2009/09/10 - PL. ÚS 27/09: CONSTITUTIONAL ACT ON SHORTENING THE TERM OF OFFICE OF THE CHAMBER OF DEPUTIES

HEADNOTES

1) In its case law, the Constitutional Court emphatically made clear the need to protect the material focus of the constitutional order, and, partly abstractly and partly casuistically, indicated its structure, as well as the fact that its consequences apply not only to the democratic legislature, but to the Constitutional Court itself.

Insofar as the Constitutional Court articulates the need to include the category of constitutional acts within the term "statute" in Art. 87 par. 1 let. a) of the Constitution, in terms of reviewing them for consistency with Art. 9 par. 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 par. 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 par. 2 of the Constitution into interpretation of Art. 87 par. 1 let. 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.

2) 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 (the Chamber of Deputies of the Parliament of the Czech Republic elected in 2006) and a specific situation (ending its term of office on the day of elections, which are to be held by 15 October 2009, and shortening deadlines under the Act on Elections to the Parliament of the Czech Republic and under the Administrative Procedure Code, only for this instance). This fact is expressly stated not only in Art. 1 of this constitutional Act, but also in Art. 2 (which is a direct amendment to statutes implemented by the constitutional act!), which contains the express formulation concerning the shortening of deadlines, "for this instance."
The original constitutional framers, in Art. 9 par. 2 of the Constitution, placed the democratic principle and the principle of a law-based state on the same level among the principles that fundamentally identify the constitutional system of the Czech Republic. As the Constitutional Court's case law indicates, violating the principle of generality of laws falls within the realm of impermissible interference with a law-based state. Possible exceptions are either cases of accepting application of law in the form of a statute (e.g. an act on the state budget), or cases of express authorization to issue an ad hoc statute (e.g. constitutional acts issued under Art. 11 and Art. 100 par. 3 of the Constitution) or ad hoc statutes whose issuance is supported by exceptional reasons that meet the condition of the proportionality test (e.g. restitution acts containing lists).
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 par. 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 no. 110/1998 Coll., on the Security of the Czech Republic, as amended by constitutional Act no. 300/2000 Coll.), but that procedure would have to meet the requirements that follow from the principle of proportionality.

3) In addition to the principle that it is impermissible to hold elections in time periods that exceed the term of office, Art. 21 par. 2 of the Charter also enshrines the principle of regular terms of office (regular exercise of voting rights). The ad hoc constitutional act on shortening the term of office is inconsistent with the constitutional imperative of regular election periods, only for one instance, not generally for the future; it sets an exception to Art. 16 par. 1 of the Constitution.

4) There is a fundamental difference in the framework shortening the term of office of the Czech National council by constitutional Act no. 64/1990 Coll., on the one hand, and shortening the term of office of the Chamber of Deputies of the Parliament of the Czech Republic by constitutional Acts no. 69/1998 Coll. and no. 195/2009 Coll., on the other hand. The first of the three cited constitutional acts was adopted before elections were held and a representative assembly constituted, and the two others were adopted afterwards. Thus, they retroactively set the conditions for exercising voting rights (active and passive),

The presumptions on the basis of which the voters decided in the elections to the Chamber of Deputies were changed with retroactive effect.
The Constitutional Court considers such circumvention of fundamental constitutional principles to be incompatible with the principle of the prohibition on retroactivity, in connection with the principles of protecting justified confidence by the citizens in the law and the right to vote freely, i.e. – among other things – the right to vote with knowledge of the conditions for creating the democratic public authorities resulting from the elections, including knowledge of their term of office. The Constitutional Court considers violation of these constitutional principles arising from Art. 1 par. 1 of the Constitution to be interference with the essential requirements for a democratic state governed by the rule of law, enshrined in Art. 9 par. 2 of the Constitution.

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

On 10 September 2009, the plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled in the matter of a petition from Miloš Melčák, residing at Obeciny IX/3617, 760 01 Zlín, represented by Jan Kalvoda, attorney, with his registered office at Bělohorská 35,160 00 Prague 6, seeking the annulment of constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, filed under § 74 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, as follows:

I. Constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, is annulled as of 10 September 2009.

II. The Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic, countersigned by the Prime Minister, ceases to have legal effect simultaneously with Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies.

REASONING

I.
Description of the Matter and Recapitulation of the Petition

In his constitutional complaint, delivered to the Constitutional Court on 26 August 2009, the complainant seeks the annulment of the Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Czech Republic, countersigned by the Prime Minister. At the same time, under § 74 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, together with the constitutional complaint, he is filing a petition seeking the annulment of constitutional Act no. 195/2009 Coll., on shortening the Fifth Term of Office of the Chamber of Deputies. He feels injured by the cited decision of the president, in particular as regards his fundamental right arising from Art. 21 par. 4 of the Charter of Fundamental Rights and Freedoms (the "Charter"), which, according to the Constitutional Court's case law (file no. Pl. ÚS 73/04) also gives rise to the right to uninterrupted exercise of a public office. He believes this fundamental right has been violated, not by the unconstitutional manner in which the legal order was applied and interpreted in the Decision of the President of the Republic contested by the constitutional complaint, but by its legal basis, constitutional Act no. 195/2009 Coll., which he considers to be inconsistent with Art. 21 par. 2 and 4, Art. 22 of the Charter and with Art. 9 par. 2, Art. 16 par. 1 and Art. 17 par. 1 of the Constitution.

By resolution of 1 September 2009 ref. no. Pl. ÚS 24/09-16, the Constitutional Court postponed the enforceability of Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic. Subsequently, by resolution of 2 September 2009 ref. no. Pl. ÚS 24/09-20 proceedings in the matter of the constitutional complaint from the complainant Miloš Melčák, conducted as file no. Pl. ÚS 24/09, were interrupted and the petition to annul constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, was passed on for a decision under Art. 87 par. 1 let. a) of the Constitution.

In the reasoning of his petition, the complainant states that constitutional Act no. 195/2009 Coll. is a constitutional act only formally, but substantively it contravenes the constitutional order, and in fact suspends the constitutional order – ad hoc, for one term of office, suspends its effect for a period arbitrarily chosen by the momentary qualified majority of deputies and senators, due to which, in this sense it is not an act that supplements or amends the Constitution (under Art. 9 par. 1 of the Constitution). He considers the contested constitutional act to be inconsistent with the constitutional order in the sense that it changes an essential requirement for a democratic state governed by the rule of law, which, under Art. 9 par. 2 of the Constitution cannot be changed. That requirement is that the free competition among political forces be subject to the same rules, and, especially, to rules set in advance.

The petitioner then presents the following arguments in support of the Constitutional Court's competence to review the constitutionality of the constitutional act in question: He considers untenable a literal interpretation of Art. 87 par. 1 let. a) of the Constitution, which would lead to absurd consequences – to the ability to use a constitutional act to codify anything, outside the scope of constitutional review. From that point of view he does not find a relevant difference between shortening the term of office of the president or parliamentary deputies and, for example, extending their mandates for life, again, ad hoc, only of deputies elected to this term of office; even Art. 21 par. 1 of the Charter, would not be an obstacle to this "logic," because any later constitutional act has the same legal force as the Charter. According to the petitioner, formalistic insistence on classifying the contested act as a constitutional act, only on the basis that it was passed by a qualified majority is inconsistent with a substantive conception of a state governed by the rule of law, with the fact that the Constitution of the Czech Republic is not neutral in terms of values; it is founded on the inalienability of fundamental human and civil rights and also on the presumption that the "fundamental requirements for a democratic state governed by the rule of law" cannot be changed. In this sense, the petitioner considers as part of the constitutional order not only a statute passed by a qualified majority of Parliament, but one that simultaneously "not opposing the – unchangeable – essential requirements for a democratic state governed by the rule of law." He states his belief that the contested "constitutional" act does not meet these conditions, and is therefore not part of the constitutional order. In his opinion, this conclusion also follows from the statute's departure from the framework of Art. 9 par. 1 of the Constitution, because the contested "constitutional" act does not amend or supplement the Constitution, but suspends a certain provision in it (on

the length of the term of office) for a particular term of office, and does so retroactively. In other words, it replaces the suspended constitutional framework, for this term of office only, with an ad hoc rule based on an agreement between certain political forces. He is of the opinion that removing or postponing the enforceability of a particular constitutional provision for a certain time is appropriate for exceptional situations in the history of the state, such as threats to its integrity, a state of war, or natural disasters; however, even such procedures cannot be used arbitrarily, but only on the basis of constitutional authorization. He states his belief that, however, the unwillingness of the majority of political forces to comply with constitutional procedures in establishing a new government during a particular term of office, is not such a situation.

The petition goes on to analyze in detail the significance and meaning of Art. 9 par. 2 of the Constitution, in connection with the guarantees of democratic, free competition among political forces. It refers to the Constitutional Court's legal opinion stated in judgment file no. Pl. ÚS 53/2000 that "Free competition among political forces is based above all on the fact that all political subjects are governed by the same rules specified, defined in advance, which are based on these basic principles. … At the same time, its decision-making may not be arbitrary, but must respect the constitutional principles that are part of the basic principles of the constitutionally guaranteed political system. If the risk of arbitrariness were not ruled out, and even mere circumvention of these regulations were possible, this would undoubtedly always lead to violation of constitutional order, its purpose and meaning, and this would force the intervention of the Constitutional Court, which is, under Art. 83 and 87, the judicial organ for protection of constitutionality and lawfulness." The petitioner considers it a defining element of a legal norm, including a constitution, essential to the understanding of a substantive law-based state, that it is binding for the future, in the same manner, on all who find themselves in a situation that arises in the future. In his opinion, the idea that statutorily provided rules could be suspended in a self-serving manner, and only for a particular instance, would mean accepting arbitrariness and violating the principle of the rule of law. At this point he also refers to the Constitutional Court's legal opinion in judgment file no. Pl. ÚS 24/04.

According to the petitioner, the contested constitutional act violated the constitutional prohibition on retroactivity, by retroactively adjusting a term of office while it was running – the term of office began as a four-year term (Art. 16 par. 1 of the Constitution) and was retroactively adjusted (shortened). The petitioner considers this retroactive effect to be true retroactivity, which is also inconsistent with the principle of legitimate expectation, and he points to the fact that the exceptional acceptance of true retroactivity in public law in the period after World War II was limited to issues of dealing with the totalitarian past, an example of which is the act on illegality of the communist regime or restitution legislation. In this matter, however, similar reasons that would justify true retroactivity do not exist.

The petitioner emphasizes the exceptional significance of the relationship between elections and the functioning of a democratic law-based state; he considers a pre-defined term of office to be important for applying the principles of the sovereignty of the people, equal opportunity, open political competition, the right

of a deputy to uninterrupted exercise of a mandate during a pre-determined period, and especially for ensuring protection of the rights of a parliamentary minority. In his opinion, a possible breach of these principles can be allowed only on the basis of the Constitution, under conditions generally provided by the Constitution (those being the conditions of dissolving the Chamber of Deputies). In this regard he refers to a number of decisions in which the Constitutional Court spoke on protection of the cited principles (file no. II. ÚS 275/96, Pl. ÚS 24/04, Pl. ÚS 73/04). Insofar as the Constitutional Court, in judgment file no. Pl. ÚS 73/04, derives the limits of the judicial branch's ability to annul elections due to election offenses, on the grounds that it is impermissible to change the will of the sovereign by a decision by the judicial branch, then, according to the petitioner, it is all the less permissible for the legislative branch.

