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Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

National Report

*** Constitutional Court of the Czech Republic ***

A) THE ROLE OF THE CONSTITUTIONAL COURT IN DEFINING AND APPLYING EXPLICIT/IMPLICIT CONSTITUTIONAL PRINCIPLES.

1. ***Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning*?**

According to Article 83 of the Czech Constitution (the "Constitution"), the Constitutional Court is the judicial body responsible for the protection of constitutionality. It is thus up to the Constitutional Court to resolve disputes concerning constitutionality and act as the supreme interpreter of the constitutional order. From the formal legal perspective (cf. Baroš, Pospíšil 2015: 1118-1119) "the concept of a constitutional order (as the constitution in formal sense of the word) can be considered the legal definition of an open set of legal regulations of the highest legal force (i.e. all those which, in addition to the Constitution and the Charter of Fundamental Rights and Freedoms, have the force of constitutional law). Although such a legal definition is not typical of constitutions, the Czech constitutional legislature opted to define which legal regulations should fall within the notion of constitutional order. An exact definition of what should be considered a part of the constitutional order then has fundamental importance for the Constitutional Court (and given its competencies in a constitutional democracy, also for all those to whom its decisions are addressed or addressees of the legal regulations under constitutional review, as the case may be), since non-conformity with the constitutional order is a reference criterion for annulling (individual provisions) of laws (Art. 87 (1)(a) of the Constitution) or other legal regulations (Art. 87 (1)(b) of the Constitution), or a criterion for declaring an international treaty as (non-)conforming to the constitutional order pursuant to Art. 10a and Article 49 of the Constitution (Art. 87 (2) of the Constitution). Pursuant to Art. 89 *(88 - trans.)* (2) of the Constitution, justices of the Constitutional Court are bound, in their decision-making, exclusively by the constitutional order and the Constitutional Court Act. Definition of the constitutional order is then also significant for the option of filing the Senate's constitutional action against the President of the Republic, as the Senate may also lodge such an action on the grounds of gross violation of the Constitution or some other segment of the constitutional order (see the comments on Art. 65 (2) of the Constitution), and for judges of common courts, who may submit a matter to the

Constitutional Court if they believe that a law which they are to apply is in conflict with the constitutional order (Art. 95 (2) of the Constitution)."

If the Constitutional Court is to protect constitutionality, it must protect the balance among constitutional institutions (the principle of separation of powers and of checks and balances) as well as the basic principles of the rule of law and, in general terms, the basic principles (contained both explicitly and implicitly in the constitutional order) of constitutional democracy as such (for more details, see also below judgement File No. Pl. ÚS 33/97 of 17 December 1997, N 163/9 Coll. of Judgements and Resolutions 399; 30/1998 Coll.) If the legislation of various countries was founded on the principle of superiority of the constitution after the Second World War, the Czech Republic adopted this paradigm after the fall of the communist regime. The Czech Constitution, too, thus strives to follow on from "modern constitutionalism, which subjects the basic questions of political institutions and processes in the State to the principles of the rule of law" (Klokočka 1994: IX). Democracy no longer rests on unlimited "will of the people", but the Constitution rather enforces on the people certain substantive limitations, which all constituted powers are bound to obey. Validity of legal norms is no longer conditional solely on compliance with formal requisites, but also requires conformity with the principles of fairness enshrined in the Constitution.

In its judgement File No. Pl. ÚS 19/93 of 21 December 1993 (N 1/1 Coll. of Judgements and Resolutions 1; 14/1994 Coll.), already, the Constitutional Court held that *"the legitimacy of a political regime cannot rely only on formal legal principles , as the values and principles underlying the regime are not only legal, but primarily political. The principles of our Constitution, such as sovereignty of the people, representative democracy and rule of law, are principles of political organisation of society, which cannot be normatively defined to the full extent. While positive law is based on those principles, their contents are not exhausted through normative regulation – there is always something more to them."* According to the Constitutional Court, the constitutive principles of democratic society are thus placed, within the Constitution, above the legislative competence and, thus, "ultra vires" of the Parliament. In the opinion of the Constitutional Court, the Czech Constitution is thus not a text deprived of values that solely defines the individual institutions and processes, but rather also encompasses certain regulatory ideas, expressing the fundamental inviolable values of democratic society. This is therefore not only about complying with the competence and procedural framework of constitutional institutions and procedures (the legality principle), but a key role is also played by the *contents* of political decisions. Interpretation and application of all legal norms must conform to their material sense; norms can constitute law only if they respect the basic constitutive values of democratic society.

According to foreign jurisprudence, the depth of reflections on democracy and the relationship between law and the principal social and political values comprised in the rulings of the Constitutional Court is practically unheard of in case-law of many established western courts (Robertson 2010: 123). The emphasis on *values* (human dignity, freedom, justice) and *principles* (sovereignty of the people, rule of law, representative democracy) attests to the degree to which the Czech Constitutional Court strived to keep pace with post-war constitutionalism. In summary, the Constitutional Court is bound by the constitutional order; further conditions (along with the Constitutional Court Act) have yet to be laid down. The Constitutional Court not only can, but actually must, invoke these principles, which are associated with the post-war constitutionalism and are also considered a part of the Czech constitutional order. The Constitutional Court elaborated on these principles in terms of their

contents especially in the first period of its activity. The current case-law then mostly follows on from this heritage of the Constitutional Court.

