2010/07/01 - PL. ÚS 9/07: CHURCH RESTITUTION

HEADNOTES

To Verdict I.
1. In the Judgment file No. II. ÚS 528/02, the Constitutional Court declared that "[the ordinary courts], in the course of the proceedings, neglected to consider that devolution of property of churches is covered by the imperative provisions of § 29 of Act No. 229/1991 Coll., according to which such property as was originally owned by churches, religious orders and congregations cannot be transferred to the ownership of third parties prior to adoption of an act regarding such property. The Act on Land thus anticipates that agricultural property which was earlier owned by ecclesiastical legal entities would be regulated through a separate act and until such an act is passed, such property is protected. Therefore, it is necessary to apply the rule of restitution acts to such property, and thus there is no room for bringing indictments for ascertaining ownership due to the absence of pressing legal interest. Such interest cannot be derived even from the fact that the state was not able to pass a special restitution act in spite of the fact that Act No. 229/1991 Coll., which became effective as early as 24 June 1991, anticipates the adoption of such an act. However, the state must fulfil its obligation to pass a restitution act, established by the above-cited provisions of the Act on Land, regarding ecclesiastical property, as the state must oblige legitimate expectation on the part of ecclesiastical legal entities which are supported by statutory provisions." This conclusion (in opposition to Judgment file No. IV. ÚS 298/05 – see above) was subsequently confirmed by a standpoint taken in file No. Pl. ÚS-st. 22/05 (see above) which first of all addressed the nature of Act No. 298/1990 Coll. as a restitution act, since the restitution purpose of this act was fulfilled through the enumeration of the entitled parties and property concerned (property being transferred). In addition, this standpoint adopted a part of the reasoning of Judgment file No. II. ÚS 528/02, in such a part which explicitly declares the obligation of the legislature to pass a restitution act, as they must oblige legitimate expectation on the part of ecclesiastical legal entities, which is supported by statutory provisions. The above specified declaration of the obligation of the legislature to adopt a restitution act and thus oblige legitimate expectation on the part of the ecclesiastical entities is steadily reproduced in later case law of the Constitutional Court [cf. the previously mentioned resolution file No. II. ÚS 687/04; additionally, resolution file No. II. ÚS 230/05 dated 16 March 2006; resolution file No. IV. ÚS 509/05 dated 19 June 2006; resolution file No. I. ÚS 679/03 dated 10 May 2007; resolution file No. I. ÚS 1652/07 dated 18 July 2007 (not published in the Collection of Judgments and Rulings /SbNU/); clause 29 of Judgment file No. IV. ÚS 34/06, dated 21 November 2007 (N 201/47 SbNU 597); resolution file No. IV. ÚS 158/08 dated 6 May 2008; resolution file No. II. ÚS 2904/08 dated 7 January 2009 (not published in the Collection of Judgments and Rulings /SbNU/) and a number of others; lastly Judgment dated 24 June 2009, file No. I. ÚS 663/06].

2. It follows from the meaning of the contested provision and the hitherto interpretation of the same by the Constitutional Court (continuation to the

above-recapitulated case law) that their purpose is not only the actual "blockage" of a certain part of state property (partly also property registered as owned by third parties, particularly municipalities); that is, for example, attempts to preserve a certain status quo in terms of property. The nature of the contested provisions must be seen in particular in the commitment (pledge) of the legislature, at a deferred time, to adopt a legal arrangement settling the historic property of churches and religious communities, which would take into account objective particulars of the matter under discussion and actually consummates the provisions of § 29 of the Act on Land.

3. The above-specified purpose of § 29 of the Act on Land must be observed in the context of the value foundation for restitution and rehabilitation law and the case law of the Constitutional Court. The legislature embodied the primary value points in the preambles and introductory provisions of restitution acts and rehabilitation acts and Act No. 198/1993 Coll. on Lawlessness of the Communist Regime and on Resistance to the Same. The Constitutional Court explicitly declared the non-legitimacy of the regime and its acts from 1948 to 1989 in its key Judgment file No. Pl. ÚS 19/93, dated 21 December 1993 (N 1/1 SbNU 1; 14/1994 Coll.). In addition, it is necessary to emphasise that the issue of the restitution under consideration is not seen by the Constitutional Court, even through the distance of two decades, as one of historic injustice that would stretch beyond the instruments of a rule of law state.