The petitioner rejects the argument that the constitution can codify everything that receives a constitutional majority, regardless of the provision that the essential requirements for a democratic state governed by the rule of law cannot be changed. He states his belief that these requirements must also include the predictability of the law, which comes from it being general, as well as the opinion that the Constitutional Court already stated this thesis in judgment file no. Pl. ÚS 77/06: "In a substantive law-based state, a statute in the formal sense cannot be understood as a mere repository of a wide variety of changes made throughout the legal order. On the contrary, the substantive conception of the law-based state requires that a statute be, both in terms of form and substance, a predictable, consistent source of law." He also points out, again with reference to the Constitutional Court's case law (file no. Pl. ÚS 73/04) – the importance of fair conditions for political competition. Here he stresses the difference between shortening the term of office of the Chamber of Deputies for one instance, and the general rule for dissolving it. He is aware that in the world's democratic countries there are various constitutional models for dissolving parliaments and calling early elections. In his opinion, in terms of Art. 9 par. 2 of the Constitution, it is possible to enshrine such a model through a general amendment to the Constitution, but it is not possible to rely on the democratic character of a state, proceed formally within the framework of its constitution, and simultaneously suspend the essential, substantive requirements that guarantee its democratic and law-based character.

The petitioner analyzes the purpose of the mechanism for dissolving the Chamber of Deputies, tied to a vote of no confidence in the government (or a refusal to give a vote of confidence), as it is enshrined in the Constitution; he states that this mechanism makes the fall of the government conditional on a seriously intended decision by the opposition to form a government, that it aims to rule out demonstrative, non-serious attempts to destabilize the government, that it lays a precisely weighed responsibility on the participants in political competition.

In his opinion, circumventing this procedure by shortening the term of office of the Chamber of Deputies makes political competition unequal, and preserves the existing circle of competitors, because new political parties or movements will necessarily find themselves under time pressure, if they were aiming their involvement in the contest toward the regular date of elections. He emphasizes that, in terms of political competition, the time when elections to the representative body are held is not politically neutral – in the case of early

elections, the only legitimate date is one that arises from procedures described in advance by the Constitution. Therefore, he considers that the contested constitutional act has violated the principle of equal opportunity in political competition (which he supports by reference to the Constitutional Court's legal opinion stated in judgment file no. Pl. ÚS 53/2000). He expressly states in this regard: "The modus operandi of constitutional offenders lies in the fact that the Constitution, or its essential requirements guaranteeing the rules of political competition, are not annulled for a particular time, but are ignored, suspended. Yet, nothing prevents the momentary constitutional majority from amending or supplementing the Constitution – it can codify any easy manner of calling early elections for the next time. A new constitutional rule would be established, to replace the existing one, the next time, and it would mean free (equal and open) competition between political forces in the future, it would conform to the constitutional order, i.e. the essential requirements for a democratic state governed by the rule of law. However, the majority does not do that; for the next time it again returns to the rigid procedure of calling new elections; until such time as the momentary majority again decides that it is politically suitable – for it – to ignore the constitutional procedure again and get out of political competition through an ad hoc statute."

From a historic viewpoint the petitioner points out that the contested constitutional law is identical in content with the one adopted in 1998, and the political circumstances are also analogous. He considers the argument of "constitutional habit" established by the procedure in 1998 to be unacceptable, and outlines the political-cultural consequences of breaching constitutional principles.

In his opinion, constitutional Act no. 195/2009 Coll., because it changes the rules of free, equal and open political competition, which is among the essential requirements of a democratic, law-based state, by suspending the Constitution for one instance, retroactively and in a manner that limits the sovereignty of the people, is thus inconsistent with Art. 21 par. 2 and 4, Art. 22 of the Charter a Art. 9 par. 2, Art. 16 par. 1 and Art. 17 par. 1 of the Constitution. For all these reasons, thus presented, he proposes that constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, be annulled.

II.
Recapitulation of the Essential Parts of Responses from the Parties to the Proceeding

Under § 42 par. 4 and § 69 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the Constitutional Court sent the petition to the Chamber of Deputies. In his response, delivered to the Constitutional Court on 4 September 2009, the Chairman of the Chamber of Deputies of the Parliament of the Czech Republic, Ing. Miloslav Vlček, states that in debate on the bill of the adjudicated constitutional act the question of adopting a special constitutional act was discussed in detail, alternatives for resolving the current political situations were raised, the reservations that certain experts and politicians had to the proposed practical solution were raised and discussed, and the possibility of a

general constitutional amendment to the rules for dissolving the Chamber of Deputies was considered. The need to respect the essential requirements for a democratic, law-based state was emphasized.

With reference to the Constitutional Court's opinion on the function of a party's response in a proceeding on review of norms (file no. Pl. ÚS 24/07), over and above the routine response from the chamber, the Chairman of the Chamber of Deputies states that constitutional Act no. 195/2009 Coll. was adopted on the basis of wide political consensus, both chambers of Parliament consented to it in a constitutionally prescribed manner, it was signed by the appropriate constitutional authorities, and duly promulgated. In his opinion, the content of the cited constitutional act does not conflict with the substantive requirements of the democratic legal order, because the shortening of the term of office of the Chamber of Deputies is tied to holding new elections to the Chamber of Deputies. Shortening the term of office of the Chamber of Deputies does not violate the principle of the sovereignty of the people; on the contrary it leads to the need for members of the legislative assembly to give an accounting to the citizens earlier, which does not conflict with the requirements of democracy or of a law-based state. The present constitutional act changes nothing about the fact that the legislative assembly is constituted on the basis of duly held elections, and regularly answers to the citizens, in elections, for its activities.

The response also contains the personal opinion of the Chairman of the Chamber of Deputies, that the Constitutional Court, under the valid wording of the Constitution, is not competent to review the "constitutionality" of constitutional acts and to annul constitutional acts. If the Constitutional Court adopted such authority, it would set itself above the constitutional framers. It is the obligation of the constitutional framers to ensure that adopted constitutional acts do not deviate from what is, under Art. 9 par. 2 of the Constitution, compatible with democracy and with a state governed by the rule of law.

Under § 42 par. 4 and § 69 of Act no. 182/1993 Coll., as amended by later regulations, the Constitutional Court also sent the petition to the Senate of the Parliament of the Czech Republic. In the introduction of the Senate's response, delivered to the Constitutional Court on 4 September 2009, its chairman, MUDr. Přemysl Sobotka, recapitulates the course of debate of the constitutional act in the Senate, and in particular recapitulates the arguments for and against adopting it.

Among the former, he cites the opinion that although the one-time constitutional act displays some non-systematic features, but that defect is not of such intensity that adopting the act could endanger or violate the principles of a democratic law-based state. A one-time shortening of the term of office of the Chamber of Deputies is not a new institution in our legal order, because it was already "used successfully" once in constitutional Act no. 69/1998 Coll., and therefore, there is no reason why the Parliament could not now choose the same path for shortening the fifth term of office of the Chamber of Deputies, because this solution can speedily open the path to early parliamentary elections and thus end a period of political instability.

Among the criticisms of the adopted law, the response refers to the statement from the Senate Permanent Commission for the Constitution of the Czech Republic and Parliamentary Procedure, adopted at its 6th meeting, held on 27 May 2009, in which the Commission concluded that the proposed constitutional act goes against the purpose of the Constitution as a system of general rules of governing, known in advance, interferes in the relationship between the deputies and the citizens, as well as in the competence of the Senate, and adopting it is certainly not the only way to arrange early elections to the Chamber of Deputies.

In conclusion, the Chairman of the Senate states that the Senate discussed the draft constitutional act within the bounds of constitutionally specified competence and in a constitutionally prescribed manner, and approved the contested constitutional framework by a majority, with the knowledge that its substance was not inconsistent with Art. 9 par. 2 of the Constitution or with other norms that are part of the constitutional order; he leaves the evaluation of the petitioner's objections fully in the Constitutional Court's discretion.

In view of the exceptional urgency of the matter, the Constitutional Court shortened the deadline under § 69 par. 1 of Act no. 182/1993 Coll. and simultaneously notified both chambers of the Parliament of the CR of their opportunity to state, immediately after receiving the petition for a response, that they consider the time given by the deadline to be insufficient. The party to the proceeding accepted the Constitutional Court's actions and sent the response to the petition by the deadline specified.

III.
Hearing

At the hearing, no proposals were made to supplement the evidence, and no new facts beyond the framework of the petition and written responses to it arose from the testimony of the parties to the proceeding or their responses to the judges' questions.

IV.
The Imperative of the Non-changeability of the Material Core of the Constitution of the Czech Republic (Art. 9 par. 2 of the Constitution) and its Impact on Art. 87 par. 1 let. a) of the Constitution

In its first judgment in a proceeding on review of norms, in the matter of the constitutionality of Act no. 198/1993 Coll., on the Illegality of the Communist Regime and on Resistance to It, file no. Pl. ÚS 19/93, the Constitutional Court formulated fundamental these for the interpretation and understanding of the imperative of the non-changeability of the material core of the Constitution: "In its later development, the legal positivism tradition … revealed … its weaknesses several times. Constitutions constructed on these foundations are neutral as to

values: they form an institutional and procedural framework, which can be filled with very different political content, because observing the jurisdictional and procedural framework of constitutional institutions and procedures, i.e. criteria of a formally rational nature, becomes the criterion for constitutionality. … The awareness that injustice must remain injustice, even if it is wrapped in the cloak of the law, was reflected in the constitution of post-war Germany, and at present also in the Constitution of the Czech Republic. Our new constitution is not established on neutrality of values, it is not merely a definition of institutions and processes, but incorporates in its text certain regulatory ideas, expressing the basic untouchable values of a democratic society. … Czech law is not based on the supremacy of laws. The fact that statutes are superior to lower legal norms does not yet mean that they are sovereign. Even in the sense of the scope of legislative competence within a constitutional state, one cannot speak of the sovereignty of laws. In the concept of a constitutional state on which the Czech Constitution is based, law and justice are not subject to the discretion of the legislature, and thus of laws, because the legislature is bound by certain fundamental values that the Constitution declares to be untouchable. For example, the Czech Constitution provides in Art. 9 par. 2 that 'any change in the essential requirements for a democratic state governed by the rule of law is impermissible.' This places the constitutive principles of a democratic society, within this constitution, above legislative competence, and thus 'ultra vires' of Parliament. A constitutional state stands and falls with these principles. Removal of one of these principles, by anyone, even by a majority or unanimous decision of Parliament, could not be interpreted otherwise than as removal of this constitutional state as such."