2. ***What constitutional principles are considered to be organic in your jurisdiction? Are thereany explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles*?**

The principles invoked by the Constitutional Court are mostly related to the rule of law (Art. 1 (1) of the Constitution). A State governed by the rule of low can thus no longer be solely a State "that consistently complies with the legal regulations (the formal aspect); the values and objectives pursued and attained by the State's activity must also be fair (the material aspect)" (see Šimíček 2010a: 27). The Constitutional Court provided perhaps the most extensive analysis of the distinction between the formal and material aspects of a rule of law (along with aforesaid judgement Pl. ÚS 19/93) in its judgement File No. I. ÚS 2517/08 of 24 February 2009 (N 34/52 Coll. of Judgements and Resolutions 343), where it held that "unlike the modern, material rule of law, which is based on the idea of fairness, the formal rule of law (first mentioned by R. v. Mohl) – the predecessor of material rule of law – requires that each act of the State power be made on the basis of a legal norm adopted by the State; in other words, a State governed by the formal rule of law is a State ruled by laws adopted in conformity with the procedure prescribed by the Constitution. Only a law can lay down the competencies of individual governmental authorities, while the powers of the three individual branches of State power are set out by the Constitution." According to the Constitutional Court, the rule of law, in its modern concept, "aims at establishing and maintaining a materially fair state of affairs. The rule of law is both an important element of democracy and a prerequisite for unimpaired exercise of the fundamental rights by individuals, including human dignity as their inherent aspect, which serves as a starting point for inferring the individual fundamental rights and also (in addition to other principles, such as non-discrimination) the prohibition of arbitrary conduct (arbitrariness), which is thus embodied – in doctrinal terms – in the wording of Art. 2 (2) of the Charter of Fundamental Rights and Freedoms."

The concept of the rule of law accepted by the constitutional legislature does not treat material and formal rule of law as opposing phenomena, even though the construction of the material rule of law – as developed in the case-law of the Constitutional Court in a number of areas – has clearly overcome the original idea of formal rule of law that is conceptually based on legalism and positivism (paragraph 19 of Judgement I. ÚS 420/09). However, this does not mean that the law need not have certain formal qualities. To the contrary, even nowadays "the principle of the rule of law is bound to *formal characteristics* that must be manifested by the legal rules in the given legal system so that individuals can take them into account when determining their future conduct. […] Even in a democratic State governed by the rule of law, the law must have proper formal quality (Judgement Pl. ÚS 77/06, paragraph 45). In this context, legal doctrine speaks about "*formal values of law*", which "do not determine the contents of the legal regulations, but are to secure the very existence of law as well as its acceptance and applicability: these values include order, predictability, non-arbitrariness, equality in law and legal certainty. […] Legal philosopher Neil MacCormick speaks in this respect about the *ethics of legalism*, which is characterised by regularity, predictability, certainty, permanency and unity. [...] The basic principles of the rule of law include the principle of predictability of law, its comprehensibility and lack of inherent contradictions."

(Pl. ÚS 77/06, paragraph 36; see also Pl. ÚS 21/01). "Every legal regulation must express respect for the general legal principles, such as confidence in law, legal certainty and predictability of legal acts that structure the legal order of a democratic State governed by the rule of law or can be inferred from them (paragraph 20 of Judgement File No. I. ÚS 420/09 of 3 June 2009, N 131/53 Coll. of Judgements and Resolutions 647).

The material aspect of the rule of law (i.e. the notion of fairness or justice) is expressed primarily by the concept of an individual as a *dignified human being* that has equal rights with all other beings (Article 1 of the Charter). The Constitutional Court then interpreted Article 2 of the Constitution as the general freedom to act, i.e. an umbrella or general clause which logically responds to the inability to predict all future encroachments on the free space of an individual when formulating the fundamental rights (cf. Judgements I. ÚS 512/02, I. ÚS 546/03, I. ÚS 43/04, IV. ÚS 29/05, I. ÚS 1835/07, etc.).

Material rule of law has important implications for the activities of public authorities and this is why public authorities "must remain within the confines of their powers and competencies stipulated by the constitutional order and laws, which is true not only in formal terms, as the exercise of these powers must also conform, in material terms (in their contents), to certain fundamental principles which are mostly expressed in the provisions of the constitutional order and which guarantee the fundamental rights and create the value base of the constitutional order. In respect of the exercise of powers and competencies of a public authority, it is therefore crucial to also follow the purpose at which the exercise of the powers is aimed, as well as the means that are used therein (Judgement File No. I. ÚS 1849/08 of 18 February 2010, N 30/56 Coll. of Judgements and Resolutions 339).

Important consequences of the element of constitutionalism in constitutional democracy – i.e. the material rule of law – include not only the aforesaid construction of non-constitutional law with a focus on its values, but also the need to avoid excessive formalism in application and interpretation of non-constitutional law [indeed, this usually entails sophisticated justification of clear injustice – see historic Judgement III. ÚS 127/96 and extensive case-law following on from that judgement], as well as the need to bear in mind unwritten principles of democratic society in the sense of the sources of law (Holländer 2000: 22; see further paragraph 3). At the same time, the Constitutional Court emphasises the link between the entire exercise of public power and the concept of fairness, not only in a situation where clear injustice is being justified under the veil of formalism, but also in cases where two constitutional principles collide with each other.

3. ***Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?***

Yes, indeed, the Constitution inherently includes principles (such as the principle of proportionality, and many principles following from the rule of law) which – even if not stated explicitly – follow from the constitutional order as a whole. Certain norms of constitutional law then solely express a certain principle which does not encompass any subjective right, while other norms take on both forms, i.e. the form of a principle and that of

a subjective right. As stated by Justice Eliška Wagnerová in her dissenting opinion to Judgement File No. Pl. ÚS 44/02, "if a contested rule is at variance with such a provision comprised in the constitutional order from which a subjective law can be inferred, it must be subjected to a much stricter test than in a case where the contested rule collides solely with a principle enshrining exclusively objective law".

A comprehensive analysis of the position of constitutional principles in the Czech constitutional order was provided in Judgement File No. Pl. ÚS 33/97 of 17 December 1997 (N 163/9 Coll. of Judgements and Resolutions 399; 30/1998 Coll.), which I cite extensively below: "A modern constitution conceived in democratic terms is a social agreement whereby the people, representing the constituent power (*pouvoir constituant*), form a single political (State) body, and establish the relationship of an individual to the whole as well as a set of governmental (State) institutions. A document institutionalising the set of fundamental, generally accepted values and forming the mechanism and process of creating legitimate decisions by the public power cannot exist outside the context of values accepted by the general public, the concepts of justice, as well as ideas of the sense, purpose and manner of functioning of democratic institutions. In other words, it cannot function outside a certain minimum consensus regarding values and institutions. It thus follows from the above for the field of law that the fundamental legal principles and customs are also a source of law in general, as well as a source of constitutional law, also in the system of written law.

