Supreme Court at any given time and that such an interpretation *"has been respected and adhered to since 1993, making this interpretation and application a constitutional convention."*[11]

Even though the Court ruled in favour of the Chairperson of the Supreme Court, it did so without any arguments based on unwritten rules. More importantly, Justice Rychetský stated in his dissenting opinion that *"to review the constitutional act issued by the President of the Republic in accordance with Art. 62 of the Constitution from the point of view of compliance with constitutional conventions and also compliance with sub-constitutional law (…) is a power that was not entrusted to the Constitutional Court by the Constitution."*[12] It can be concluded that the Constitutional Court avoided to understand the unwritten rules as either the sources of constitutional legal norms or interpretational tools in this case. On the contrary it adopted the approach avoiding the justiciability of such rules.

From these illustrative examples we can summarise that the understanding and use of unwritten rules are far from clear and unified in the Czech constitutional law. This is further underlined by the ambiguous terminology used by the academic literature. We can encounter terms such as constitutional custom (Filip, 2003), constitutional convention (Kindlová, 2008; Kysela, 2008), political convention (Klíma, 2005, 2006), parliamentary convention (Filip, 2003), constitutional practice, or tradition.[13] Some authors distinguish between some of these terms conceptually (Gerloch, 2021), while others consider them entirely interchangeable (Pavlíček, 2015; Syllová, 2007). Hence, we believe that this chaotic situation can (and should) be remedied using the functional analysis.

3. METHOD OF FUNCTIONAL ANALYSIS

The essence of functional analysis is to define constructs by their functions in the system, rather than by the terms used to describe them or their content (Horák, 2022a). For constructs that are too vague, variably, and often mutually contradictorily

[8] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský.
[9] Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).
[10] Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.
[11] Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), majority opinion.
[12] Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), dissenting opinion by Justice Rychetský.
[13] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), both the majority opinion and concurring opinion by Justices Holländer and Jurka.

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defined in terms of their content, this is the only way to systematically work with them. From the definition of the functions of individual constructs in the Czech constitutional system, we can deduce their functional characteristics using three variables that reflect the characteristic properties of each such defined construct, i.e., its strengths and also its limits.

As these variables, we have selected: a) normative power, which reflects the position of the construct in the constitutional order of the Czech Republic and indicates how conflicts between this construct and written provisions of various legal powers should be resolved; b) applicability before the court, dealing with the question of whether courts can apply the construct as a normative argument directly, indirectly, or not at all; and finally c) content width, determining the scope of the construct, i.e., how broad the potential spectrum of situations in which the construct can be legitimately applied is (for details on criteria used, see Horák, 2022a, 2022b).

We applied the method of functional analysis to identify individual constructs and define their characteristic features, including limits for their use, to relevant case law of Czech courts and also Czech academic literature.

4. RESULTING FUNCTIONALLY DEFINED CONSTRUCTS

Based on the conducted functional analysis, three distinct types of the unwritten rules (i.e., the established rules of behaviour the meet all the above parameters, namely *usus longaevus*, *opinio necessitatis*, *unwritten nature* and *non-negligibility*) can be distinguished which we have labelled as constitutional custom, established constitutional practice, and constitutional convention.

We note that while the definition of individual constructs by their functions is universally applicable across different constitutional systems, the determination of their characteristic features is not. The individual characteristic features do not only arise from the (universal) function of the construct but also significantly from the nature and basic principles of each specific constitutional system in which the construct is to be used. In this regard, it is particularly important to emphasise that the Czech Republic has a system of written constitutional law with a material core protected by the eternity clause,[14] which includes, among other things, the principles of popular sovereignty, separation of powers, and legal certainty. Our conclusions, which arise from the functional analysis of the individual constructs examined in the Czech Republic, are therefore not universally valid and cannot be transferred without further ado to other legal systems that do not meet the above characteristics.

4.1 Constitutional Custom

The first functionally defined construct we will deal with is constitutional custom, whose function in the constitutional system is norm-creating. In other words, constitutional custom can be defined as a distinct source of constitutional law carrying a legally enforceable rule of behaviour (i.e., a constitutional norm). From the norm-creating function of this construct, its strong characteristic features, as well as its limitations, derive.

First, as an independent source, constitutional custom does not need any basis in written constitutional law. On the contrary, it is capable of creating new constitutional

[14] Constitution of the Czech Republic, Art. 9 paras. 2-3.

norms and possibly even changing norms enshrined in written constitutional law.[15] In other words, it is possible to imagine the existence of a constitutional custom *contra constitutionem*, which could prevail over a norm contained in a written provision through interpretative rules of *lex posterior derogat legi priori* or *lex specialis derogat legi generali*. It can thus be stated that constitutional custom functionally has high normative power.

Furthermore, since constitutional custom is a distinct source of constitutional law carrying constitutional norms just like any provision of written constitutional law, it is directly applicable as a legal argument before the court, which functionally indicates high applicability before the court.