In judgment file no. Pl. ÚS 36/01 the Constitutional Court applied Art. 9 par. 2 of the Constitution in the position of a basic rule for interpretation of the Constitution and amendments to it: "The constitutional maxim in Art. 9 par. 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." In this connection, we must also mention judgment file no. Pl. ÚS 11/02, in which the Court also included in Art. 9 par. 2 of the Constitution the guarantee of ruling out arbitrariness in its own interpretation of the constitutional order: "If the Constitutional Court itself, as a constitutional body, i.e. a public authority, is not to act arbitrarily, the Constitutional Court also being subject to the prohibition on arbitrary conduct, because it too, or it especially, is required to respect the framework of the constitutional state, in which arbitrary conduct by public authorities is strictly forbidden, it must feel bound by its own decisions, and can depart from them through its case law only under certain circumstances. This postulate can be described as an essential requirement for a democratic state governed by the rule of law (Art. 1 par. 1, in connection with Art. 9, par. 2 of the Constitution.)"

In a number of its decisions the Constitutional Court also outlined the meaning of the term "essential requirements for a democratic state governed by the rule of law" under Art. 9 par. 2 of the Constitution. In judgment file no. III. ÚS 31/97 it

stated: “The concept of a democratic state under Art. 9 par. 2 of the Constitution is interpreted by the Constitutional Court, as well as by doctrine. In its decision in the matter file no. Pl. ÚS 19/93, the Constitutional Court included in this concept a substantive, not a formal, understanding of a state governed by the rule of law.” The court also referred to doctrinaire positions, according to which the essential requirements for a democratic state governed by the rule of law under Art. 9 par. 2 and 3 of the Constitution include “above all the sovereignty of the people and the principles contained in Art. 5 and 6 of the Constitution and the natural law provisions of the Charter of Fundamental Rights and Freedoms, which establish a constitutional right to resistance (Art. 23 of the Charter)“ , or, in other words, these requirements are “concentrated in several articles of Chapter I of the Constitution and in Chapter I and V of the Charter, and ceremonially declared in the Preamble to the Constitution“ . From a comparative perspective, the Constitutional Court also pointed to Art. 79 par. 3 of the Grundgesetz of Germany, Art. 110 par. 1 of the Constitution of the Greek Republic, and Art. 288 of the Constitution of the Portuguese Republic.

The Constitutional Court also included in the material focus of the legal order – consistently with the doctrinaire opinion – the fundamental principles of election law (judgment file no. Pl. ÚS 42/2000).

We can draw several general conclusions from these decisions: in its case law, the Constitutional Court emphatically made clear the need to protect the material focus of the constitutional order, and, partly abstractly and partly casuistically, indicated its structure, as well as the fact that its consequences apply not only to the democratic legislature, but to the Constitutional Court itself. When (file no. Pl. ÚS 36/01) it was faced with a constitutional act (amending and supplementing the Constitution) that the Court considered to be inconsistent with the material focus of the Constitution (Art. 9 par. 2), it then proceeded using a method of interpretation that conformed to the safeguards arising from Art. 9 par. 2 (i.e. by analogy, with the principle of giving priority to a consistent interpretation over derogation). It maintained this legal opinion in its further case law (file no. Pl. ÚS 44/02 and I. ÚS 752/02).

Where the Constitutional Court, in judgment file no. Pl. ÚS 21/01, departed from previous settled case law, this legal opinion was not part of the essential grounds for that decision, and was stated only as obiter dictum. In this regard, democratic constitutional law theory agrees that it is relevant to the binding nature of a precedent to distinguish the importance of ratio decidendi and obiter dicta: “the written opinion of the precedent-setting court is not binding in its entirety; only the grounds for the decision, the ratio decidendi, are binding.”

The constitutional development in the Czech Republic is in line with the constitutional development of European democracies in the protection of the constitutive principles of a democratic society.

The authors of the German Grundgesetz (Fundamental Law) of 1949 responded to German history of 1919-1945 by, among other things, removing the “material focus of the Constitution” from the discretion of the constitutional framers; in other words, by enshrining the “imperative of non-changeability” (Ewigkeitsklausel).

Under it, amendment to the Grundgesetz concerning the fundamental principles of federal organization, the basic principles of protection of human rights, a law-based state, the sovereignty of the people, and the right to civil disobedience is impermissible (Art. 79 par. 3 of the Grundgesetz). According to the doctrine and case law of the German Constitutional Court, the consequence of this framework of non-changeability of the "material core" of the Constitution is a procedure where the German Constitutional Court would rule, with final effect, on the inconsistency of a constitutional act with the material core of the constitution; this includes the possibility that it would declare the amendment to the Grundgesetz invalid. The doctrinaire opinion that the German Constitutional Court is competent to rule that a constitutional act amending the Grundgesetz inconsistently with Art. 79 par. 3 is invalid, became accepted when the Grundgesetz went into effect, and was subsequently confirmed by the case law of the German Constitutional Court (BVerfGE, 30, 1/24).

The Constitution of the Austrian Republic defines procedural limitations on the constitutional framers for the Constitution's material focus, and also establishes the competence of the Constitutional Court in that regard. In Austrian constitutional law theory, "land and federal statutes, both ordinary and constitutional acts, are within the review competence of the Constitutional Court." This competence is derived, out of the group of federal constitutional acts, from Art. 140 of the Federal Constitution, which establishes the general competence of the Court in reviewing norms, in connection with Art. 44 par. 3 of the Federal Constitution, under which a complete revision of the Constitution, or a partial revision, if one third of members of the National Council Federal Council request it, must be approved by a referendum. Doctrinaire opinion is that it is up to the Constitutional Court to review, including through an a posteriori review of norms, whether this procedure has been observed in terms of an amending intervention by the constitutional framers in the "material focus of the Constitution." It includes among the components of that focus, a representative democracy, federal organization, a liberal law-based state and the separation of powers. This opinion is also based on the legal opinion of the Austrian Constitutional Court, stated in decisions VfSlg. 11.584, 11.756, 11.827, 11.916, 11.918, 11.927, 11.972. Starting from the criticism that legislative practice circumvents the authority of the Constitutional Court by adopting constitutional acts in areas of simple law, the Court concludes that the constitutional framers cannot, in this manner "head toward" breaching the fundamental principles of the Federal Constitution.

This line of decisions was also confirmed by the Court's other case law. The decision of 11 November 2001 VfGH 16.327 reviewed the constitutionality of a statutory provision to which the Parliament ascribed the force of a constitutional provision, § 126a of the Act on Public Procurements, under which "provisions of land statutes valid as of 1 January 2001, concerning the organization and competence of bodies that are responsible for legal protection concerning public procurement, are deemed to be not inconsistent with the Federal Constitution." The Constitutional Court previously distinguished simple and qualified constitutional law (i.e. constitutional law that forms the material core of the Constitution under Art. 44 par. 3). It stated that, for the purpose of protecting "the existing core of the Constitution," the constitutional framers of simple constitutional law are not permitted to completely suspend the binding nature of

the Federal Constitution for a component field of the legal order (regardless of the importance of that component field). In this regard, the Constitutional Court did not consider it necessary to review whether proceedings under Art. 44 par. 3 of the Federal Constitution came into consideration. It stated that suspending the Constitution is inconsistent with the principles of democracy and with a law-based state, and is not within the discretion of the constitutional framers under Art. 44 par. 1 of the Federal Constitution. On the basis of these arguments, and although, under the literal wording of Art. 140 par. 1 of the Federal Constitution, the Constitutional Court decides "on the unconstitutionality of federal and land statutes, the Constitutional Court annulled § 126a of the Act on Public Procurement, described by the constitutional framers as a provision of a constitutional act and adopted by a procedure under Art. 44 par. 1 of the Federal Constitution.

The development of democratic constitutionality in democratic countries at present emphasizes the protection of values that identify the constitutional system of freedom and democracy, which includes the possibility of judicial review of constitutional amendments.

Just as in Germany Art. 79 par. 3 of the Grundgesetz is a reaction to the undemocratic developments and Nazi despotism in the period before 1945 (and analogously, Art. 44 par. 3 of the Federal Constitution of the Austrian Republic), Art. 9 par. 2 of the Constitution is the result of experience with the decline of legal culture and suppression of fundamental rights during the forty-year rule of the communist regime in Czechoslovakia. Therefore, as a result of this analogy, interpretation of Art. 79 par. 3 of the Grundgesetz by the German Federal Constitutional Court and similar steps in other democratic countries are deeply inspiring for the Constitutional Court of the Czech Republic.

Insofar as the Constitutional Court articulates the need to include the category of constitutional acts within the term "statute" in Art. 87 par. 1 let. a) of the Constitution, in terms of reviewing them for consistency with Art. 9 par. 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 par. 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 par. 2 of the Constitution into interpretation of Art. 87 par. 1 let. 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 Constitutional Court notes, only secondarily, that for those situations where the category of constitutional acts needs to be excluded from the term "statute,"

the wording of the Constitution expressly enshrines this fact [see Art. 50 par. 1, Art. 62 let. h) of the Constitution].

V.
Constitutional Conformity of the Legislative Process

Starting with the interpretation of Art. 87 par. 1 let. a) of the Constitution thus presented, the Constitutional Court, in accordance with § 68 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, as is the rule in proceedings on the review of norms, in this matter too is required to evaluate whether the contested constitutional act was adopted and issued within the bounds of constitutionally prescribed competence and in a constitutionally prescribed manner.

Chamber of Deputies publications and stenographic records, as well as the response to the party to the proceeding, the Parliament of the Czech Republic, showed that the Chamber of Deputies approved the draft of the act in question, i.e. constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, in the third reading at its 56th session on 13 May 2009 by resolution no. 1207, when out of 189 deputies present, 172 deputies voted in favor, and 9 were against.

On 28 May 2009, the plenum of the Senate discussed the draft act at 7th session of its seventh term of office, and approved the draft act by resolution no. 181. In vote no. 4, out of 71 senators present, 56 were in favor of the act, 8 were against, and 7 abstained.

The constitutional act was signed by the appropriate constitutional authorities and was duly promulgated as no. 195/2009 Coll. in part 58 of the Collection of Laws, which was distributed on 29 June 2009, and under Art. 3 it went into effect on the day it was promulgated, i.e. on 29 June 2009.

VI.
Breach of the Constitution by an Ad Hoc Constitutional Act (a Constitutional Act for an Individual Instance) and Conflict with the Essential Requirements for a Democratic State Governed by the Rule of Law

The aims of adopting constitutional Act no. 195/2009 Coll. are expressed in the background report to the draft constitutional Act on Shortening the Fifth Term of Office of the Chamber of Deputies, submitted by Deputies Petr Tluchoř, Bohuslav Sobotka and Přemysl Rabas (Chamber of Deputies publication 796): “In view of the present distribution of political parties in the Chamber of Deputies, where, under Art. 68 par. 3 of the Constitution, the newly appointed government must seek a vote of confidence within 30 days after it is named, and in view of the fact that the Chamber of Deputies can be dissolved and new elections called only when three governments in a row have failed to obtain a vote of confidence in the Chamber of Deputies [Art. 35 par. 1 let. a) of the Constitution], the Czech Republic faces the danger of a lengthy period of instability and political crisis. A constitutionally

legitimate means for resolving this situation is to hold early elections, in which the citizens can newly express their will, and from which a new Chamber of Deputies can be formed, able to give the government and the Czech Republic the political foundations necessary to stabilize the constitutional, political and economic conditions. … Thus, the proposed constitutional act proposes a solution that Parliament already selected in the 1990s in order to hold early elections to the Chamber of Deputies in 1998. The political representatives of that time (the government and both chambers of Parliament) also came to an agreement on calling early elections through a special constitutional act. … Thus, this is a path to organizing new elections to the Chamber of Deputies that is already familiar to our constitutional practice. The proposed constitutional act does not conflict with the essential requirements for a democratic state governed by the rule of law, which, under Art. 9 par. 2 of the Constitution, may not be changed. In particular, it respects Art. 21 par. 2 of the Charter of Fundamental Rights and Freedoms, under which elections must be held by deadlines that do not exceed the regular terms of office provided by law."