This thesis is confirmed not only by theoretical analyses, but primarily by the history of the 20th century, linked to the existence of totalitarian States. Mechanical identification of law with legal texts became a much appreciated tool for totalitarian manipulation. It especially made the judiciary an obedient and non-thinking instrument of enforcing the totalitarian power.

It is also absolutely unsustainable if law is applied solely on the basis of its linguistic interpretation. Linguistic interpretation serves only for initial examination of the legal norm applied. It is only the starting point in explaining and clarifying its sense and purpose (which is also the aim of a number of other procedures, such as logical and systematic interpretation, interpretation *e ratione legis*, etc.). Mechanical application abstracting or failing to acknowledge, either intentionally or because of ignorance, the sense and objective of the legal rule changes the law into an instrument of estrangement and absurdity.

Acceptance of other sources of law along with written law (especially general legal principles) evokes the question of their recognisability. In other words, it gives rise to the question of whether their formulation is a matter of arbitrary discretion or whether certain objective procedures can be set for their formulation.

Democracy deals with possible arbitrariness in formulating "unwritten law" in two ways. Primarily, it does not share the scepticism – which is so deeply rooted in our environment – as to the possibility of making responsible individual decisions and presenting them to the general public for assessment based on convincing arguments. The first safeguard against arbitrariness is thus the cultural and moral context of responsibility. The second lies in the system of democratic institutions based on the separation of powers. In other words, the first safeguard lies in autonomous, while the second in heteronomous legislation. The features defining society of people comprise a definable scope of jointly-shared values, as well as concepts of rationality (purposefulness) of conduct. Society lacking this feature can only be maintained by force (power).

A typical example of definable unwritten legal rules of human conduct is customary law. To create a legal custom, there must be a general conviction of the need to obey a general rule of conduct (*opinion necessitatis*) and also its established long usage (*usus longaevus, longa consuetudo*). Both these criteria also serve to define a general legal rule (the criterion distinguishing between a general principle and a legal custom lies especially in the degree of their generality).

At the same time, within the system of written law, a general legal rule has the nature of a separate source of law only *praeter legem* (i.e. only unless written law lays down otherwise).

The Czech law thus knows and commonly applies a number of general legal principles which are not explicitly comprised in the legal regulations. The principle that ignorance of law is no excuse [see, in this respect, more recent case-law, especially paragraph 25 of Judgement File No. II. ÚS 3764/12 of 13 May 2014 (N 91/73 Coll. of Judgements and Resolutions 517)] and the principle of non-retroactivity, not only in the field of criminal law, can serve as examples of the above. Further examples include the interpretation rules *a contrari*o, *a minore ad maius,a maiore ad minus, reductio ad absurdum*, etc. Yet another, modern constitutional unwritten rule lies in the resolution of mutual conflicts of fundamental rights and freedoms by using the principle of proportionality. There can be no doubt that these generally recognised legal principles include, in the area of constitutional law, the rules of counting time, as they have been comprehensibly and meaningfully defined in European legal doctrine since the Roman times [...]."

While the Constitutional Court mostly satisfied itself with referring to constitutional principles originating in the Czech constitutional order, it is true that in some judgements, it referred to a broader concept of "general principles of law recognised by civilised nations", where it inferred their legally binding effect from the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. As the Constitutional Court held in Judgement File No. IV. ÚS 98/97 of 30 June 1997 (N 88/8 Coll. of Judgements and Resolutions 305), "where there exist and are legally binding general principles of law recognised by civilised nations (Art. 7 (2) of the Convention), i.e. principles that, in substance, reflect the values of these nations, the legislation of the individual countries, as well as application of law in these countries, must correspond to these principles. Consequently, this is not about relying on a mere political and historical opinion, but rather evaluation and interpretation which cannot be avoided by any court, if it wants to adhere to its duty set out in Articles 90 and 95 (1) of the Constitution."
For the role of the academia in formulating constitutional principles, see the answer to question 4 below.

4. ***What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travauxpreparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?***

As far as the definition of constitutional principles is concerned, it can be stated that the Constitutional Court plays the key role in this respect. Scholars serving on the Constitutional Court as its justices and lawyers with rich foreign experience (Vladimír Klokočka, Pavel Holländer, Vladimír Čermák, Eliška Wagnerová) were the ones who made the decisive contribution to the definition of constitutional principles. The involvement of university scholars was smaller, as they tended to adopt the case-law of the Constitutional Court and some even offered criticism of the Court's decisions. Nonetheless, the scholars-justices published considerable materials during their term in office, and in some of their papers, they actually foresaw what later became part of the Constitutional Court's case-law. Rather than relying on analysis of the specific methods used by these justices (for more details, see Judgement File No. Pl. ÚS 33/97, paragraph 3), the constitutional principles were formulated especially on the basis of the western (especially German) constitutionalism, which the justices strived to follow, and they therefore adopted its basic concepts. They thus construed similarly analogous provisions of the Czech Constitution and Charter on which they relied in establishing each constitutional principle (see above for an analysis of Art. 1 (1) of the Constitution, which mentions a democratic State governed by the rule of law and which could thus have been the origin for the distinction between formal and material rule of law). *Travaux preparatoires* were not decisive in the creation of the Constitution in this respect; however, it must be noted that Prof. Vladimír Klokočka, who then played the decisive role in the formulation of constitutional principles in the case-law of the Constitutional Court, also took part in these works. More specifically, Vladimír Klokočka and Pavel Holländer opposed the "Carlsbad proposal" within the preparation of the Constitution, and Mr Klokočka also later participated in meetings of the Government's Legislative Council (cf. Němeček 2010: 96 *et seq*.).