These two very strong characteristic features are, however, problematic in the Czech constitutional system for at least three reasons. Firstly, they can significantly reduce the level of legal certainty and predictability of the law, as they allow the creation of new or modification of existing constitutional norms without their clear, sufficiently precise, and explicit enshrinement in the text of a legal regulation (constitutional statute). Secondly, they disrupt the principle of the separation of powers,[16] as the one who will ultimately create (or, if we want, "discover" and "declare" their existence) new constitutional norms will be the judiciary, not the legislature. This is also related to our third objection, which is the democratic deficit, as the constitution-making competence was explicitly entrusted to the Parliament by the Constitution,[17] both chambers of which are elected in free and direct elections based on universal and equal suffrage.[18] By allowing the creation or modification of constitutional norms through custom, we would thus interfere with the values and principles that we rank among the material core of the Czech constitution.

From the above, we deduce that the use of constitutional custom in the Czech constitutional system should be very limited. Originally, we even thought that there was no room for its application at all; however, we eventually came to the conclusion that there is indeed a narrow space for it, which derives from Art 9, para. 2 of the Constitution, which defines the material core of the Constitution as *"the essential requirements for a democratic state governed by the rule of law"*[19] and forbids its future changes or amendments. The only hypothetical case of legitimate use of constitutional custom, in our opinion, would be a situation where a substantial change in circumstances would cause a provision of written constitutional law to become evidently contrary to the material core of the constitution, and relevant constitutional actors would respond to such a constitutional crisis by simply ignoring the problematic provision instead of enacting an appropriate amendment to the constitutional order. If this state persisted for a long time, it would eventually lead to the creation and maintenance of a long-term "unconstitutional practice," about which the actors would be convinced that, despite its contradiction with a specific provision of the constitutional order, it is entirely in line with the principles and values contained in the material core of the constitution. We believe that in such a case, it could be a constitutional custom that, relying on Art. 9, para. 2, would be capable of changing or abolishing the original problematic rule contained in the constitutional text.

[15] This characterisation is based on the notion of customs in public international law (see Čepelka and Šturma, 2003; Fon and Parisi, 2009).
[16] Constitution of the Czech Republic, Art. 2, para. 1.
[17] Constitution of the Czech Republic, Art. 9, para. 1 in connection with Art 39, para. 4.
[18] Constitution of the Czech Republic, Art. 18, paras. 1-2.
[19] Constitution of the Czech Republic, Art. 9, para. 2.

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For example, let us imagine a (somewhat apocalyptic) situation in which a pandemic of an incurable disease reduced the average life expectancy of the citizens of the Czech Republic to about 40 years, and the constitution-maker did not respond by changing the conditions for running for the mandate in the Senate or the office of the President of the Republic or the conditions for the appointment of a judge of the Constitutional Court (which are all currently set to 40 years of age).[20]

In such a situation, the mentioned age limit would be clearly contrary to the essential requirements of a democratic rule of law, as it would limit the exercise of the mentioned functions to a very narrow group of citizens. Nevertheless, none of the actively legitimised subjects would propose to the Constitutional Court to annul the relevant provisions of the Constitution for their contradiction with the constitutional order (respectively its material core), nor would they be changed by a constitutional law. Instead, persons under 40 years of age would simply be elected or appointed to the mentioned bodies and such practise would last for a long time. However, this practise, in clear contradiction with the explicit wording of the Constitution, would not be challenged before the Constitutional court, as all relevant actors would be convinced that the existing age limit would, as a result, violate the principles of universal suffrage and equal access to public functions and potentially even the functionality of the above-mentioned constitutional bodies.

The result could be a legitimately created constitutional custom derogating the relevant provision of the Constitution, which could then (i.e., after fulfilling the requirement of *usus longaevus*) be directly applied as a legal argument before the court. This means that if, after years of such practice, someone turned to the Court with a proposal to declare a certain election or appointment invalid for contradiction with the constitutional text, the Court could no longer hold in favour, as it would have to give precedence to the custom over the written provision of the Constitution.[21]

It can thus be summarised that the high normative power and direct applicability before the court should be functionally compensated in the Czech Republic by an extremely low (respectively very limited) content width, as the legitimate use of constitutional custom should apply only in situations where relevant constitutional actors feel the need to bridge the unresolved contradiction between individual provisions of the constitutional order and the material core of the constitution. In other words, the content width of constitutional custom is limited by the content of the material core of the constitution.

For these reasons, we find constitutional customs in Czech jurisprudence only very rarely. More precisely, when we leave aside the indication in one Constitutional Court's judgment, where the Court stated that the constitution *"cannot exist outside of a minimal value and institutional consensus. It follows for the area of law that, even in a system of written law, fundamental legal principles and conventions are sources not only of law in general but also of constitutional law"*,[22] the only case is the already mentioned dissenting opinion of Justices Güttler, Holeček, Janů, Kessler, and Malenovský to the

[20] Constitution of the Czech Republic, Art. 19, para. 2; Art. 57, para. 1 and Art. 84, para. 3.

[21] Cf. the decision of the Czech Republic, Constitutional Court, Pl. ÚS 34/16 (7 March 2017), in which Court rejected the constitutional complaint connected with the motion to quash a part of Art. 19, para. 2 of the Constitution, which sets the age limit for running to the Senate at 40 years arguing, *inter alia*, that Art. 9, para. 2 of the Constitution does not allow the Constitutional Court to review provisions which are already part of the Constitution. However, in her dissenting opinion, Justice Šimáčková stated that, provision in question is in accordance with the Constitution *"in the current legal, social and political context"*, which opens up the possibility of a different assessment, should that context - as we describe in the hypothetical case - change fundamentally.