4. In the matter under consideration it is first of all clear that annulment of § 29 of the Act on Land would make possible the transfer of historic property of churches to third parties, which would considerably endanger, or maybe even make impossible, property composition via restitution in kind (as one of the key methods for mitigating cases of property injustice). Transfer of the ownership right to the original ecclesiastical property to third parties (acquiring this property in good faith) would in practice mean a considerable abridgement of discretion of the legislature concerning the methods of any future property adjustment, moreover, with possible increased demands on the state budget.

5. If, therefore, the legislature determined that the transfer (devolution) of property, the owners of which were, as to the decisive date, churches and religious communities or their legal entities, is, as an act contra legem, associated with absolute invalidity (in cases being in opposition to the sense of property composition), the legislature pursued, completely reasonably, the purpose of the contested provision; this in relation to provision of a material basis for a future act on settlement of historic property of churches; and possibly a broader legislative solution to property composition between the state and churches. In the absence of a blocking effect, this purpose could be, partially or totally, thwarted; since merely legal disposal by the state of the property in question may form the basis for adoption of "acts on such property", while respecting the position of potential new owners.

6. In relation to the greatest part of the property which is affected by the blocking effect and remains in the ownership of the state, no encroachment of constitutional-law relevance is involved, in particular as regards the disposal alone of the property so blocked. The state cannot assert the ownership right as

a fundamental right against itself, in particular when the state acquired the property in question only at the cost of violating internationally accepted standards for protection of fundamental rights and freedoms and its own law. In this relation it is not possible, even theoretically, to presume good faith or a similar subjective element on the part of the state, since the state knows objectively its law. Therefore, such encroachment cannot be considered unconstitutional, even when the state (factually or legally) does not transfer the reserved section of the property which is formally in its ownership.

7. In relation to municipalities which, in some cases, are registered as the owners of what was originally ecclesiastical property, the Constitutional Court first of all finds that blockage of such property does not comprise arbitrariness of the legislature which would, on the basis of its own political discretion or on the basis of other indefensible intentions, intend to encroach upon specific municipalities or upon the general level of realisation of the right to self-government. Involvement of such municipalities is based on the historic existence of ownership plurality prior to 1948. In particular it is not possible to state without any further consideration that restriction of transfer of individual specific items of immovable property under the ownership of a municipality would mean, without any other action, restriction of the right to self-government in relation to any given municipality.

8. According to the provisions of § 4 paragraph 2 of Act No. 172/1991 Coll., "Also objects owned by the Czech Republic, the release of which is claimed by an entitled party pursuant to a special regulation, shall not pass to the ownership of municipalities". In relation to municipalities this is thus a safeguard which, according to its meaning, is to prevent clashes between the rights and claims of municipalities (as potential new acquirers) and entitled parties (future claimants). In case law related to restitution disputes, the Constitutional Court has, therefore, repeatedly stated that a municipality cannot derive its ownership right according to Act No. 172/1991 Coll., where the immovable property in question does not represent "historic ownership of municipalities".

9. It is indubitably clear from the context of the adoption of the individual restitution regulations and constant case law of the Constitutional Court, that contrary to returning the historic property of municipalities, devolution of other property determined for future restitution to municipalities was of a totally specific, formal nature, and the position of the municipality as the obliged party within the restitution process has never been questioned by the Constitutional Court.

10. With respect to the above-defined purpose of the contested provisions and the hitherto role of municipalities in the restitution process, where they conceptually act also as obliged parties, the very blockage alone of certain specific property (even though such property is registered as the property of municipalities), at a general level, does not seem to possess an inadequate effect. At this level, the interests of self-governing municipalities on one hand, and those of autonomous churches and religious communities on the other cannot be placed directly in opposition to one another.

11. The reflection of specific role of churches in society also results from international comparison. The historic role of churches in society and the nature of their activities oriented to the public to some degree distinguish the churches from other natural persons or legal entities (taking into account the nature of their assets) and also make comparison possible – in terms of the requirement of independence of the state – with local self-governments (municipalities), which are, as an agglomeration, also indivisible from the individual right of a citizen to self-determination.