5. ***What is a legal character of the constitutional principles? Axe they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?***

The Czech legal doctrine gradually comes to the conclusion that the Constitution is based on the founding principles of democracy and constitutionalism. The Constitutional Court dealt with the actual legal nature of constitutional principles in its above-mentioned judgements. As far as the relationship between constitutional principles and fundamental rights is concerned,it must be noted as a preliminary remark, that – as also held by the German Federal Constitutional Court – a certain value corresponds to each fundamental right. The fundamental rights take the form of negative rights vis-à-vis the State, but they also represent certain values (principles). In other words, the value principle represents the other side of each individual fundamental right. In this sense, fundamental rights form part of the objective order of values. These values then lay upon the State the positive obligation to make them an integral part of the legislation (Kommers 1997: 47). As already stated above, the Constitution inherently includes further principles (such as the principle of proportionality, and many principles following from the rule of law), even if they are not stated explicitly.

The distinction between fundamental rights and value principles is manifested both in the various types of proceedings held before the Constitutional Court and in relation to the public- or private-law nature of the given issue. In respect of individual constitutional complaints within vertical relations (i.e. in the relations between an individual and the State), the fundamental rights act directly as subjective rights of individuals. Respect for these rights or their protection can therefore be directly invoked against the public power. The priority of individuals with their (subjective) fundamental rights over the State also entails the essential priority of fundamental rights as subjective rights over the (objective) law (cf. Wagnerová 2007: 61). In proceedings on constitutional complaints pursuant to Art. 87 (1)(d), the Constitutional Court decides on complaints against final decisions or other interference by a public authority with constitutionally guaranteed fundamental rights and freedoms, and the complainant thus cannot invoke solely a breach of a constitutional principle, but must rather state in each case which fundamental right was allegedly breached through the contested act of public authority. It holds that failure to respect a certain legal principle can result in breach of a specific fundamental right. The Constitutional Court can then specify in its ruling that by using a procedure violating Art. 1 (1) of the Czech Constitution, the contested act of public authority violated a specific complainant's fundamental right guaranteed by the constitutional order.

However, in horizontal legal relationships and in abstract or specific review of legal norms, fundamental rights take the form of principles (values) creating an objective order of values. They thus become a component part of objective law (see, e.g., the dissenting opinion of Eliška Wagnerová on Judgement File No. Pl. ÚS 39/08 of 6 October 2010, N 207/59 Coll. of Judgements and Resolutions 3; 294/2010 Coll.). The specific disputable or contested legal rule is then assessed based on the constitutional principles. In proceedings on review of legal rules, constitutional principles may serve as a ground for derogating from a certain provision. Such a ground then usually lies in violation of Art. 1 (1) of the Constitution (rule of law, or Art. 2 (2) of the Charter, i.e. constitutionally prohibited arbitrariness), which serves as a basis for each constitutional principle.

6. ***What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.***

The most frequently applied principles include, e.g.:

- (1) in proceedings on constitutional complaints: **prohibition of arbitrariness**; In its existing case-law concerning constitutional complaints (e.g. Judgement File No. III. ÚS 151/06 of 12 July 2006 (N 132/42 Coll. of Judgements and Resolutions 57), Judgement File No. IV. ÚS 518/10 of 23 November 2010 (N 233/59 Coll. of Judgements and Resolutions 375) and others), the Constitutional Court interpreted the notion of arbitrariness in the sense of extreme non-conformity of the legal conclusions with the factual and legal findings, and also in the sense of a failure to respect mandatory rules, in the sense of interpretation that is in extreme contradiction with the principles of fairness (for example, excessive formalism), as well as interpretation and application of legal concepts in a meaning other than which is laid down by the law and consensually accepted by the legal doctrine, and finally in the sense of decision-making without more detailed criteria or at least principles inferred from a legal rule.

- (2) in proceedings on review of legal rules: **principle of non-retroactivity of legal rules**; According to the Constitutional Court, this principle follows from the principle of protection of the citizens' confidence in law, which further delimits the category of the rule of law (Pl. ÚS 21/96 of 4 February 1997, N 13/7 Coll. of Judgements and Resolutions 87; 63/1997 Coll.). Further to legal theory, the Constitutional Court distinguished, in a number of its judgements, between the notions of genuine retroactivity and quasi-retroactivity, and defined the conditions under which retroactive effect of a certain legal rule can be considered admissible (cf. the summary comprised in Judgement File No. Pl. ÚS 53/10 of 19 April 2011 (N 75/61 Coll. of Judgements and Resolutions 137; 119/2011 Coll.) in paragraphs 144 to 149). According to the Constitutional Court, genuine retroactivity is inadmissible, as a rule, provided that it involves interference with the principles of protection of the confidence in law, legal certainty or protection of acquired rights. To the contrary, quasi-retroactivity is generally admissible, although this is not without exceptions. Decisions of the Constitutional Court regarding the legislative procedure can serve as another example of the above; in this case, a major role in respect of "legislative riders" was played by the **principle of predictability of law,** its comprehensibility and absence of internal contradictions, which is inferred from the rule of law (Judgement File No. Pl. ÚS 77/06 of 15 February 2007, N 30/44 Coll. of Judgements and Resolutions 349; 37/2007 Coll.).

B) CONSTITUTIONAL PRINCIPLES AS HIGHER NORMS? IS IT POSSIBLE TO DETERMINE A HIERARCHYWITHIN THE CONSTITUTION? UNAMENDABLE (ETERNAL) PROVISIONS IN CONSTITUTIONS AND JUDICIALREVIEW OF CONSTITUTIONAL AMENDMENTS.

1. ***Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law*?**

Superiority of constitutional principles to other provisions cannot be directly inferred from the text of the Czech Constitution, as the constitutional principles are enshrined precisely in the normative text comprised in the Constitution. The Constitution contains no algorithm determining the hierarchy or order of such principles, either in relation to the other parts of the normative text or among the principles themselves.

In contrast, the Czech Constitution entails a rule for identifying the relationships and determining the priority in application between national laws and international law. These rules are provided in the following provisions of the Constitution:

"Art. 1 (2)
(2) The Czech Republic shall observe its obligations resulting from international law.

Art. 10
Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a [law] provides, the treaty shall apply.

Art. 10a
(1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organisation or institution.

(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

Art. 95 (1)
(1) In making their decisions, judges are bound by [laws] and treaties which form a part of the [legislation]; they are authorised to judge whether [regulations] other than [laws] are in conformity with [laws] or with such treaties.".