[22] Czech Republic, Constitutional Court, Pl. ÚS 33/97 (17 December 1997).

Constitutional Court's judgment concerning the appointment of the Governor and Vice-Governors of the Czech National Bank.[23] Let us reiterate that the judges in the mentioned dissenting opinion stated that *"the requirement of countersigning can be inferred from the Constitution, and any contrary constitutional custom, which would result from a series of appointment acts without countersigning, would have to be a custom contra constitutionem. Such an eventuality cannot be ruled out a priori, as constitutional custom (convention) can be a norm of constitutional law capable of derogating any written constitutional rule."*[24] The dissenting judges however ultimately concluded that such a constitutional custom *contra constitutionem* had not been created in the question of the appointment of the Governor and Vice-Governors of the Czech National Bank, as the requirements of *usus longaevus* and *opinio necessitatis* were not sufficiently met. In this context, we only add that the requirement of conviction of the need to protect the material core of the constitution against a provision of the constitutional order that came into conflict with it could not have been met in this case either.

This rare occurrence of (at least potentially possible) constitutional custom, most likely inspired by the concept of customs in international public law (Čepelka and Šturma, 2003), has not prevailed in the jurisprudence of the Constitutional Court, and constitutional norm-making thus remains (in our opinion, rightly) exclusively in the hands of the Parliament in the Czech Republic. This conclusion is also supported by the analysis of academic literature. Although some authors theoretically describe the construct of constitutional custom (Gerloch, 2021; Kysela, 2008), most of them rather problematise its existence. Filip (2003) explicitly rejects the existence of this construct in Czech constitutional law, stating that customs and conventions are not sources of law. An exception in this regard is Syllová (2007), who admits the possibility of the existence of customs that would be *contra constitutionem* as an unresolved issue.

4.2 Practice Relevant to the Interpretation of the Constitution (Established Constitutional Practice)

The second, and from the perspective of the functioning of the system of written (codified) constitutional law, significantly less problematic construct is established constitutional practice, which has an interpretative and argumentative function (Bailey, 2022) in the constitutional system.

From this function, we can deduce that established constitutional practice, unlike custom, cannot be considered a distinct source of constitutional law, as it does not carry any new constitutional norm. Therefore, it cannot change existing constitutional norms or be in conflict with them. On the other hand, it is not without normative relevance, as it is tool whereby norms contained in the provisions of written constitutional law are (bindingly) interpreted or – in cases of gaps in constitutional law – even supplemented (Cf. Melzer, 2010). It is thus possible to imagine established constitutional practice not only *secundum et intra constitutionem*, but to a limited extent also *praeter constitutionem*. In contrast to constitutional custom, it is clear that it must not be *contra constitutionem*; however, it can be *contra legem*. If a law or its individual provisions come into conflict with a provision of the constitutional order as interpreted through established constitutional practice, they must be annulled as unconstitutional. From this, we can

[23] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).
[24] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský.

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deduce that from the perspective of functional analysis, it is a construct of medium normative power.

From the connection of established constitutional practice to the provisions of written constitutional law, which are interpreted or even supplemented through it, it follows that, similarly to constitutional principles, it is also applicable in constitutional legal argumentation only indirectly, i.e., precisely through those directly applicable provisions of written constitutional law that we interpret or supplement using it, which functionally corresponds to medium applicability before the court. According to some authors, established practice and principles are essentially the same, differing only in the source of their knowledge. In the case of established practice, we derive interpretation from experience (i.e., empirically), while in the case of principles, from their logic, meaning, and purpose (i.e., rationalistically, see Heard, 1991).

The use of this construct is therefore not problematic from a functional perspective, on the contrary, it is desirable or even necessary. Compared to the interpretation and supplementation of constitutional law through rationalistic deduction based on general principles or values, the inductive empirical approach based on historical analysis of previous behaviour (in relation to the requirement of *usus longaevus*) and socio-psychological analysis of the current conviction (in relation to *opinio necessitatis*) of constitutional actors is subject to a significantly lower degree of subjectivity. In other words, established rules of behaviour are objectively ascertainable and analysable, whereas the meaning and content of abstract principles and values are inherently influenced by the subjective moral, political, or ideological background of each individual person interpreting and applying them (Horák, 2022b). More frequent use of established constitutional practice thus promises a higher degree of legal certainty and predictability of constitutional law compared to general principles. The validity of this claim, however, presupposes that the courts in their jurisprudence clearly and sufficiently precisely establish the necessary degree of fulfilment of both requirements for the formation of established constitutional practice, which they will subsequently consistently apply when utilising this construct (for possible ways of achieving this see Kindlová, 2008).