During parliamentary debate on the proposed constitutional act, arguments were also heard against adopting it, from various political parties (see, e.g. the statement by Deputy Cyril Svoboda at the 56th session of the Chamber of Deputies of the Parliament of the CR on 28 April 2009 [http://www.psp.cz/eknih/2006ps/stenprot/056schuz/s056014.htm], Senators Tomáš Töpfer, Petr Pithart and Soňa Paukrtová at the 7th session of the Senate of the Parliament of the CR on 28 May 2009 [http://www.senat.cz/xqw/xervlet/pssenat/hlasovani?action=steno&O=7&IS=4129 &T=75#st75]).

The Senate Permanent Commission for the Constitution of the Czech Republic and Parliamentary Procedure, at its 6th meeting, held on 27 May 2009, unanimously adopted a position on the draft constitutional Act on Shortening the Fifth Term of Office of the Chamber of Deputies (Senate publication 75) in which it said: "The submitted draft constitutional act is not an amendment to the Constitution in the form of formulation of a general rule. It takes no notice of constitutional mechanisms – does not change them, supplement them, or formally annul them, merely, for this one instance, provides a different way to reach early elections. The dispute is not about early elections, but about the route to them – systematic and constitutional on the one hand, or ad hoc on the other hand. Therefore, referring to the right of the people to decide who will rule them (see the background report to Chamber of Deputies publication 796) is not a relevant argument. … The model for the draft is constitutional Act no. 69/1998 Coll. Unlike in that case, however, the element of surprise is lacking, because the problem is known, and solutions have been proposed. If the route of adopting ad hoc constitutional acts were to become routine, the Constitution would never change, because it would be unnecessary. In that case, of course, there is the danger that it will diverge from constitutional and political reality – it will become a "façade." At the same time, every political crisis will turn into a constitutional crisis, because it will be addressed by a constitutional act. … There are doubts about the "constitutionality" of this draft act. The Commission recognizes the possible existence of "unconstitutional constitutional acts," or maybe rather only imaginary ones, because they are constitutional acts adopted outside the competence (ultra

vires) of the constitutional framers, if they are inconsistent with the essential requirements for a democratic state governed by the rule of law, which Art. 9 par. 2 of the Constitution declares it is impermissible to change. If this were not so, the cited provision would have no normative meaning. … The draft constitutional act goes against the purpose of the Constitution as a system of general rules of government, known in advance; it interferes in the relationship between the deputies and the citizens, as well as in the competence of the Senate. Adopting it is certainly not the only way to achieve early elections to the Chamber of Deputies, and it will certainly reduce the pressure for any amendment to the Constitution. Not, however, to the benefit of its stability, but with the risk of ad hoc circumvention."

The petition to annul constitutional Act no. 195/2009 Coll., the response from the party to the proceeding, as well as the opposing arguments expressed during parliamentary debate, all raise these fundamental questions for the Constitutional Court: Under the Constitution, what definitional, conceptual elements define the category of constitutional acts? Is an act automatically a constitutional act if it is labeled as such by the Parliament of the Czech Republic and is adopted by a procedure under Art. 39 par. 4 of the Constitution? Or must it also meet other conditions: the condition of competence (authorization) under Art. 9 par. 1 of the Constitution or another express constitutional authorization (Art. 2 par. 2, Art. 10a par. 2, Art. 11, Art. 100 par. 3), and the substantive condition provided in Art. 9 par. 2 of the Constitution?

VI./a
Generality of a Constitutional Act as an Essential Requirement of a State Governed by the Rule of Law

The constitutional practice of the Weimar Republic in 1919 to 1933 was marked by regular breaches of the constitution by special constitutional acts, including for an individual case (which led to the constitution being poorly organized and unstable). A bitter debate on the permissibility of breaching the constitution was led by the positivists (P. Laband, G. Jellinek, G. Anschütz, S. Jaselsohn, W. Jellinek) ane the substantively (value) oriented constitutionalists (C. Schmitt, G. Leibholz, C. Bilfinger). Since that time, European constitutional theory understands breaching the constitution to be the following procedure by parliament: "In a breach, the constitutional law provision is not amended, but a deviating directive is made in an individual case – while leaving it generally valid for other cases. … Such breaches are, by their nature, measures, and not norms, which is why they are not statutes in the state-law sense of the word, and as a result are also not constitutional acts. … The legislature, as a legislature, can only issue statutes, but it cannot breach them; the question concerns not legislative activity, but sovereignty."

The German Grundgesetz of 1949, reacting to the practices of the Weimar Republic and its outcomes, established a framework under which it can be changed only by a statute that expressly amends or supplements the text of the Grundgesetz (Art. 79 par. 1 first sentence of the Grundgesetz). This constitutional provision rules out, does not permit the possibility of breaching the Grundgesetz.

The impermissibility of breaching the constitution with an ad hoc constitutional act (for a single instance) is also emphasized in other democratic European countries.

The fact that statutes (i.e. fixed legal norms) should be of a general nature is not an expectation of the civil law-based state developed only in the 19th century. This idea accompanies all European legal history. It is found in the maxims of the great Roman lawyers, is lost in the Middle Ages, and comes to life again in the era of enlightenment and rationalism. Generality of content is the ideal, typical, and essential element of a statute, compared to court decisions, or government and administrative acts. The purpose of dividing state powers into the legislative, executive and judicial branches is to entrust the general and primary ruling of the state to the legislature, derivative general ruling and decision making about individual cases to the administrative branch, and exclusively only decision making on individual cases to the judiciary. The requirement that a statute be general is an important component of the principle of the rule of law and thus also of a state governed by the rule of law. As F. A. Hayek, one of the most important 20th century theoreticians of the law-based state, says: "[There is] the belief that so long as all actions of the state are duly authorized by legislation, the Rule of Law will be preserved. But this is completely to misconceive the meaning of the Rule of Law. … The Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and excludes legislation … directly aimed at particular people…."

In a number of its decisions, the Constitutional Court has repeatedly spoken on the requirement that a legal regulation be general. In judgments file no. Pl. ÚS 55/2000 and Pl. ÚS 24/04 it stated the following: "The fundamental principles of a substantive law-based state include the maxim that legal regulations must be general (the requirements that a statute, or legal regulations, be general). The generality of content is an ideal, typical, and essential element of a statute (or a legal regulation generally), in relation to judicial decisions, government and administrative acts. The purpose of dividing state powers into the legislative, executive and judicial branches is to entrust the general and primary ruling of the state to the legislature, derivative ruling and decision making about individual cases to the administrative branch, and exclusively only decision making on individual cases to the judiciary. This outline of the definitive element of the term statute (or legal regulation) then gives rise to the term statute (legal regulation) in the substantive sense, from which we must distinguish statutes (legal regulations) in the formal sense. If statutes, in the formal sense, are the acts of a legislative body through which it 'permits, or approves certain specific measures by the executive bodies (the state budget, national treaties, etc.),' traditional scholarship believes that in such cases the legislative body issues – in the form of statutes – administrative acts.' (F. Weyr, Československé ústavní právo [Czechoslovak Constitutional Law], Prague 1937, p. 37) ... Although they may be sources of law by their form (a legal regulation), by their substance they are also application of law."

The Constitutional Court analyzed the arguments in favor of generality of legal regulations in judgment file no. Pl. ÚS 12/02, in which it stated: "However, in this matter these viewpoints must be applied to review of a statute that governs a unique instance, and which therefore deviates from one of the fundamental material elements of the term "statute," which is generality. Let us point out that

the requirements that a statute be general is an important elements of the principle of the rule of law and likewise the law-based state. …A special argument against statutes that govern individual cases is the principle of separation of powers, i.e. the separation of the legislative, executive and judicial branches in a democratic, law-based state. Art. I sec. 9 of the Constitution of the USA said in this regard: 'No Bill of Attainder or ex post facto Law shall be passed.'"

The Constitutional Court considered the question of ruling out judicial review in the case of an individual legal regulation in judgment file no. Pl. ÚS 40/02, where it stated "An individual regulation contained in a legal regulation that deprives the addressees of the possibility of judicial review of the fulfillment of general conditions of the normative framework by a particular subject, which lacks transparent and acceptable justification in relation to the possibility of general regulation, must thus be considered inconsistent with the principle of a state governed by the rule of law (Art. 1 of the Constitution), in which the separation of powers and judicial protection of rights are immanent (Art. 81, Art. 90 of the Constitution)."

Thus, arguments in favor of the generality of law are the separation of powers, equality, and the right to an independent judge, and the removal of capriciousness (arbitrariness) in the exercise of state power.

Under Art. 9 par. 1, the Constitution can be supplemented or amended only by constitutional acts. Moreover, in a number of its provisions the Constitution expressly authorizes Parliament to issue constitutional acts that govern a precisely defined subject matter (Art. 2 par. 2, Art. 10a par. 2, Art. 11, Art. 100 par. 3). To evaluate the constitutionality of respecting competence in issuing constitutional Act no. 195/2009 Coll. we must also answer the question of whether an ad hoc constitutional act (for an individual instance) can be included in the framework of permissible constitutional amendments under Art. 9 par. 1 of the Constitution.

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 (the Chamber of Deputies of the Parliament of the Czech Republic elected in 2006) and a specific situation (ending its term of office on the day of elections, which are

to be held by 15 October 2009, and shortening deadlines under the Act on Elections to the Parliament of the Czech Republic and under the Administrative Procedure Code, only for this instance). This fact is expressly stated not only in Art. 1 of this constitutional Act, but also in Art. 2 (which is a direct amendment to statutes implemented by the constitutional act!), which contains the express formulation concerning the shortening of deadlines, "for this instance."

If the Constitutional Court is forced to answer the question of whether Art. 9 par. 1 of the Constitution also authorizes Parliament to issue individual legal acts in the form of constitutional acts (e.g. to issue criminal verdicts against specific persons for specific actions, to issue administrative decisions on expropriation, to shorten the term of office of a particular official of a state body, etc.), the answer is – no! The Constitutional Court also stated the substantive view for reviewing the sources of law absolutely unambiguously in judgment file no. Pl. ÚS 24/99: "The concept of a law-based state, which is enshrined in Art. 1 of the Constitution, gives rise to the principle that neither the legislature nor the executive can deal arbitrarily with the forms of law, i.e. with the sources of law; but they must be guided by the viewpoints of the constitutional framers, as well as by other viewpoints, in particular transparency, accessibility and clarity. In the opinion of the plenum of the Constitutional Court, classification of the sources of law must be derived, first of all, from the content of a legal norm."