The wording or the three above-cited articles of the Constitution has been effective in the Czech Republic since 1 June 2002, when the constitutional order was modified in relation to the process of accession of the Czech Republic to the European Communities. This involved abolishment of the dualist concept of the relation to international law and international treaties now become a part of the legislation directly, i.e. without the need for a further formal step by the legislature. Judges of common courts are to apply legal norms (rules) contained in a law or international treaty and, where a legal norm contained in a law is at variance with a rule provided in an international treaty, the judge is to automatically apply the international treaty.

The Constitution stipulates four criteria that an international treaty must meet to become a part of the national legislation:

a) ratification of the international treaty has been approved by the Parliament;
b) the Czech Republic has ratified the international treaty;
c) the international treaty is binding on the Czech Republic;
d) the treaty was promulgated as required by the law.

In terms of the Czech constitutional order, however, there are no provisions of international law or EU law that would be superior to the Constitution. Although the Constitution allows for delegation of certain powers of the Czech authorities to an international organisation, such delegation is only conditional and may exist insofar as the delegated powers are exercised in a manner compatible with the State sovereignty and substance of the material rule of law.[1]

The text of the constitutional order, i.e. the individual positive constitutional norms and concepts, can usually be – both individually and in mutual relations – subsumed under the broader notion of constitutional principles (e.g., the principle of separation of powers, the principle of temporary government and the principle of equality before law). However, the Constitutional Court of the Czech Republic does not evaluate these norms – just like constitutional principles – in terms of their systematic hierarchy, as the wording of constitutional documents is characteristic for the high degree of generality. It is therefore up to the Constitutional Court to further specify and interpret the general constitutional norms and principles when applying such texts. However, this is not done for the needs of legal theory, but rather for decision-making in a specific legal case. It can therefore be summarised that the Czech Constitutional Court did not pay systematic attention to the taxonomy of principles in its case-law and if it did indeed attribute greater weight to any of the principles, compared to some other principle or provision, this was always done in a specific case and without any attempt to establish settled interpretation in terms of legal theory. However, constitutional principles serve as one of the sources of constitutional law for the Constitutional Court, as the latter confirmed in its Judgement File No. Pl. ÚS 33/97 of 17 December 1997:

"A modern constitution conceived in democratic terms is a social agreement whereby the people, representing the constituent power (pouvoir constituant), form a single political (State) body, and establish the relationship of an individual to the whole as well as a set of governmental (State) institutions. A document institutionalising the set of fundamental, generally accepted values and forming the mechanism and process of creating legitimate decisions by the public power cannot exist outside the context of values accepted by the general public, the concepts of justice, as well as ideas of the sense, purpose and manner of

[1] See Judgement of the Constitutional Court File No. Pl. ÚS 50/04 of 8 March 2006.

functioning of democratic institutions. In other words, it cannot function outside a certain minimum consensus regarding values and institutions. It thus follows from the above for the field of law that the fundamental legal principles and customs are also a source of law in general, as well as a source of constitutional law, also in the system of written law.".

2.How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

The Constitution of the Czech Republic is a poly-legal document which – in simplified terms – comprises two areas of constitutional regulation. The first of the two mentioned areas is the field of organisation, expressing the principles on which the State is founded, organised and arranged; it provides for the concepts of public power and limits of its exercise. The second constitutional area is then the area of legislation and protection of human rights and freedoms, which is the content of the Charter of Fundamental Rights and Freedoms.

The Czech Constitution, similar to the constitutions of Spain, Portugal and the Russian Federation, sets out the fundamental values of State in its preamble and recitals (basic provisions). However, they are not provided in the form of a list and are not even defined in detail; unlike the Constitutional Court of the Federal Republic of Germany, the Czech Constitutional Court has not provided any final enumeration of the essential principles. Nonetheless, it did take at least a step in this direction in its Judgement File No. Pl. ÚS 19/08 of 26 November 2008:

"The guiding principle is undoubtedly the principle of inherent, inalienable, non-prescriptible, and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people, and separation of powers, respecting the cited material concept of a law-based state, is built to protect them. These principles cannot be touched even by an amendment to the Constitution implemented formally in harmony with law, because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them. Although the Constitutional Court has already many times […] pronounced the necessity of protecting the principles forming the material core of the Constitution in a heightened degree, a detailed list of them is not found in any constitutional provision or in the Constitutional Court's judgments. Even in this proceeding the Constitutional Court has no ambition to make such a list in a case or catalog […]".

These basic principles are usually broken down in the normative text of the Constitution to further sub-principles, which elaborate on the basic principles and thus become sectoral or institutional principles. However, the Constitutional Court has explicitly accepted the existence of constitutional principles, primarily because a mere existence of constitution is not a feature of a constitutional State, which is actually defined by the ability of the constitutional order to ensure protection of the values it proclaims. This is the fundamental difference between the formal and material concepts of the rule of law, which the Constitutional Court accepted at the very beginning of its activity, by virtue of Judgement File No. Pl. ÚS 19/93 of 21 December 1993:

"Our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society. The Czech Constitution accepts and respects the principle of legality as a part of the overall basic outline of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of "old laws" there is a discontinuity in values from the "old regime". This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state. Whatever the laws of a state are, in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be considered as legitimate.".