Emphasising this advantage of established constitutional practice, however, does not intend to diminish the importance of principles for the anchoring of the constitutional system in the liberal democratic value basis and the effective protection of the substantive rule of law.[25] It seems that established practice and principles can coexist and complement each other in constitutional legal argumentation. In the event of a conflict between established practice and principles, principles can serve as a very useful corrective. After all, Jennings (1943) supplemented the two basic requirements for the formation of this construct (i.e., *usus longaevus* and *opinio necessitatis*) with a third, which is precisely the conformity with (in the given constitutional system) leading principles and values. Hence our above statement that established constitutional practice can be *praeter constitutionem* only to a limited extent. When we extensively interpret or even supplement written constitutional law through established constitutional practice, we must do so in accordance with the mentioned key constitutional principles and values. Even long-term practice of constitutional actors will not fix an interpretation of the constitutional order that would contradict key constitutional principles and values, if only because it was never a possible (plausible) interpretation.

It can thus be summarised that established constitutional practice is limited in its applicability in two ways. Firstly, since established constitutional practice does not

[25] See e.g., Czech Republic, Constitutional Court, Pl. ÚS 19/93 (21 December 1993).

create or change constitutional norms but only supplements or serves to interpret them, its content width is limited by the content of the provisions of written constitutional law that we interpret using it or the extent of the gap in constitutional law that we are trying to bridge by supplementing existing provisions. Secondly, in interpreting or supplementing constitutional law, established constitutional practice must never come into conflict with the material core of the constitution. This functionally indicates the medium content width of this construct.

The construct of established constitutional practice appears under various labels in Czech academic literature quite often. It is worked with, for example, by Kindlová (2008), Kysela (2008), Gerloch (2021), or Syllová (2007).

The use of the construct of established constitutional practice, as well as its relationship to constitutional principles and values, can be further demonstrated through two examples in which Czech courts used established practice alongside a number of other arguments based on principles and values. The first is the already mentioned majority opinion in the judgment of the Constitutional Court on the question of countersigning the President's decision on the appointment of the Governor of the Czech National Bank.[26] The court, siding with the President of the Republic, uses several principles and values. For example, it speaks of the principles of proportionality of legal regulation and legal certainty, or the value of the independence of the Czech National Bank, which could be threatened if the government, and not exclusively the "non-partisan President," could interfere in the appointment of the Governor or Vice-Governors. The subjectivity of the argumentation based on principles or values is also evidenced by the fact that the requirements arising from the independence of the Czech National Bank were interpreted by Justices Güttler, Holeček, Janů, Kessler, and Malenovský in their aforementioned dissenting opinion in exactly the opposite way.[27] In their view, the President does not have to be non-partisan at all, and therefore sufficiently guarantee the independence of the Czech National Bank. On the contrary, they believe that independence will be best guaranteed if several constitutional bodies are involved in the appointment, which will mutually control each other and thus limit the potential arbitrariness of any of them.

As we have already mentioned above, in addition to these arguments based on principles and values, the majority of the plenary also works with established constitutional practice, stating that *"the legal opinion that Article 62 of the Constitution expresses the right of the President of the Republic to appoint all members of the Bank Board without countersignature was respected and practiced continuously from 1993 until the debates on the amendment to the ČNB Act in 2000. This interpretation was thus confirmed by the gradually developed constitutional convention. It is known that constitutional conventions have great significance in a constitutional state precisely because they compose the constitution into a functional whole and fill the space between the terse expression of constitutional principles and institutions and the variability of constitutional situations. In a democratic rule of law, it is hardly conceivable that the interpretation of the constitution and the corresponding constitutional conventions, respected and unchallenged throughout the existence of the Constitution, would be questioned by a purposeful misinterpretation of the constitution and with it the entire previous practice, including a number of decisions that have never been challenged."*[28]

[26] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.
[27] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský.
[28] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.

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From a functional perspective, this is established constitutional practice mainly because the Court (or rather its majority) does not want to use it as a separate source of law that creates a new constitutional norm or changes the norms contained in the provisions of the Constitution, but as a tool through which it (merely) bindingly interprets the provisions of Art. 62(k) of the Constitution.

The problem with this decision, however, is that the majority opinion did not use the opportunity to clearly and sufficiently precisely establish criteria for verifying the existence of established constitutional practice (i.e., *usus longaevus* and *opinio necessitatis*) for the future. On the contrary, the decision states that *"the essential aspect of this fact is not the verification of the extent to which the formal requirements of 'constitutional convention' are met […]."*[29] Instead of an empirically ascertainable construct that has the potential to bring much-needed objectivity to constitutional legal argumentation, the majority opinion unfortunately ultimately used just another largely subjective argument, as evidenced by the fact that the very existence of the established constitutional practice declared by the majority opinion was questioned or at least intensely debated by both dissenting opinions.[30] We are therefore convinced that although the majority opinion used the construct of established constitutional practice from a functional perspective, its true potential unfortunately remained unfulfilled.

The second example of the use of established constitutional practice can be observed in the judgment of the Supreme Administrative Court,[31] ruling on the dispute between the President of the Republic and a nominees-in-waiting to the offices of judge. In the case the President refused to appoint several court nominees-in-waiting to the offices of judge even though they satisfied all legal requirements, and the government issued a resolution recommending the Prime Minister countersign the decision of the President on the appointment of candidates. He did so, because he believed that no one should be appointed to the office of a judge before she or he turns 30 years of age. However, Act on courts and judges[32] did not require them to be over 30 at that time.