The original constitutional framers, in Art. 9 par. 2 of the Constitution, placed the democratic principle and the principle of a law-based state on the same level among the principles that fundamentally identify the constitutional system of the Czech Republic. As the Constitutional Court's case law indicates, violating the principle of generality of laws falls within the realm of impermissible interference with a law-based state. Possible exceptions are either cases of accepting application of law in the form of a statute (e.g. an act on the state budget), or cases of express authorization to issue an ad hoc statute (e.g. constitutional acts issued under Art. 11 and Art. 100 par. 3 of the Constitution) or ad hoc statutes whose issuance is supported by exceptional reasons that meet the condition of the proportionality test (e.g. restitution acts containing lists).

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 par. 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 no. 110/1998 Coll., on the Security of the Czech Republic, as amended by constitutional Act no. 300/2000 Coll.), but that procedure would have to meet the requirements that follow from the principle of proportionality.

As the Constitutional Court has ruled in its settled case law (see judgments file no. Pl. ÚS 4/94, Pl. ÚS 15/96, Pl. ÚS 16/98, Pl. ÚS 41/02 and others), the principle of proportionality is based, among other things, on analysis of the possible normative means in relation to the intended aim, and their subsidiarity in terms of limiting

constitutionally protected values – a fundamental right or public good. If the aim pursued by the legislature (in this case the constitutional framers) can be achieved by different normative means, then the constitutionally conforming one is the one that limits the given constitutionally protected value to the smallest extent.

If the aim of passing constitutional Act no. 195/2009 Coll. was to quickly resolve the governmental (parliamentary) crisis, and accordingly, quickly dissolve the Chamber of Deputies and call early elections, in the Constitutional Court's opinion this aim could also have been achieved by a constitutional process under Art. 35 par. 1 of the Constitution [specifically, a process according to letter b) of that Article]. Thus, the consequence of adopting the contested statutory provision was not to resolve the government crisis quickly, but to shift the date until which the Chamber of Deputies would remain in office until the date of the elections – if the Chamber of Deputies were dissolved, under Art. 17 par. 2 of the Constitution elections would be held within sixty days after it was dissolved. This breach of the constitutional framework contained in Art. 35 of the Constitution also circumvents the constitutional purpose of the institution of dissolving the Chamber of Deputies, which is constitutional pressure to have a vote of no confidence in the government (or a refusal to give a vote of confidence) joined to awareness of the constitutional consequences, in the event that there is no new parliamentary majority capable of forming a government. Beyond that, it remains only to emphasize that the most important public interest arising from Art. 9 par. 2 of the Constitution is the formation of a legitimate Parliament, based on elections whose legal basis is not open to constitutional challenge.

For the reasons thus set forth, the Constitutional Court did not find arguments in favor of not observing the framework of authorization for adopting constitutional acts, as it is defined in Art. 9 par. 1 of the Constitution.

The Constitutional Court has repeatedly emphasized that it considers the principle of generality of a constitutional act to be part of the essential requirements for a law-based state. It points out that generality is not an aim in itself; its aim is to ensure separation of the legislative, executive and judicial branches, an equal constitutional framework for analogous situations, and thereby to rule out arbitrariness in the application of state authority, and enable a guarantee of the protection of individual rights in the form of a right to judicial protection. Therefore, the essence and significance of the generality of a constitutional act, as a conceptual element of the category of a state governed by the rule of law, is protection of freedom.

An argument made in favor of constitutional conformity of constitutional of Act no. 195/2009 Coll. is that it did not affect Art. 21 par. 2 of the Charter, so the term of office of the Chamber of Deputies was not lengthened, but shortened, so there was no limitation of the voting rights of citizens or interference in the legitimacy of Parliament. A relevant statement supporting this argument was raised in the parliamentary debate on the draft constitutional Act on Shortening the Term of office of the Chamber of Deputies in 1998: "the danger of the proposed act lies primarily in the fact that it creates a precedent of the highest legal force, a precedent that says that it is possible, for momentary, utilitarian, political reasons, to change the fundamental law of the land. If that is possible once, it is possible

always. Parliament could, for the same reasons, suspend the powers of the Constitutional Court if its decisions were not in line with the political will of the moment; it could, for the same reasons, suspend the powers of the president if they were inconsistent with the political will of the moment, it could, for the same reasons, suspend the Charter of Fundamental Rights and Freedoms if it were an obstacle to achieving political aims. Putting fundamental legal certainties in doubt for political reasons puts democracy in doubt, and it creates the potential danger that authoritarianism and totalitarianism will arise. And it is to no avail that the authors of this precedent did not and do not, as I believe, have anything of the sort in mind, and through their draft act only want to arrange for early elections to be held. Political logic does not take account of intent, and those who will next time go down the path that this precedent opens may have different and much darker intent. It is precisely for this reason that the Constitution of the CR expressly states in Art. 9 par. 2, that amendment of the essential requirements for a democratic state governed by the rule of law is impermissible." Similarly as in 1998, so in the process of adopting the constitutional Act on Shortening the Term of Office of the Chamber of Deputies elected in 2006 the relevant counter arguments were heard against this argument in favor of it, especially in the widely quoted opinion of the Senate Permanent Commission for the Constitution of the Czech Republic and Parliamentary Procedure.

In addition to the principle that it is impermissible to hold elections in time periods that exceed the term of office, Art. 21 par. 2 of the Charter also enshrines the principle of regular terms of office (regular exercise of voting rights). The ad hoc constitutional act on shortening the term of office is inconsistent with the constitutional imperative of regular election periods, only for on e instance, not generally for the future; it sets an exception to Art. 16 par. 1 of the Constitution.

The Constitutional Court concludes: even the constitutional framers cannot declare constitutional an act that lacks the character of a statute, let alone of a constitutional act. Such a procedure is unconstitutional arbitrariness. Ruling out review of such acts by the Constitutional Court would completely eliminate its role as the protector of constitutionality (Art. 83 of the Constitution).

VI./b
The Ban on Retroactivity of a Constitutional Act as and Essential Requirement for a State Governed by the Rule of Law

The Constitutional Court has already, in judgment file no. Pl. ÚS 21/96, set the basic viewpoints for evaluating the constitutionality of a retroactive legal framework (that legal opinion was then confirmed in a series of other decisions, see file no. Pl. ÚS 35/08, Pl. ÚS-st. 27/09 and others). It stated that "the basic principles defining a law-based state include the principle of protecting the confidence of citizens in the law, and the related principle of the prohibition on retroactivity of legal norms. … Thus, with true retroactivity, a lex posterior annuls (does not recognize) legal effects at a time when a lex prior was in effect, or calls forth or connects the rights and obligations of subjects with facts that were not legal facts when the lex prior was in effect."

There is a fundamental difference in the framework shortening the term of office of the Czech National council by constitutional Act no. 64/1990 Coll., on the one hand, and shortening the term of office of the Chamber of Deputies of the Parliament of the Czech Republic by constitutional Acts no. 69/1998 Coll. and no. 195/2009 Coll., on the other hand. The first of the three cited constitutional acts was adopted before elections were held and a representative assembly constituted, and the two others were adopted afterwards. Thus, they retroactively set the conditions for exercising voting rights (active and passive), The presumptions on the basis of which the voters decided in the elections to the Chamber of Deputies were changed with retroactive effect.

A democratic constitution, which is a fictional social contract, in its most general form provides the framework of human freedom compatible with the freedom of others, a set of constitutive values, and finally, the structure of the basic institutions of public power and authority, through which they become legitimate. The purpose of these institutions is to guarantee the constitutional framework of freedom, guarantee domestic peace, as well as other constitutionally foreseen public benefits. Thus, the constitution is a fundamental document that provides binding and uncrossable rules, limits and bounds for the creation of the supreme constitutional bodies of state power, from a substantive and procedural point of view, as well as the ordinary and extraordinary termination of their mandates.

In this case, the Constitutional Court states that the 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.

The Constitutional Court considers such circumvention of fundamental constitutional principles to be incompatible with the principle of the prohibition on retroactivity, in connection with the principles of protecting justified confidence by the citizens in the law and the right to vote freely, i.e. – among other things – the right to vote with knowledge of the conditions for creating the democratic public authorities resulting from the elections, including knowledge of their term of office. The Constitutional Court considers violation of these constitutional principles arising from Art. 1 par. 1 of the Constitution to be interference with the essential requirements for a democratic state governed by the rule of law, enshrined in Art. 9 par. 2 of the Constitution.

VI./c
The Essential Grounds for Derogation of Constitutional Act no. 195/2009 Coll.

These starting points, thus set forth, are the basis for reaching an answer to the questions formulated above, concerning the defining elements of constitutional acts, of whether they must meet, in addition to the procedural conditions in Art. 39 par. 4 of the Constitution, also the condition of competence (authorization) in Art. 9 par. 1 of the Constitution or another express constitutional authorization (Art. 2 par. 2, Art. 10a par. 2, Art. 11, Art. 100 par. 3), and the substantive condition set forth in Art. 9 par. 2 of the Constitution. The Constitutional Court's position is that the validity of a constitutional act comes from meeting all three of these conditions: the procedural condition, the competence (authorization) condition, and the substantive condition (consistency with the non-changeable principles of a democratic state governed by the rule of law). In the adjudicated matter, it then concluded that constitutional Act no. 195/2009 Coll., as regards constitutionality, is unacceptably individual and retroactive, and that it violates Art. 9 par. 1, Art. 21 par. 2 of the Charter in connection with Art. 16 par. 1 of the Constitution and Art. 1 par. 1 of the Constitution, with an intensity that results in interference in Art. 9 par. 2 of the Constitution.

Based on these reasons, the Constitutional Court concluded that constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, is inconsistent with the essential requirements for a democratic state governed by the rule of law under Art. 9 par. 2 of the Constitution, wherefore it annulled it as of 10 September 2009, i.e. the date this judgment is promulgated.

VII.
Derogation under § 70 par. 3 of Act no. 182/1993 Coll.

Under § 70 par. 3 of Act no. 182/1993 Coll., if implementing regulations were issued to a statute that the Constitutional Court annuls, the Constitutional Court shall simultaneously state in its judgment which implementing regulations cease to be valid together with the statute.

In its resolution of 1 September 2009 ref. no. Pl. ÚS 24/09-16 on Deferring the Enforceability of Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies, the Constitutional Court stated that this decision is of a mixed nature: it contains elements of a normative legal act, and at the same it must be considered an act of application of the cited constitutional act. Therefore, the Constitutional Court concluded that the elements of a normative legal act (an implementing one) that are contained in this Decision of the President of the Republic are grounds for the procedure under the cited § 70 par. 3 of Act no. 182/1993 Coll.

VIII.
Obiter Dictum

By annulling constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, the Constitutional Court did not in any way limit the rights of citizens to exercise their voting rights, because the only consequence of this step (if Parliament does not adopt another, constitutionally conforming solution) is that the present, democratically constituted Chamber of Deputies of the Parliament of the Czech Republic will continue to perform its office to the end of its regular term of office.

Instruction: Decisions of the Constitutional Court cannot be appealed.