It can be inferred from the above (solely as doctrine[2], rather than based on case-law of the Constitutional Court) that the basic constitutional principles could involve the following:

- the principle of democracy
- the principle of respect for human rights and freedoms
- the republican principle
- the principle of parliamentary democracy
- the principle of material rule of law
- the principle of protection of ownership
- the principle of unitary State
- the principle of self-government
- the principle of social State

However, these principles can be in mutual contradiction in terms of their application. Unlike other normative rules, principles represent the greatest possible generalisation and, as such, do not provide any procedure leading to an unambiguous result. In their application by the Constitutional Court – especially in the sphere of protection of fundamental rights and freedoms – they thus serve especially as a guideline and interpretation tool in broader sense of the word. However, in case of conflict of these principles, the Constitutional Court must strive to minimise interferences with this principle, which has shown to be weaker in a specific case – see also Judgement File No. Pl. ÚS 4/94 of 12 October 1994:

"*Fundamental rights and basic freedoms may be restricted, despite the fact the constitutional text makes no provision therefor, only in the case that two such rights come into conflict with each other. There is a rudimentary maxim that a fundamental right or basic freedom may be restricted only for the sake of another fundamental right or basic freedom. Should the Court reach the conclusion that it is reasonable to give priority to one of the two conflicting fundamental rights, it is necessary, as a condition of the final decision, to take all possible steps to minimize the impingement of one upon the other. This principle can be inferred from Article 4 para. 4 of the Charter of Fundamental Rights and Basic Freedoms,1) namely to the effect that fundamental rights and basic freedoms must be preserved not only when applying provisions on the limits of the fundamental rights and basic freedoms, but also analogously in the case that they are bounded as the result of a conflict between two rights.*".

[2] Filip, J: Ústavní právo České republiky *(Constitutional Law of the Czech Republic)*, Doplněk publishing house, 4th edition, 2003, p. 191

3. ***How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?***

The Constitution of the Czech Republic was adopted by the Czech National Council on 16 December 1992 as a result of the process of dividing Czechoslovakia. The Czech National Council was the legislative assembly of the Czech part of the federation, formed in general elections held in June 1992. The authority of the Czech National Council to adopt the constitution of a new, not yet existing, State (the Czech Republic was created on 1 January 1993) was derived from the Constitutional Act on the Czechoslovak Federation, according to which the Czech National Council was the "representative of national sovereignty and independence of the Czech nation and the supreme public authority in the Czech Republic".

As mentioned above, the Constitution, in a broad sense of the word, is a poly-legal document and, along with the legal act denoted explicitly as the "Constitution of the Czech Republic", there also exist further constitutional laws having the same legal force as the Constitution of the Czech Republic. It is stated in Article 3 of the Czech Constitution that "*The Charter of Fundamental Rights and Basic Freedoms forms a part of the constitutional order of the Czech Republic.*".

The Charter of Fundamental Rights and Freedoms was originally enshrined in a constitutional law passed by the Federal Assembly of the Czech and Slovak Federative Republic and comprised a catalogue of rights and freedoms. The Charter was then incorporated, without any modifications, in the system of constitutional law of the Czech Republic and, together with other constitutional laws, it forms the "constitutional order". In its Art. 112 (1), the Czech Constitution further provides a list of legal regulations forming the "constitutional order":

"*The constitutional order of the Czech Republic is made up of this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional [laws] adopted pursuant to this Constitution, and those constitutional [laws] of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional [laws] of the Czech National Council adopted after 6 June 1992.*".

Amendments to the Constitution are dealt with in its Article 9.

"*Art. 9*

(1) This Constitution may be supplemented or amended only by constitutional [laws].

(2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.

(3) Legal norms may not be interpreted so as to authorise anyone to do away with or jeopardise the democratic foundations of the state.".

According to Art. 39 (4) of the Czech Constitution, each amendment or supplementation of the constitutional order requires the consent of a qualified three-fifth majority of all Deputies and three-fifth majority of the Senators present. Unlike the process of adopting simple laws, a negative standpoint of the Senate cannot be overturned in new discussion of constitutional bills in the Chamber of Deputies.

While paragraph 1 of cited Article 9 of the Czech Constitution lays down the procedural limits for amendments to the Constitution, paragraph 2 stipulates limits in terms of the contents of such amendments. The rationale behind the latter paragraph lies in protection of the material core of the Constitution, i.e. the basic principles on which rests the entire structure of the State. This provision is not only declaratory, quite to the contrary – it forms the basis of a constitutional instruction that binds all the public authorities to protect the material core of the Constitution. Although there is no mandatory list of provisions, principles or requisites that must not be changed, this "focal point" of the Constitution limits primarily legislative bodies in their legislating activity. The Constitutional Court, as all other bodies of the judicial and executive branches, are then limited by the wording of the third paragraph, which prohibits them from interpreting law as to endanger or infringe on the material core of constitutionality.

The Constitutional Court deals with the material core of the Constitution in its case-law consistently and in the long term.

Judgement File No. Pl. ÚS 19/93 of 21 December 1993:
"*Czech law is not founded on the sovereignty of statutory law. The precedence of statutes over legal norms of a lower order does not signify their sovereignty. It is not possible to speak of the sovereignty of statutory law, not even in the sense of the scope of the legislative power within the bounds of a constitutional state. Within the concept of the constitutional state, upon which the Czech Constitution is based, law and justice are not subjects for the unfettered discretion of the legislators, not even subjects for a statute, for the legislators are bound by certain basic values which the Constitution has declared as inviolable. For example, the Czech Constitution provides in Art. 9 (2) that 'changes of the essential requirements for a democratic law-based state are impermissible'. Thus, the constitutive principles of a democratic society in the framework of this Constitution are placed beyond the legislative power and are thus 'ultra vires' of the Parliament. A constitutional state stands or falls with these principles. To do away with any of these principles, by whatever means carried out, whether by a majority or an entirely unanimous decision of Parliament, could not be otherwise interpreted than as the elimination of this constitutional state as such*".

Judgement File No. Pl. ÚS 36/01 of 25 June 2002:
"The constitutional maxim in Art. 9 (2) of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms. […] The enshrining in the Constitution of a general incorporative norm, and the overcoming thereby of a dualistic concept of the relationship between international and domestic law, cannot be interpreted to mean that ratified and promulgated international agreements on human rights and

fundamental freedoms are removed as a reference point for purposes of the evaluation of domestic law by the Constitutional Court with derogative results.Therefore, the scope of the concept of constitutional order cannot be interpreted only with regard to Art. 112 (1) of the Constitution, but also in view of Art. 1 (2) of the Constitution, and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it.".