After this refusal the Government issued yet another resolution which included all the refused nominees-in-waiting which were under 30. The President, however, remained inactive and did not decide on the appointment or refusal to appoint at all till one of the concerned a nominees-in-waiting approached the administrative courts (for details, see Brunclík et al., 2023).

The Supreme Administrative Court stated that the President (being in this particular case in a role of mere administrative authority rather than a head of the state) is obliged to decide properly (i.e., in accordance with the law and with sufficient justification) and in a timely manner on all nominees-in-waiting to the offices of judge listed in the Government's resolution. In its reasoning, the Court used several principles (e.g., the principle of strict legality, the prohibition of arbitrariness, or the principle of government responsibility for countersigned acts of the President of the Republic) as well as (and for us importantly) established constitutional practice, the content of which in this case should be the properly and timely executed *"The reaction of the President of the Republic to the initiative of the (…) Government, by which a set of candidates for the positions of judges is submitted together with accompanying documents. The Supreme*

[29] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), majority opinion.
[30] Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001), dissenting opinion by Justices Güttler, Holeček, Janů, Kessler, and Malenovský and concurring opinion by Justices Holländer and Jurka.
[31] Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).
[32] Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.

Administrative Court emphasises that the content of the convention is that the President reacts to the submitted initiative."[33]

From a functional perspective, this is established constitutional practice mainly because the court first explicitly refers to the already cited and analysed passage of the majority opinion in judgment of the Czech Constitutional Court on the appointment of the Governor of the Czech National Bank, and further states that *"the formed constitutional convention both politically binds constitutional actors and serves as an interpretative guide for the interpretation of the Constitution by the Constitutional Court and ordinary courts."*[34] Again, it is more of a tool for (binding) interpretation of the already discussed provisions of Art. 63, para. 1(i), 3 and 4 of the Constitution than a source of law creating new or transforming existing constitutional norms.

Another example where the use of established constitutional practice seems very effective is the resolution of the question of whether the resignation of the Prime Minister automatically means the resignation of the entire government or not. The relevant provisions of the Art. 73 of the Constitution, which state that *"(1) The Prime Minister submits his resignation to the President of the Republic. Other members of the government submit their resignations to the President of the Republic through the Prime Minister. (2) The government shall submit its resignation if the Chamber of Deputies rejects its request for a vote of confidence, or if it adopts a resolution of no confidence. The government shall always submit its resignation after the constituent meeting of a newly elected Chamber of Deputies. (3) If the government submits its resignation in accordance with paragraph 2, the President of the Republic shall accept it"*, do not provide a clear answer. In the past, there was a debate in the doctrine about this, which can be simplified as a dispute between the "Prague school," which, following Professor Pavlíček, answered yes, and the "Brno school," which followed the opposite opinion of Professor Filip. We belong to the Prague school, but we also recognise the defensibility of the opposite interpretation, for which not insignificant arguments were also presented (see Antoš, 2022). However, this is a past defensibility: given that over the past 25 years a clear established constitutional practice has been created that corresponds to the first of the mentioned interpretations, the second originally possible interpretation is thus excluded.

4.3 Constitutional Convention

The third functionally defined construct is the constitutional convention. In line with the traditional British concept (cf. Dicey, 1885; for review see Kindlová, 2008) it can be defined as an established rule of behaviour for constitutional bodies, the observance of which is expected, even though its violation does not result in legal sanctions, but only political sanctions or public disapproval. This construct thus operates somewhere between the legal and political levels of the constitutional system. We define the basic function of this construct within the constitutional system as the prevention and moderation of conflicts between constitutional actors. The constitutional convention thus functions as a lubricant, preventing the gears of the constitutional system from grinding to a halt.

Given the above, we can state that constitutional conventions do not create new or change existing constitutional norms, nor they serve to interpret or supplement them. At the same time, it is true that constitutional conventions cannot "override" even the provisions of ordinary law. If the legislature decides to incorporate a new legal rule into a

[33] Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).
[34] Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).

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law that contradicts an existing constitutional convention, the constitutional convention will not stand up before court, and behaviour in accordance with such a convention should still be rejected by the court as unlawful (i.e., contrary to the newly established legal norm). This implies that the normative power of constitutional conventions in the legal system is low to none.

At this point, it is necessary to recall that, alongside law, there are other normative systems. The fact that constitutional conventions are not legally binding and enforceable does not mean that they are ineffective; on the contrary, it is conceivable that they are enforced even more effectively than if they were legally binding. A classic illustration is provided by Sophocles' famous tragedy Antigone, where there is a direct collision between a legal prohibition and an extra-legal command. Antigone decides to break the king's law, which forbids the burial of her brother, because she considers it her duty under religious laws and traditions. She follows higher principles dictated by her family ties and obligations, and considers them more important – more binding for her – than the legal regulations issued by the king.

Furthermore, since the constitutional convention does not create a legal obligation, it is logical that it cannot serve as a direct legal argument before the court. However, it is conceivable that if the convention is not in conflict with any constitutional or legal norm, the courts may take it into account to illustrate the context of a specific constitutional situation they are deciding on in individual cases. This functionally indicates low to none applicability before the court.