Brno, 10 September 2009

Pavel Rychetský
Chairman of the Constitutional Court

Dissenting opinion of judge Vladimír Kůrka

I.
1. By way of introduction, I will state that, in my opinion, the review of the constitutionality of Constitutional Act no. 195/2009 Coll. should never have been opened, because, as I tried to explain in my dissenting opinion to the decision of the plenum of the Constitutional Court of 1 September 2009, file no. Pl. ÚS 24/09, the constitutional complaint from representative M. M. should have been rejected as non-reviewable, whereby the proceeding concerning the petition related to would have lost its foundation under § 74 of the Act on the Constitutional Court. However, that is now passé.

II.
2. For purposes of the related review, it is proper to begin with what is a constitutional act; that is (most generally) an act so designated, adopted in a special (classified) procedure, and the subject matter it regulates is "constitutional" material; these conditions have been met.

3. The Constitutional Court is bound by constitutional acts, and therefore they are fundamentally not subject to its review under § 87 par. 1 let. a) of the Constitution; however, one can agree (and it is obviously appropriate) that this does not apply in the case of those "constitutional" acts that affected (violated) the so-called material focus of the Constitution, as intended by Art. 9 par. 2 of the Constitution. Of course, that possibility is an obvious exception to the principle.

4. Thus, the question before the Constitutional Court was whether in this case (of Constitutional Act no. 195/2009 Coll.) there were exceptional grounds – in terms of Art. 9 par. 2 of the Constitution – for it to to intervene.

5. In my opinion, which I will try to justify presently, such (sufficiently strong, or persuasive) grounds do not exist here.

III.
6. Above all, however, I do not share the other method to which the majority of the plenum turned. In simple terms, after it concluded that there was insufficient "authorization" in Art. 9 par. 1 of the Constitution for issuing this constitutional act (and thus "sentenced" the act to its review), it evaluated whether it might not stand after all on the basis of Art. 9 par. 2 of the Constitution; that could give it exceptional justification but in this matter that is not the situation. Thus, the order of significance of Art. 9 par. 1 and Art. 9 par. 2 of the Constitution is reversed.

7. The majority of the plenum, to support the inconsistency of the evaluated constitutional act with Art. 9 par. 1 of the Constitution, puts forth the opinion that it does not represent either an "amendment" or "supplement" to the Constitution anticipated by that article, because it is a particular – and impermissible – breach of the Constitution, which it elucidates by quoting from the work cited in footnote 12, as well as in paragraphs 1 to 5 on page 15 of the reasoning of the judgment.

8. However, upon a closer look, it becomes justifiable that this may be a "supplement' to the Constitution after all; even a statute "for one-time use" is a permanent component of the legal order, and here the fact that after it is applied (and therefore "exhausted") it is de facto no longer used (no social relationships, or legal relationships, can arise under it or be governed by it), is meaningless. Such a statute supplements the Constitution by even taking precedence over it in a particular situation; in a certain sense it is in the position of a special law (attributes such as "suspension," postponement of the Constitution, etc., are only forms of expression. If the regime for ending a term of office was formulated in Act no. 195/2009 Coll. as the basis of a general rule, it would obviously be recognized, that both this regime and the regimes under Art. 35 par. 1 of the Constitution can exist side by side; thus, this would be a supplement to the Constitution under Art. 9 par. 1, among other things because it would be difficult to conclude, that they would be mutually "inconsistent" (see paragraph 3 on page 15 of the reasoning).

9. It follows from this – if the inadequate "supplement" of the Constitution (in the sense of lack of "authorization" under Art. 9 par. 1 of the Constitution) is not unquestionable – that it also cannot be a reliable basis for the chosen method, which, on the basis of Art. 9 par. 1 of the Constitution is aimed at establishing the competence of the Constitutional Court to the review of a constitutional act (and thereby, de facto, to derogation, avoidable only exceptionally, if it were to be protection of the material focus of the Constitution under Art. 9 par. 2).

10. What appears all the riskier is that the inadequate "supplement" of the Constitution (on the contrary, "breach") is identified exclusively with the criticism that it "regulates a unique case" or that it is an "ad hoc" statute, in other words, that the regulation enshrined is insufficiently general, as in fact it is supposed to be only a bill of attainder.

11. There is no doubt that statutes that lack the attributes of a general legal

regulation are “defective” statutes, which, as a rule, are in conflict with the principles of a law-based state, although exceptions are generally known, and the majority opinion itself mentions some (the Act on the State Budget, certain enumerated restitution statutes, statutes passed under extraordinary circumstances, natural catastrophes, or a state of war); certainly not all of them can be described, as the majority would like, as aiming at protecting the material core of the Constitution. In any case, there is also a visible difference between “issuing criminal judgments” or “issuing administrative decisions on expropriation,” which the majority opinion mentions (page 15, paragraph 5), and the contested constitutional act, as well as between it (shortening a term of office) and “shortening the period of holding office” of another state body (ibid.).

12. Of course, the basis for methods chosen by the majority of the plenum not only becomes more relativized, because what comes into play is individual evaluation of a particular statue, or its purpose and context when it was issued, but – and also therefore – it loses persuasive strength and force of arguments in favor of the exclusively determinative conclusion here, i.e. that the Constitutional Court, without anything further, has the competence to intervene even if the contested statute is a constitutional act.

IV.
13. For these reasons, in my opinion, priority should have been given to the method stated in simplified form under points 1. to 3. above; the fact that there are no adequate grounds for the Constitutional Court to intervene against the constitutional act follows from the nature of the firmly maintained condition that a constitutional act affect the material focus of the Constitution, protected by Art. 9 par. 2.

14. The material focus of the Constitution in Art. 9 par. 2 is defined with the help of “relatively uncertain” concepts that cannot – in terms of content – be identified (completely) abstractly, through exhaustive rules; a typical method is a demonstrative (incomplete) listing of determinative elements, or perhaps comparison of situations that specifically involve this “focus.” The individual conclusion, whether there was (or was not) interference, logically cannot be based on an undisputed contraposition of “yes, yes” versus “no, no,” but at the level of “likely yes” or “likely no.” It was also stated above that the competence of the Constitutional Court here is exceptional, and like every exception, must, by the logic of the matter, be reviewed restrictively; doubts concerning in – in the particular case – require restraint.

15. The foregoing (particularly points 10 and 11) posit that the inadequate generality of a statue need not, in and of itself, be interference in Art. 9 par. 2 of the Constitution, or that a positive finding thereof must be tied to the results of individual review. This must apply all the more so to constitutional acts, because the Constitutional Court’s approach to them is exceptionally limited.

16. However, in this review, if it involves a constitutional act, the principle of proportionality, which the majority of the plenum also considers, necessarily appears in a different form than with constitutional review of “ordinary” statutes; the modification is caused by that “firmly maintained condition” (point 13), which

arises both from the exceptionality of the review, and from it being narrowed solely to the level of Art. 9 par. 2 of the Constitution.

17. The basis of "individual" review consists of evaluating whether the reviewed "non-general" constitutional act specifically, to a considerable degree, interfered in the position of those constitutional subjects, which (together with their relationship) are fundamental for the current constitutional system, and thus, as the majority of the plenum concludes, is interference in the essential requirements of a law-based state, the separation of powers and "equality and the right to one's own, independent judge."

18. However, here – in my opinion –such interference (and the correspondingly necessary intensity) – does not exist.

19. The opposite can be illustrated by example. It would be different in a situation where a similar "constitutional" statute shortened the term of office (appointment) of another constitutional body, for example (as the petitioner states), the president, or Constitutional court judges, etc.; here, however, the actions of Parliament were directed only at itself (the Chamber of Deputies), and only to limit itself (shortening, not lengthening its term of office). It would be appropriate to review shortening of a term of office differently only if the Constitution enshrined a rule that the term of office of the Chamber of Deputies cannot be shortened under any circumstances, and laid justified emphasis on preserving that rule. It is worth pointing out that Art. 21 par. 2 of the Charter of Fundamental Rights and Freedoms provides that elections must be held (only) within periods of time not exceeding the regular terms of office provided for by law, and the principle of regular elections derived therefrom by the majority of the plenum is already limited anyway (Art. 35 par. 1 of the Constitution).

20. The Constitution anticipates a shortened term of office (Art. 35 par. 1), so one can dispute only the process leading to it, which the reviewed constitutional act represents, or which it newly established (added).

21. The only question then is whether this process to end the term of office of the Chamber of Deputies, as yet unanticipated by the Constitution, could have affected its – determinative – material focus (point 16).

22. Here we can not only not overlook the fact that the internal process in Parliament when the contested act was adopted as a constitutional act, is formally correct, and observes the requirement of voting by a supermajority of deputies; it is especially important that the political (parliamentary) relationships were obviously such that this same will of parliament, thus expressed, could also be used, with the same result, in the indisputably "constitutional" process enshrined in Art. 35 par. 1 let. a) of the Constitution. The general advantage emphasized by the majority opinion, the fact that this process strengthens the responsibility of the "new parliamentary majority" in the formation of the government, does not, in my opinion, have a constitutional dimension.

23. It is certainly acceptable that the foreseeability of the process of "forming constitutional bodies" is a constitutional value, as the majority of the plenum

states; however, for the reason just stated, putting forth this principle as a measure to indicate that the level of the material focus of the Constitution was reached in this case has limits that cannot be overlooked, if it is not obvious that the situation resulting from the contested constitutional act (the early termination of the term of office of the Chamber of Deputies), would be different from the results of a "constitutional" process.

24. Comparison with the procedure under Art. 35 par. 1 let. a) of the Constitution, on which the majority opinion relies, is not without importance, including because achieving the aim it pursues could not be – given the existing distribution of political parties in the Chamber of deputies, and the political interests they formulated – anything other than an expression of a process which is externally consistent with the Constitution, but on the other hand, at the price of applying (repeatedly) a non-serious, but only pretended, constitutionally relevant will (the will of the government regarding the call for a confidence vote and of the Chamber of Deputies regarding voting on it), which obviously also does not correspond to constitutional principles. The existence of a "true" will for a constitutional law process is undoubtedly also a constitutional value, and that was necessarily suppressed.

25. The rights of the minority (outvoted) deputies cannot be affected by the reviewed process, or its expression in a constitutional act (in terms of Art. 9 par. 2 of the Constitution), not only because of the quality of the applied (statutory) method, but also because there is no constitutionally guaranteed right for them to exercise their mandate for a full term of office (Art. 35 par. 1 of the Constitution); in any case, the petitioner, M. M., stated in the constitutional complaint that he was concerned exclusively with "the principle," and he would accept the end of his mandate under Art. 35 par. 1 let. a) of the Constitution (for details, see my dissenting opinion to Constitutional Court resolution of 1 September 2009, file no. Pl. ÚS 24/09).

26. It is appropriate to apply this by analogy to what the majority argues is the violation of "the citizen's justified confidence in the law and the right to vote freely," including the "knowledge … of the term of office"; for the same reasons, a voter must "be prepared" that he may vote "earlier."

27. In my opinion, the constitutional content of free political competition (Art. 5 of the Constitution), which is also claimed to be endangered, was also not affected, because the voting of the competing parties represented in Parliament (in favor of the contested Act) was the final outcome of this "competition," not a denial or limitation of it. The political parties (just like the deputies) could not assume that the term of office would necessarily be four years, i.e. that it would not end earlier, and, of course, that also applies to political parties not represented in parliament. The procedure of the constitutional act, even if it is "defective" minimizes the possibility that this led to an extreme deviation from tolerable limits. Nor is there a factual basis to conclude that this procedure was guided by arbitrariness, in the sense of intentionally excluding a minority from political competition.