Judgement File No. Pl. ÚS 19/08 of 26 November 2008:

"The reference criterion of admissibility of delegating the powers from the Czech Republic to an international organisation lies especially in respect for the material core of the Constitution according to its Art. 9 (2). This is mainly a question of protecting fundamental human rights and freedoms as enshrined in the Charter of Fundamental Rights and Freedoms, in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, in other international treaties in this area and in the settled case-law of the Constitutional Court of the Czech Republic and the European Court of Human Rights. It can be assumed in this respect, however, that an important role will be played especially by application of the Lisbon Treaty, or rather the Charter of Fundamental Rights of the European Union in specific cases where the Constitutional Court of the Czech Republic could be seised by virtue of individual constitutional complaints related to possible (exceptional) interference by the EU institutions and EU law in fundamental rights and freedoms.".

4. ***Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard amongacademic scholars and other societal groups in your jurisdiction*?**

The Constitution may be amended or supplemented exclusively via the legislative branch, as the basic scheme of approving a law and approving a constitutional law is based on the same principles. The requirement on stability of the constitutional order is thus not secured by means of establishing a special constitutional legislative body or any special procedure, but rather exclusively by means of increasing the qualified majority of votes required of both parliamentary chambers. In terms of the Constitution, there is thus no difference between the legislative and constituent body, and entities authorised to submit a bill are the same as those authorised to submit a constitutional bill (i.e. to amend the Constitution).

According to Art. 41 (2) of the Constitution, these entities are as follows:

- any Deputy;
- a group of Deputies;
- the Senate;
- the Government;
- the assembly of a higher territorial self-governing unit.

Certain differences can be found in the manner of discussing a bill and a constitutional bill, as unlike a regular bill, a constitutional bill must also be discussed by the upper chamber of the Parliament, i.e. the Senate. A constitutional bill also cannot be discussed in an accelerated procedure during a state of emergency or state of war, or in an accelerated procedure consisting of a single reading (instead of the total of three). Moreover, the President of the Republic may not veto a constitutional law adopted by the Parliament.

However, the procedure in constitutional amendments is not subject to judicial review. Not even the Constitutional Court has an explicit power to assess whether a constitutional law was adopted properly. This can only happen under extraordinary circumstances, as listed in the response to question 6 of the questionnaire.

In view of the high quorum for the adoption of constitutional amendments, the Czech Constitution is a relatively stable document and its original text has so far been amended or supplemented only eight times. The Constitutional Court does not supervise over the process of amending the Constitution, as it lacks either consultative or interpretation powers for evaluation *a priori* of bills, and the less so of constitutional bills. In addition, the Constitutional Court often accentuates in its decisions the importance of the principles of separation of powers and the responsibility of individual components of public authority for the individual segments of exercise of the public authority. If constitutional legislation is entrusted exclusively to the legislative branch, then not even judicial bodies can interfere with the process of creating constitutional laws. The Constitutional Court therefore respects the democratic will expressed by the legislature, but with the proviso that this will may not interfere with the material core of the Constitution.

Autonomy of the legislature's will was highlighted by the Constitutional Court in proceedings on review of the Employment Act – Judgement File No. Pl. ÚS 55/13 of 15 May 2015:

"*Decision-making on the scope of social rights belongs among important political questions which are primarily the subject of electoral competition and are therefore ultimately decided by the elected representatives in the legislative assembly. Indeed, social rights can be classified among "essentially disputable or contested concepts" which are subject to a lively public and political debate focusing on their deepest meaning. This is why, in this case, the Constitutional Court must exercise greater self-restraint in relation to the legislature's democratic will, which should reflect the current will of society."*.

5. ***Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court andchallenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?***

No, neither the Constitution in narrower sense nor any other provision of the constitutional order provides explicitly for the possibility of reviewing constitutional amendments.

6. ***Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absenceof explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.***

During the entire term of its existence, the Constitutional Court reviewed the constitutionality of a constitutional law only in a single case. In 2009, one of the members of the Chamber of

Deputies filed a constitutional complaint with an application for annulment of Constitutional Act No. 195/2009 Coll., whereby the Parliament shortened *ad hoc* the fifth electoral term of the Chamber of Deputies. Together with the application, the Deputy also applied for annulment of the President's decision on the announcement of elections to the Chamber of Deputies. The contested Constitutional Act laid down that the electoral term of the Chamber of Deputies elected in 2006 would end in 2009 on the date of elections to the Chamber of Deputies, which would be held not later than by 15 October 2009. The complainant submitted that the mentioned decision of the President of the Republic had infringed on his fundamental right of access to elected and other public offices under equal terms, and the complainant also perceived a breach of his fundamental right in the contested Constitutional Act, as it had suspended *ad hoc* the rules laid down by the Constitution for dissolving the Chamber of Deputies, where the Act under scrutiny had changed the rules of free, equal and open political competition, which belonged among the essential requisites of a democratic State governed by the rule of law under Art. 9 (2) of the Charter *(Constitution – trans.).* Moreover, in the complainant's opinion, the contested law had retroactive effects.

The Constitutional Court satisfied the application and annulled the contested Constitutional Act as well as the President's decision on the announcement of elections to the Chamber of Deputies.

It reasoned its decision as follows:

- The notion of "law" embodied in Art. 87 (1)(a) of the Constitution, according to which the Constitutional Court is to make decisions on the annulment of laws or their provisions if they are at variance with the constitutional order, also applies to constitutional laws, within the scope of their review in terms of the imperative non-admissibility of changes to the requisites of a democratic State governed by the rule of law enshrined in Art. 9 (2) of the Constitution. Within the protection of the material core of the Constitution, the Constitutional Court thus extended the scope of its review to also include laws denoted as "constitutional".