On the other hand, these established rules of behaviour can relate to a wide range of situations that may or may not be anticipated by the constitution-maker or legislature. In this respect, constitutional conventions can go far beyond or outside the framework of written provisions of the constitution or laws. Their content width is therefore high; it is limited only by the general characteristic of unwritten rules of the constitutional system, which is a sufficient degree of relevance for the constitutional system.

An example of constitutional conventions in the Czech Republic is that a newly appointed government presenting itself before the Chamber of Deputies with a request for confidence also presents a relatively detailed political program statement on this occasion. Such a requirement goes beyond the current written constitutional and legal framework[35] (content width), but it does not change or supplement constitutional law (normative power), as compliance with this obligation is not legally enforceable (applicability before the court). Nevertheless, it is likely that if the government did not present a political program statement, it would face increased criticism from the opposition and the public, and at least a minority government would find it more difficult to convince the necessary majority of present deputies and thus gain confidence. The political program statement can thus be seen as a tool that facilitates communication between the government requesting confidence and the Chamber of Deputies, as well as a tool for the Chamber of Deputies to control whether the government subsequently adheres to its political program statement. The political sanction for non-compliance with this rule of behaviour can then be the denial of confidence.

The construct of constitutional convention is emphasised in Czech academic literature by Klíma (2006) and, with certain reservations, also by Filip (2003), who states that customs and conventions are not sources of law and does not comment on their potential justiciability, from which we can infer that he rather does not admit it.

Since we do not consider constitutional conventions to be applicable (as a legal argument) before the court, it is relatively difficult to find their example in case law, with

[35] Constitution of the Czech Republic, Art. 68, para. 3.

the exception of the already mentioned Judgment of the Czech Constitutional Court concerning the President's power to appoint the (second) Vice-President of the Supreme Court.[36] Let us reiterate, what is crucial for the purposes of our analysis is the argument of Justice Rychetský in his dissenting opinion, where he states, among other things, that *"the petitioner did not challenge the President's power to issue such a decision and only objected to the 'breach of constitutional convention' [...], and the violation of Act No. 6/2002 Coll. [...] The President of the Supreme Court therefore did not claim or demonstrate the existence of a dispute between two state bodies over the scope of their competences (a competence dispute), but only under the pretext of a competence dispute between two state bodies actually demanded that the Constitutional Court review the constitutional act issued by the President of the Republic under Article 62 of the Constitution in terms of 'compliance with constitutional conventions' and assess its legality in terms of compliance with sub-constitutional law. This is, however, a competence that the Constitution did not entrust to the Constitutional Court."*[37]

Justice Rychetský thus explicitly states that the Constitutional Court was not entrusted with the competence to assess the compliance of the President's acts with constitutional conventions. In his view, this construct is therefore not directly or indirectly applicable before the court, and the obligations arising from constitutional conventions are not legally enforceable and sanctionable. From a functional perspective, such a characterisation precisely corresponds to the construct of constitutional convention as we work with it in this article.

5. CONCLUSION

Through our functional analysis, we have identified three distinct constructs, specifically constitutional custom, established constitutional practice, and constitutional convention. All these constructs can be collectively referred to as unwritten rules in the constitutional system and defined as established rules of behaviour formed as a result of long-term and repeated use (*usus longaevus*), which creates the conviction of relevant constitutional actors about the need to follow them for the future (*opinio necessitatis*). These rules, although not explicitly prescribed by any provision of written constitutional law, possess a sufficient degree of relevance for the functioning of the constitutional system, unlike constitutional traditions.

Despite this common definition, functional analysis shows that each of these constructs plays a different role in the constitutional system, from which their characteristic features arise, describing and limiting the functioning of each of these constructs in the Czech environment. These characteristic features are expressed through three variables: normative power, content width, and applicability before the court. The results of the functional analysis are summarised in Table 1. We have also supplemented it with selected specific examples of the occurrence of each of the examined constructs in the current Czech constitutional system.

[36] Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).
[37] Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007), dissenting opinion by Justice Rychetský.

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Table 1: Results of Functional Analysis of Constructs of Constitutional Custom, Established Constitutional Practice, and Constitutional Convention

Construct	Constitutional Custom	Established Constitutional Practice	Constitutional Convention
Function in the Constitutional System	Norm-creating	Interpretative, Argumentative	Preventive, Moderating
Normative Power	High	Medium	Low/None
Content Width	Low	Medium	High
Applicability Before the Court	High	Medium	Low/None
Examples	None so far	1. The resignation of the Prime Minister means the resignation of the entire government 2. The Governor and Vice-Governors of the Czech National Bank are appointed without countersignature 3. The President shall properly and in a timely manner decide on all nominees-in-waiting to the offices of judge listed in the Government's resolution recommending the countersignature of the President's decision on their appointment 4. Non-application of the 30-day deadline for the Senate's decision on Constitutional Acts.	The government requesting confidence presents itself before the Chamber of Deputies with a program statement