28. Also, the impermissible arbitrariness of the political majority does not appear

relevant, because the existence has not been refuted of a comprehensible and substantive purpose for the constitutional act it adopted, based on the claim that the act can objectively serve to effectively avert the existing social-political crisis and the danger of an economic crisis.

29. In these circumstances even the objection of "changing the rules during the contest" cannot shift the review of the contested act toward the material focus of the Constitution.

30. This is also related to the review – logically with the same result – of the defect in the constitutional act which the majority of the plenum identifies as violation of the prohibition on retroactivity. In accordance with the (here, exclusively relevant) review of the constitutional act in terms of Art. 9 par. 2 of the Constitution, and the corresponding evaluation of other defects, namely the lack of generality (see points 15 to 17 above), this objection too must unavoidably be weighed not in its abstract form (existence), but specifically, in relation to the individual statute, and we must verify the extent of its actual effect on rights that were acquired earlier (in public law we can also imagine a "retroactive" regulation that interferes in the past by providing a higher standard of protection to entitled subjects).

31. However, the majority of the plenum is arguing only broadly, by reference to general principles, and then only by reference to the abovementioned (addressed in point 26) "justified confidence in the law and the right to vote freely … with knowledge of conditions …" which cannot be sufficient to document actual interference in Art. 9 par. 2 of the Constitution; here the simultaneously presented ideas on ignoring Art. 35 of the Constitution are – in my opinion – skewed.

V.

32. I grant that differentiating the two "methods" in parts III. and IV. may not appear sufficiently clear, because it was subsequently – during deliberations on the matter by the plenum of the Constitutional Court – somewhat erased; nevertheless, I find that both were preserved in the end (for part III. see the second paragraph on page 16 and the fifth paragraph on page 16 of the reasoning of the judgment; part IV. is tied to deliberations on the consequences of the statute being insufficiently general, as well as its retroactivity). As already stated, these methods differ in their "order" and the function of Art. 9 par. 2 (in relation to Art. 9 par. 1); in the first case Art. 9 par. 1 is dominant (see point 6), in the other Art. 9 par. 2 (as sufficient) (see also the last paragraph on page 18 of the reasoning). The "essential grounds" set forth clearly attempt to "reconcile" both methods with the conclusion that Art. 9 par. 1 was violated (after all), but at the same time "at an intensity establishing interference in Art. 9 par. 2 of the Constitution." However, this can be problematic, if the alleged insufficient authorization to issue a constitutional act, if it is neither an amendment nor supplement to the Constitution (Art. 9 par. 1), is – according to the majority's analysis – apparently in and of itself a justification of the Constitutional Court's competence to derogate from it. The question logically arises what place in establishing that competence is held by this further element, which rests in the "intensity" of interference under Art. 9 par. 2, regardless of the fact that Art. 9 par. 2 is also understood differently in the reasoning, as not a necessary complement to Art. 9 par. 1, but, in contrast, in the role of an actor,

capable of ruling out its otherwise arising effects.

VI.
33. Therefore, I summarize, noting the starting points of "review" stated in points 13 and 14, that in this matter, this constitutional act did not relevantly interfere in Art. 9 par. 2 of the Constitution, and thus there are no reliable grounds for the Constitutional Court to intervene and derogate. Therefore, the petition from Deputy M. M. should have been denied.

34. Of course, I do not claim, on the other hand, that the reviewed constitutional act is otherwise not contestable, defect-free, or constitutionally correct, but in my opinion that is not the issue.

Dissenting opinion of Constitutional Court judge Jan Musil to the judgment of the plenum of the Constitutional Court of 10 September 2009, file no. Pl. ÚS 27/09

I disagree with the verdicts and the reasoning of the judgment by the plenum of the Constitutional Court of 10 September 2009, file no. Pl. ÚS 27/09, which annulled Constitutional Act no. 195/2009 Coll., on Shortening the Term of Office of the Chamber of Deputies, and which annulled the Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic.

Pursuant to § 14 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, I am submitting a dissenting opinion, with the following reasoning:

I. The proceeding on annulling a statute under Article 87 par. 1 let. a) of the Constitution should never have been opened

1. As I already indicated in my dissenting opinion to the decision by the plenum of the Constitutional Court of 1 September 2009, file no. Pl. ÚS 24/09, postponing the effectiveness of the Decision of the President of the Republic, no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic, now, too, I state that Deputy M. M. is not a person who had standing, to submit, together with a constitutional complaint against the Decision of the President of the Republic on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic, a petition to annul a statute, N.B., a constitutional act.

2. A petition to annul a statute under § 74 of the Act on the Constitutional Court can be joined only with a constitutional complaint that the complainant has standing to file. The institution of a constitutional complaint serves to protect the complainant's own subjective fundamental rights or freedoms, guaranteed by the constitutional order [see Art. 87 par. 1 let. d) of the Constitution of the CR, and § 72 par.1 let. a) of the Act on the Constitutional Court]. The complainant, as a parliamentary deputy, has no constitutional right to carry out his parliamentary mandate for a full term of office under all circumstances; on the contrary, the

Constitution itself assumes that a parliamentary mandate may terminate earlier for a number of reasons, one of which is the dissolution of the Chamber of Deputies (Article 25 of the Constitution).

3. M. M.'s constitutional complaint contested the Decision of the President of the Republic that set a definite date for elections. There is no way to conclude how and why the complainant's subjective rights should be affected by the fact that the elections are to be held on the specified dates, 9 and 10 October 2009. It is quite obvious from the content of the constitutional complaint that its purpose is not really to cast doubt on the election dates, but to cast doubt on the adoption of Constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies.

4. In my opinion, the procedure chosen by the complainant, i.e. contesting the constitutional act by joining this petition to the filed constitutional complaint, de facto circumvents Article 87 par. 1 let. a) of the Constitution and § 64 par. 1 of the Act on the Constitutional Court, which specifies, in a definitive list, the circle of persons authorized to submit a petition to annul a statute.

5. The Constitutional Court's settled case law is consistently based on the accessory nature of a petition to annul a statute, a petition that "shares the fate" of a constitutional complaint. IN my opinion the submitted constitutional complaint is impermissible, and therefore it should have been denied under § 43 of the Act on the Constitutional Court. The joined petition to annul a statute should have been denied together with it.

6. If the Constitutional Court accepted a constitutional complaint that should have been denied as acceptable grounds for opening a proceeding to annul a statute [under Article 87 par. 1 let. a) of the Constitution], it did not, in my opinion, respect Article 2 par. 3 of the Constitution, under which "state authority … may be asserted only in cases, within the bounds, and in the manner provided for by law" (the Charter of Fundamental Rights and Freedoms says the same thing in different words in Article 2 par. 2).

II. The competence of the Constitutional Court to review constitutional acts is disputed, and declaration of this competence is not persuasively justified in the judgment

7. There have been many years of controversial discussion, both in the Czech Republic and abroad, about whether constitutional courts are competent to review constitutional acts. The dispute takes place in the case law of constitutional courts and in legal scholarship; the same is happening in political science and the political sphere. It appears that this discussion has not yet been concluded; in fact, one cannot even say that any trend toward ending the dispute has definitively crystallized.

8. The Constitutional Court's judgment assumes this competence a priori, at least in cases where a constitutional act is contested on the grounds provided in Article 9 par. 2 of the Constitution, i.e. due to violation of a prohibition on changing the essential requirements of a democratic state governed by the rule of law, or due to

violation of Article 9 par. 1 of the Constitution. In a situation where this competence of the Constitutional Court is not expressly enshrined directly in the Constitution, it can be derived only through interpretation, based partly on meta-juristic arguments (historic, axiological, moral, etc. arguments are also used). Here, given the nature of the matter, the Constitutional Court is "on thin ice," and so its interpretation and arguments must be exceptionally persuasive.

9. I do not find this thoroughness and general persuasiveness in the reasoning of the judgment. I make this statement, even though I myself incline toward a fundamental recognition of the Constitutional Court's authority to subject constitutional acts to review, within the bounds of the criteria provided in Article 9 par. 2 of the Constitution. There is not enough space in a dissenting opinion to expound in detail on the reasons that lead me to this. However, I expected (in vain) that they would be set out in detail in the reasoning of the judgment, which is of a "pioneering" nature in this aspect, because this is the first time in the practice of the Czech Constitutional Court that this problem is being decided.

10. Insofar as part IV. of the reasoning argues that the Constitutional Court already, in its past case law "outlined the meaning of the term 'essential requirements for a democratic state governed by the rule of law,'" that always happened only in connection with a review of "ordinary" statutes, not constitutional acts.

11. One can recognize the argument that, if the requirement of observing the essential requirements of a democratic, law-based state is not to remain "only a political, or moral challenge," there should be a guarantor or arbiter who will watch over the observance of this rule, and who will also be equipped with procedural rules for review, or even cassation or other reparatory mechanisms to correct defects. There is no agreement as to who is to be that guarantor and arbiter, either in constitutional law scholarship or in the political sphere, in this country or abroad. There are opinions that, for example, a second chamber of parliament could be this review entity, or that a referendum could be a suitable mechanism; there are also skeptical opinions that such a "super-review" and yet functional mechanism cannot be created at all, because the pyramid of review mechanisms cannot be built endlessly (the problem arises "who inspects the inspectors").

12. As far as I know, the Constitutional Court has never yet considered arguments that would persuasively prove that it is the Constitutional Court that should or must be that guarantor and arbiter who watches over the constitutional framers to ensure that the substantive requirements of a democratic, law-based state are observed. The present judgment declares a prior that the Constitutional Court has this competence, without worrying too much about persuasive arguments.

13. With a matter so serious, because it affects a fundamental constitutional principle, the separation of powers, one can require that this new power of the Constitutional Court, derived only by interpretation, be applied in practice with exceptional restraint and restrictiveness. In any case, the Constitutional Court itself, in a number of its decisions, repeatedly refers to the rule of restraint in other contexts. Likewise, those foreign constitutional courts that attempt to

promote their competence to review constitutional statutes proceed with great restraint. For example, the German Constitutional Court, which in its case law generally proclaims its competence to also review constitutional statutes in terms of whether they do not violate the material core of the Constitution, has not annulled a single constitutional statute in the entire period of its existence (since 1949). Moreover, Article 79 par. 3 of the German Grundgesetz defines this material core of the Constitution much more precisely than the Czech constitutional framers did in Article 9 par. 2 of the Constitution, so review of whether it is applied properly is easier in the practice of the German Constitutional Court than it is in this country. In Austria, as far as I know, the Constitutional Court annulled a constitutional statute in only one case (VfGH 16.327, 11 November 2001), when it concluded that the contested constitutional statute violated the material core of the Constitution in an absolutely flagrant manner.

III. Constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies does not violate the fundamental principles of the right to vote

14. Part IV. of the judgment's reasoning contains the statement that, "the Constitutional Court also included in the material focus of the legal order – consistently with the doctrinaire opinion – the fundamental principles of election law (judgment file no. Pl. ÚS 42/2000)." Given that this statement is being reproduced right now, in connection with review of Constitutional Act no. 195/2009 Coll., it could lead some readers of the judgment to the interpretation that the subject of the presently reviewed constitutional statute are the fundamental principles of voting rights. Therefore, I consider it appropriate to add a "preventive" note that I would consider such an interpretation incorrect.

15. The fundamental principles of voting rights must undoubtedly be considered to include the principles set forth in Article 21 of the Charter (in particular universality, equality, and the secret ballot). In contrast, the rule that a term of office cannot be shortened, is not among the fundamental principles of voting rights.

16. Constitutional Act no. 195/2009 Coll. is also not inconsistent with the requirement stated in Article 21 par. 2 of the Charter ("Elections must be held within terms not exceeding the regular electoral terms provided for by law."). This rule undoubtedly prohibits only extending an electoral term, not the possibility of shortening it.

17. For completeness, one can state that the cited judgment, file no. Pl. ÚS 42/2000, concerned review of the proportional representation model of elections, i.e. a matter of a completely different nature than shortening the term of office of the Chamber of Deputies; no analogies can be drawn with the present case.

IV. Passing Constitutional Act no. 195/2009 Coll., which does not meet the requirement that a statute be general, is not a violation of the essential requirements of a democratic, law-based state

18. Part VI./a of the judgment's reasoning contains the statement: "The

Constitutional Court has repeatedly emphasized that it considers the principle of generality of a constitutional act to be part of the essential requirements for a law-based state."

19. This claim does not correspond to reality, for the simple reason that the Constitutional Court has never yet reviewed the constitutionality of a constitutional act. It has addressed the problem of generality only with "ordinary" statutes.

20. However, even in those cases where the Constitutional Court criticized the legislature for adopting an "ordinary" statute not containing a general rule, It did not find a violation of the essential requirements of a democratic, law-based state, due to which it annulled the statute as unconstitutional, merely in the lack of generality. It always emphasized that this form of a "non-general" statute is unconstitutional in the case of the particular statute because it also endangers or violates another fundamental constitutional right. For example, in judgment file no. Pl. ÚS 24/04, it emphasize that the statutory provision declaring a certain unique structure (the weirs on the Elbe River) to be a matter of public interest, also interferes in the executive branch (makes it impossible to evaluate the matter in a construction proceeding following procedural principles) and limits the parties' right to judicial review.

21. I believe that the form of a "non-general" statute is legislatively technically unsuitable and undesirable, although it is value-neutral in and of itself. It becomes a violation of constitutionality only if that form really is capable of causing danger to, or violation of, fundamental rights in the given normative subject matter. The requirement that a legal norm be general is not, in and of itself, part of the essential requirements of a democratic, law-based state.

22. This is also supported by the fact that in both Czech and foreign legislation there are dozens of cases where "ordinary" or even constitutional norms do not meet the generality requirement and concern a unique matter. As one foreign example of this we can cite Articles 143b or 143c of the German Constitution (Grundgesetz). We can also find several cases of unique statutes, sometimes containing curious formulations like "Mr. X. Y. served the state" in currently valid Czech law.

23. Deliberating that such cases involve bills of attainder rather than statutes is an attractive topic in specialized legal literature, but as a relevant legal argument for the proposition that they violate the essential requirements of a democratic law-based state, they fail to convince me.

V. Adoption of Constitutional Act no. 195/2009 Coll. is not a "breach" of the Constitution

24. I consider less important, though still worth noting, the fact that the judgment describes the process of adoption of Constitutional Act no. 195/2009 Coll. as a "breach of the constitutional framework," a term that could, for the uninitiated reader, call forth a priori negative connotations (as a brutal, inappropriate procedure). I consider the use of such expressive terminology to be improper in a situation where the chosen term is not generally shared by all participants in the

debate, which is still on-going. This manner of conducting a debate, in which, moreover one of the participants defines the content of a term that is as yet disputed, is generally criticized. Completely peripherally, and outside constitutional law argumentation, we can refer to Karel Čapek's critical perceptions in his ironic essay, "Twelve Models for Battle by the Pen, or a Handbook of Written Argument" in the book Marsyas.

VI. No special authorization was needed for the adoption of Constitutional Act no. 195/2009 Coll.

25. Part VI./c of the reasoning, among the substantive grounds for derogation of the constitutional act, states: The Constitutional Court's position is that the validity of a constitutional act comes from meeting all three of these conditions: the procedural condition, the competence (authorization) condition, and the substantive condition (consistency with the non-changeable principles of a democratic state governed by the rule of law).

26. The Constitutional court claims that general authorization to supplement or amend constitutional acts is provided by Article 9 par. 1 of the Constitution. The Constitutional Court itself defines what "supplement" and "amend" the Constitution mean, and concludes that constitutional Act no. 195/2009 Coll. is neither a supplement nor an amendment, but is something different, described as "suspending a constitutional norm."

27. In this case the Constitutional Court is again itself defining the meaning of certain terms, without that definition being generally accepted. I believe that in the case of such fundamental decision making as this, the Constitutional Court should first test whether its chosen definition is generally accepted, or is at least convincingly explained. For example, I myself think that Constitutional Act no. 195/2009 Coll. is not a "suspension" of the Constitution, but a supplement.

28. The practice of the German constitutional framers also supports the idea that a different method of interpreting the term "supplement the Constitution" is acceptable. It too is authorized, by Article 79 par. 1 of the Grundgesetz, only to "amend or supplement" the express wording of the constitutional text. Nevertheless, in 1993 and 2006 the German constitutional framers, without obstacles, adopted completely new provisions of Articles 143b and 143c, which have no connection to the previously valid text of the Constitutional. Evidently it considers that action to be a supplement to the constitutional text. The question arises: why should such an interpretation not be possible in this country as well?

29. The judgment's reasoning allows that it would be possible, beyond the framework of an allegedly "general norm of competence," which it sees in Article 9 par. 1 of the Constitution, to adopt other constitutional acts that would be neither a "supplement" nor an "amendment" of the Constitution, but it requires that such cases be based on special constitutional authorization. The judgment also enshrines the rule that "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 par. 2 of the Constitution."

30. I believe that with these claims the Constitutional Court is exceeding its role as a negative legislature and adopting the competence for positive norm creation by creating new constitutional rules.

31. I do not agree with the opinion that the legislature (the Parliament) needs special authorization to adopt any constitutional acts. I also do not agree with the opinion that Article 9 par. 1 of the Constitution is an authorizing norm. Parliament's general legislative (and constitutional framing) powers are enshrined in Article 15 of the Constitution. Parliament is completely autonomous in the legislative branch. It may not be limited in any way in these powers; it is limited constitutionally only procedurally (by the rules set forth for creating norms) and by material conditions (maintaining consistency with the immutable principles of a democratic, law-based state), enshrined in Article 9 par. 2 of the Constitution.

Lest I be accused of giving the constitutional framework the power to change winter into summer, I will add, for completeness, that even the constitutional framers are, naturally, also limited by the laws of nature and common sense.

32. Parliament's sovereign and autonomous status follows from its strong democratic legitimacy, from the fact that it is the representative of the citizens of the Czech Republic, who are the highest sovereign in the democratic state. I consider the requirement that the constitutional framers need general or special authorization, which it would grant to itself, for the creation of any constitutional acts, to be illogical nonsense.

VII. The adoption of Constitutional Act no. 195/2009 Coll. was not barred by the prohibition of retroactivity

33. The judgment contains a categorical claim that Constitutional Act no. 195/2009 Coll. was in consistent with the prohibition on retroactivity. It sees retroactivity primarily in the fact that this constitutional act sets a new rule for dissolving the Chamber of Deputies, which did not exist at the time when the citizens elected their deputies. This allegedly "retroactively set the conditions for exercising voting rights (active and passive). The presumptions on the basis of which the voters decided in the elections to the Chamber of Deputies were changed with retroactive effect." (part VI./b of the judgment's reasoning).

34. I disagree with this claim. I state that the constitutional law issue of the retroactivity of laws is immensely complicated, and a dissenting opinion does not give me sufficient space or time to present comprehensive arguments. Czech, and especially foreign, specialized literature contains hundreds, perhaps thousands, of monographs and treaties on this question, concerning hundreds of cases from general and constitutional courts. There is no opportunity here to reproduce them, even briefly.

35. Therefore, I will limit myself merely to a concise statement: There is no monolithic concept of retroactivity that would authorize the categorical declaration of universal claims. There are several kinds of retroactivity (true,

false), each of which leads to different consequences. Applying the prohibition on retroactivity differs according to the legal area in which the prohibition is applied: It is different in public law (constitutional, criminal …), different in private law (civil, commercial), and different in substantive or procedural law. Today application of this institution is strongly influenced by the case law of the European Court of Human Rights and the European Court of Justice.

Numerous exceptions to the prohibition on retroaktivity are recognized.

36. Current theoretical and judicial views of these problems are unsettled and controversial. Perhaps the least confusion and highest degree of agreement exist in criminal law, where the impermissibility of retroactivity in this country is expressly regulated in Article 40 par. 6 of the Charter. However, even here there are exceptions to this prohibition (e.g., retroactivity is allowed in a situation where it is more favorable for the perpetrator (retroactivity in mitius)). Even here, however, there is no agreement on a number of things (e.g. retroactivity of the period of limitations, etc.). This question is relatively thoroughly, though far from unambiguously, clarified in civil law, where the new institution of "legitimate expectations" is gradually being implemented.

In the area of constitutional law, the problem of the prohibition on retroactivity has been addressed relatively little, and it is difficult to reach social consensus on this area.

Rather ironically, I can raise one curious question: Could permitting early elections to the Chamber of Deputies be seen as a thing that is advantageous for the citizens of the Czech Republic? Could we not allow an exception to the prohibition on retroaktivity here on in mitius grounds?

I believe that this judgment has treated this complicated issue very lightly, which many people will find difficult to tolerate.

37. It is a question whether the prohibition on retroactivity of norms, as the judgment relies on it, can be raised above the most fundamental act of representative democracy – the ability to test the degree of legitimacy of political representation in democratic elections. Let us remember that even in the interim the voter remains the decisive subject, whose will is the only source for the legitimacy of political power, and not merely an object observing it from the side.

VIII. Closing Comments

38. I cannot omit a reminder that in this case the Constitutional Court did not apply the proportionality test, which it otherwise applies abundantly.

39. One can also pose the question: Will the damage caused by annulling this constitutional act not be much greater than the alleged damage that our constitutional system suffered by its adoption? Can we, in this case, really permit application of the principle fiat iustitia, pereant mundus (let the world perish, as long as justice prevails)? Will it not, in this case, be not justice that prevails, but – lawyers?

40. Did the Constitutional Court think through the fact that by posing the problem of retroactivity as one of the essential grounds for annulling this constitutional act will, for the entire term of office, petrify the existing regulation of the alternatives for shortening the term of office? I do not wish to raise premature concerns, but I believe that the Constitutional Court has opened the door for questioning any future regulation (even if the new regulation is general) through an individual constitutional complaint, not only for a deputy, but perhaps even for any voter.

For all these reasons I believe that the petition from Deputy M. M. should have been denied.