  In the wording of Judgement File No. Pl. ÚS 27/09 of 10 September 2009:

  "*Insofar as the Constitutional Court articulates the need to include the category of constitutional acts within the term "statute" in Art. 87 (1)(a) of the Constitution, in terms of reviewing them for consistency with Art. 9 (2) of the Constitution, with direct derogative consequences, it does so in connection to its case law, beginning with the key judgment file no. Pl. ÚS 19/93, and does so in accordance with the values and principles that guide constitutional systems in democratic countries. Protection of the material core of the Constitution, i.e. the imperative that the essential requirements for a democratic state governed by the rule of law, under Art. 9 (2) of the Constitution, are non-changeable, is not a mere slogan or proclamation, but a constitutional provision with normative consequences. In No. 78 of The Federalist Papers, Alexander Hamilton wrote that 'the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.' Without the projection of Art. 9 (2) of the Constitution into interpretation of Art. 87 (1)(a) of the Constitution, the non-changeability of the essential requirements for a democratic state governed by the rule of law would lose its normative nature and remain merely a political, or moral challenge.*".

- The principle of generality of a law represents a part of the essential requisites of a democratic State governed by the rule of law within the meaning of Art. 9 (2) of the Constitution, i.e. a part of the material core of the Constitution.

  In the wording of Judgement File No. Pl. ÚS 27/09 of 10 September 2009:

  "An ad hoc constitutional act (for an individual instance) is not a supplement or amendment to the Constitution. In content, a constitutional act for an individual instance can take two forms – either it involves time-limited suspension of the Constitution, or a substantive, or personal, exception from the general validity of the constitutional framework.

  A supplement to the constitution can be characterized by the fact that the supplemented constitutional provision does not change, and the supplemented and supplementing provisions are not inconsistent. An amendment to the constitution means that a particular constitutional provision is annulled or partly annulled and perhaps (not necessarily) a new provision is established. In a breach, the constitution is not annulled, but the breached (in this case, suspended) provision and the breaching (in this case, suspending) provision are inconsistent.

  Constitutional Act No. 195/2009 Coll. is a constitutional act only in form, but not in substance. In substance it is an individual legal act affecting not a generally defined circle of addressees and situations, but a specifically designated subject […] and a specific situation […]."

- While the legislature may neglect the principle of generality of laws under certain conditions, constitutional laws can nevertheless be adopted *ad hoc* only under extraordinary circumstances associated with the protection of the material core of the Constitution.

  In the wording of Judgement File No. Pl. ÚS 27/09 of 10 September 2009:
  "*In the absence of a constitutional authorization to issue constitutional acts ad hoc, the constitutional conformity of a constitutional act adopted inconsistently with the constitutionally defined scope of the competence of Parliament could be established only by protection of the material core under Art. 9 (2) of the Constitution. In other words, protection of the democratic state governed by the rule of law by adopting an ad hoc constitutional act could be accepted in absolutely exceptional circumstances (such as a state of war or natural catastrophe that are not addressed by either the Constitution or by constitutional Act on the Security of the Czech Republic, but that procedure would have to meet the requirements that follow from the principle of proportionality.*".

- The Constitutional Court also considered a breach of the principle of non-retroactivity to constitute an interference with the essential requisites of a democratic State governed by the rule of law as enshrined in Art. 9 (2) of the Constitution. Indeed, the contested constitutional law reduced the electoral term of the Chamber of Deputies

after it was constituted, and consequently, the conditions for exercising the rights to vote and be elected were changed retroactively.

In the wording of Judgement File No. Pl. ÚS 27/09 of 10 September 2009:
"*[T]he early termination of the term of office of the Chamber of Deputies of the Parliament of the Czech Republic is an institution foreseen and approved by the Constitution (see the framework for dissolving the Chamber of Deputies and calling early elections enshrined in Art. 35 of the Constitution). However, the Constitution cumulatively provides both substantive conditions, as well as appropriate procedure, for exercising it, without a possibility of deviating from them. In this case, the contested constitutional act completely ignores both. It temporarily ad hoc suspends Article 35, and, outside the constitutionally prescribed procedure, sets, for this individual instance, a completely different procedure from the one that the Constitution foresees and requires, and does so although that procedure is not admissible on the grounds of exceptional purposes such as those in which, in the foregoing analysis on the question of public interest, the Constitutional Court included, for example, a state of war or natural catastrophe*".

Summary of conclusions concerning review of constitutional laws:
In the cited ruling, the Constitutional Court reached the conclusion that validity of a constitutional law is subject to three cumulative conditions:

- a procedural condition (the adoption of the constitutional law through the proper procedure)
- a competence condition (whether the given public authority has the power to adopt such a constitutional law); and
- a material condition (whether the adopted constitutional law is in line with the inviolable principles of a democratic State governed by the rule of law).

In the case at hand, the Constitutional Court then concluded that the contested constitutional law was an inadmissible act adopted *ad hoc* with retroactive effects (and, consequently, the material conditions for validity of a constitutional law are not met), which – in addition to further provisions of the Constitution and Charter of Fundamental Rights and Freedoms – interfered with Art. 9 (2) of the Constitution, which delimits and protects the material core of constitutionality.

7. ***Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.***

The case-law of the Constitutional Court does not indicate any tendency towards extending the jurisdiction of the Constitutional Court in terms of review of constitutional amendments. The reason lies, on the one hand, in the fact that the Constitutional Court has reviewed a constitutional law only once during the past twenty-three years and, on the other hand, in procedural limitations which prevent the Constitutional Court from instituting proceedings on review of a legal regulation of its own motion, but rather only on application of an entity that

is authorised by the Constitution to this effect. The space for activism or expansion by the Constitutional Court in the field of review of constitutional laws is close to non-existent in the light of these facts.

Although the decision on review of a constitutional law taken in 2009 raised a lively debate in both political circles and the academia, no-one actually questioned the ruling of the Constitutional Court as to its binding effects or enforceability. Even the generally critical academic debate (mostly) did not question the authority of the Constitutional Court to examine conformity of constitutional laws with the material core of the Constitution; individual voices were rather raised in respect of the question of whether the issue of elections to the Parliament can be fully subsumed under the notion of "essential requisites of a democratic State governed by the rule of law". While various politicians, who were already engaged in the campaign for the next elections at the time when the judgement was rendered, voiced their disagreement with the Constitutional Court's decision in the media, at the same time they vowed to treat the decision of the Constitutional Court as binding and to respect it. The authority of the Constitutional Court to review amendments to the Constitution – should they interfere with the material core – was thus construed in the aforesaid judgement and has not been questioned since.

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