Constitutional customs have a norm-creating function because they create new or change existing constitutional norms. Their existence is considered problematic in a system of written (codified) constitutional law in terms of clarity and predictability of constitutional law, separation of powers, and democratic deficit. Therefore, their strong characteristic features (i.e., high normative power and direct applicability before the court) should be compensated by very low (limited) content width. Established practice relevant to the interpretation of the constitution has an interpretative and argumentative function because it serves as a tool for interpreting and possibly supplementing written constitutional law. The balance of this construct arises mainly from the fact that all three of its characteristic features can be described as being of medium strength. Finally, constitutional conventions, due to their ability to support the smooth and effective conduct of constitutional processes and offer easier solutions to conflict situations that might otherwise threaten to stall the constitutional system, have a preventive and moderating function. Their strong characteristic feature is content width, as they are applicable to a very wide range of constitutional situations without having to rely on specific provisions of written constitutional law. This strong feature is, however, compensated by low to none normative power and applicability before the court. The use of the last two mentioned constructs is considered (not only) in a system of written

(codified) constitutional law to be entirely legitimate, desirable, and even indispensable in some situations.

We believe that the functional approach we have applied and the results we have achieved through this approach can help bridge the existing uncertainty surrounding the status and role of unwritten rules in Czech doctrine and case law. This uncertainty (or mutual misunderstanding) concerns not only the issue of terminology but also the much more important issue of content and meaning. In other words, we argue that the case law and doctrine of constitutional law have so far used various words to refer to not one, but three constructs, leading to disputes about their content and status in the legal system, as well as the risk of their substitution or hybridisation (see Horák, 2006b).

BIBLIOGRAPHY:

Ahmed, F., Albert, R. and Perry, A. (2019). Judging Constitutional Conventions. *International Journal of Constitutional Law*, 17(3), 787–806, https://doi.org/10.1093/icon/moz060

Allan, T. R. S. (1993). *Law, Liberty, and Justice, The Legal Foundation of British Constitutionalism*. Oxford: Clarendon Press.

Antoš, M. (2022). Demise předsedy vlády = demise vlády? V Čechách (spíše) ano, na Moravě (možná) ne [Resignation of the Prime Minister = resignation of the government? In Bohemia (rather) yes, in Moravia (maybe) no]. In: Benák, J., Filip, J. and Šimíček, V. (eds.), *Pocta Janu Svatoňovi k 70. narozeninám* (pp. 209-231). Brno: Masarykova univerzita.

Antoš, M., Brunclík, M., Hájek, L., Kindlová, M., Kubát, M. and Vincze, A. (2024). Constitutional Conventions in Central Europe: Insights from Experts. *Problems of Post-Communism,* online first, 1–9, https://doi.org/10.1080/10758216.2024.2374706

Antoš, M. and Horák, F. (2024). Nepsaná pravidla v ústavním systému: Ústavní obyčej, ustálená ústavní praxe a ústavní zvyklost. [Unwritten Rules in the Constitutional System: Constitutional Custom, Established Constitutional Practice and Constitutional Convention]. *Právník,* 163(2), 120-136.

Arendt, H. (2006). *Between past and future: Eight Exercises in Political Thought*. New York: Penguin.

Bailey, D. (2022). Settled Practice in Statutory Interpretation. *The Cambridge Law Journal*, 81(1), 28–49, https://doi.org/10.1017/S0008197322000034

Brunclík, M., Kubát, M., Vincze, A., Kindlová, M., Antoš, M., Horák, F. and Hájek, L. (2023). *Power beyond constitutions: Presidential constitutional conventions in Central Europe*. Cham: Springer Nature, https://doi.org/10.1007/978-3-031-34244-8

Čepelka, Č. and Šturma, P. (2003). *Mezinárodní právo veřejné [Public International Law]*. Praha: Eurolex Bohemia.

Chand, B. (1938). Conventions of the Constitution. *Journal of Legislation and International Law*, 20(4), 222–229.

Cooray, L. J. M. (1979). *Conventions, the Australian Constitution and the Future*. Sydney: Legal Books.

Dicey, A. V. (1885). *Lectures Introductory to the Study of the Law of the Constitution*. London: Macmillan.

Dodek, A. (2011). Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference. *Supreme Court Law Review*, 54(5), 117–142.

Filip, J. (2003). *Ústavní právo České Republiky 1. Základní pojmy a instituty Ústavní základy ČR [Constitutional Law of the Czech Republic 1. Basic Concepts and Institutions Constitutional Foundations of the Czech Republic]*. Brno: Masarykova univerzita.

Fon, V. and Parisi, F. (2009). Stability and Change in International Customary Law. *Supreme Court Economic Review*, 17(1), 279–309, https://doi.org/10.1086/656058.

Forsey, E. A. (1984). The Courts and the Conventions of the Constitution. *University of New Brunswick Law Journal*, 33(1), 11-41.

Gerloch, A. (2021). *Teorie práva [Theory of Law]*. Plzeň: Aleš Čeněk.

Heard, A. (1989). Recognizing the Variety among Constitutional Conventions. *Canadian Journal of Political Science*, 22(1), 63–82, https://doi.org/10.1017/S0008423900000846

Heard, A. (1991). *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto: Oxford University Press.

Heard, A. (2012). Constitutional Conventions: The Heart of the Living Constitution. *Journal of Parliamentary and Political Law,* 6, 319-338.

Horák, F. (2019). Krize hodnot a soudobé právo [The Crisis of Values and Contemporary Law]. *Jurisprudence,* 28(4), 28-41.

Horák, F. (2022a). Human Dignity in Legal Argumentation: A Functional Perspective. *European Constitutional Law Review*, 18(2), 237–263, https://doi.org/10.1017/S1574019622000141

Horák, F. (2022b). *Střet hodnot. Funkcionální analýza konstruktů rovnosti, svobody, spravedlnosti a důstojnosti v ústavněprávní argumentaci [Clash of values. Functional analysis of equality, freedom, justice and dignity constructs in constitutional argumentation]*. Praha: Leges.

Jennings, I. (1943). *The Law and the Constitution*. London: University of London Press.

Killey, I. (2014). *Constitutional Conventions in Australia. An Introduction to the Unwritten Rules of Australia's Constitutions*. London: Anthem Press.

Kindlová, M. (2008). Ústavní zvyklosti jako součást ústavy (komparace commonwealthského přístupu a judikatury Ústavního soudu ČR) [Constitutional conventions as part of the Constitution (comparison of the commonwealth approach and the jurisprudence of the Constitutional Court of the Czech Republic)]. In: Klíma, K. and Jirásek, J. (eds.), *Pocta Jánu Gronskému* (pp. 300–317). Plzeň: Aleš Čeněk.

Klíma, K. (2005). Článek 68 [Article 68]. In: Klíma, K. (ed.), *Komentář k Ústavě a Listině [Commentary on the Constitution and the Charter]* (pp. 339–342). Plzeň: Aleš Čeněk.

Klíma, K. (2006). *Ústavní právo [Constitutional Law]*. Plzeň: Aleš Čeněk.

Kysela, J. (2008). Ústavní principy, ústavní konvence a ústavní inženýrství [Constitutional Principles, Constitutional Conventions and Constitutional Engineering]. In: Klíma, K. and Jirásek, J. (eds.), *Pocta Jánu Gronskému* (pp. 121–136). Plzeň: Aleš Čeněk.

Marshall, G. (2001). *Constitutional Conventions: The Rules and Forms of Political Accountability*. Oxford: Clarendon Press.

Marshall, G. and Moodie, G. C. (1971). *Some Problems of the Constitution*. London: Hutchinson.

Melzer, F. (2010). *Metodologie nalézání práva: Úvod do právní argumentace [Methodology of finding law: an introduction to legal argumentation]*. Praha: C. H. Beck.

Morlok, M. (2002). Leistungsgrenzen des Verfassungsrechts. Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung? [The limits of constitutional law. Informalisation and de-

parliamentarisation of political decisions as threats to the constitution?] *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 62(1), 37–84.
Pavlíček, V. (2015). Kapitola XVII. Prezident republiky [Chapter XVII. The President of the Republic]. In: Pavlíček, V. (ed.), *Ústavní právo a státověda. II. Díl. Ústavní právo České republiky [Constitutional Law and Constitutional Theory. Part II. Constitutional Law of the Czech Republic]* (pp. 832-882). Praha: Leges, 2015.
Píša, R. (2014). Ústavní konvence komparativně [Constitutional conventions comparatively]. In: Wintr, J. and Antoš, M. (eds.), *Ústavní právo v mezinárodním kontextu [Constitutional Law in an International Context]* (pp. 17-26). Praha: Univerzita Karlova v Praze.
Plaxton, M. (2016) The Caretaker Convention and Supreme Court Appointments. *Supreme Court Law Review*, 72(2d), 449–477, http://dx.doi.org/10.2139/ssrn.2645025
Syllová, J. (2007). Čl. 9 (Změna Ústavy) [Article 9 (Amendment to the Constitution)] In: Sládeček, V., Mikule, V. and Syllová, J (eds.), *Ústava České republiky. Komentář [Constitution of the Czech Republic. Commentary]* (pp. 67-75). Praha: C. H. Beck.
Tomuschat, C. (1972) *Verfassungsgewohnheitsrecht?: Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland [Constitutional customary law?: An investigation into the constitutional law of the Federal Republic of Germany]*. Heidelberg: C. Winter.
Twomey, A. (2011). Changing the Leader – the Constitutional Conventions concerning the Resignation of Prime Ministers and Premiers. *Federal Law Review*, 39(3), s. 329–360, https://doi.org/10.22145/flr.39.3.1
Vermeule, A. (2013). Conventions in Court. *Harvard Public Law Working Paper 13-46,* 1-31, http://dx.doi.org/10.2139/ssrn.2354491

Act No. 6/1993 Coll. on the Czech National Bank (ČNB Act), Czech Republic.
Act of Law No. 6/2002 Coll., on courts and judges, Czech Republic.
Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.
Czech Republic, Constitutional Court, Pl. ÚS 87/06 (12 September 2007).
Czech Republic, Constitutional Court, Pl. ÚS 33/97 (17 December 1997).
Czech Republic, Constitutional Court, Pl. ÚS 14/01 (20 June 2001).
Czech Republic, Constitutional Court, Pl. ÚS 19/93 (21 December 1993).
Czech Republic, Constitutional Court, Pl. ÚS 34/16 (7 March 2017).
Czech Republic, Czech Supreme Administrative Court, 4 Ans 9/2007 – 197 (21 May 2008).