12. During an abstract review of constitutionality, the Constitutional Court is not able to objectively prove or theoretically model every conceivable situation which may be caused by the contested provisions in every individual case. Therefore, the subject of evaluation cannot now be formed by specific cases of individual owners either, with respect to whom, taking into consideration specific circumstances, including, for example, the relevance of the ownership title, the existence of good faith, or the hitherto role of the type of the subject in question in the restitution process, the Constitutional Court may further elaborate its evaluation in the future.

13. When the contested provisions speak about "churches, religious communities, orders and congregations", there is no other reasonable interpretation than that these are entities existing with their own legal personality according to valid law, whether they were understood as ecclesiastical legal entities inside churches and religious communities or besides them, which were the subject of the right in rem from which the churches and religious communities draw resources to attain their objectives, and removal of which they therefore experienced as property injustice. In relation to such ecclesiastical legal entities, this is then such property which de iure or de facto devolved to the state in the decisive period from 25 February 1948 to 1 January 1990.

14. The definition of the range of the property in question in the provisions of § 29 of the Act on Land is sufficiently definite, since the existence of the right in rem (or forfeiture of the right to property, through the seizure of which injustice was done) within the decisive period of time is an objectively legally provable fact, and it is non-decisive that state bodies do not maintain a complete and separate list of the property in question, for which there is also no legal reason.

15. On the basis of what has been said above, the Constitutional Court has found no reasons for granting the petition for annulment of § 29 of the Act on Land, since said provisions are not unconstitutional. Within the scope of the attained constitutionally conforming interpretation the Constitutional Court has found that the purpose as well as the means contained in the contested provisions stand up when tested against the constitutional principles.

To Verdict II.
16. Today, the pressure of public interest in removing legal uncertainty resulting from the provisional legal condition (Act No. 298/1990 Coll. in

connection with § 29 of the Act on Land) has exceeded the tolerable and justifiable limit. Non-adoption of a special act, to which the legislature has explicitly bound itself, for a period of nineteen years, in spite of the legislature being admonished by the Constitutional Court for the problematic nature of its inactivity, is a sign of impermissible legislative arbitrariness, and violates Article 1 paragraph 1 of the Constitution.

17. The Constitutional Court states that in addition to the explicit statutory basis contained in the provisions of § 29 of the Act on Land, the legitimate expectation of churches and religious communities is also based on the general concept of the restitution process in place after 1989, which, neither in the individual restitution provisions nor as a whole, may be interpreted to the detriment of entire groups of entities (persons).

18. The point designated by the Constitutional Court in its case law as "legitimate expectation" is indubitably a continuing and specific property interest falling under Article 11 of the Charter and Article 1 of the Protocol to the Convention. The impossibility to realise such a property interest (to obtain compensation) during a period of nineteen years thus, in the opinion of the Constitutional Court, fulfils the aspect of unconstitutionality, consisting of an omission to legislatively deal with a systemic and comprehensive problem of which the legislature has repeatedly been reminded by the Constitutional Court. The legitimacy of the purpose of such encroachment (inactivity) may have lasted for a certain transitionary period at the time of adopting the most essential steps of the transformation of the society, however, it is not sustainable ad infinitum.

19. The provisions of Article 2 paragraph 1 of the Charter guarantees the plurality of religions and religious tolerance, as well as separation of the state from specific religious denominations (the principle of a state which is neutral from the viewpoint of confession). The principle of plurality of religions and tolerance is expressed in Article 15 paragraph 1 and in Article 16 of the Charter of Fundamental Rights and Basic Freedoms. The central principle of the state being neutral from the viewpoint of confession is implemented through the co-operation pattern of the relation between the state and churches and their mutual independence. What is crucial for the following considerations is whether and to what degree economic self-sufficiency constitutes a material precondition of independent exercise of rights guaranteed particularly by Article 16 paragraphs 1 and 2 of the Charter. The point is that the constitutional order of the Czech Republic does not contain merely an imperative for independence of the state of churches and religious communities (as part of the ideological and religious neutrality of the state), but also the requirement for the independence of churches and religious communities of the state when carrying out their objectives.

20. In the absence of a sensible settlement of historic ecclesiastical property, when the state, as a result of its own inactivity, continues to be a dominant source of income for the churches and religious communities concerned, this in addition without any clear link to revenues from the historic property of churches being withheld, the above condition thus, in its consequences,

violates Article 16 paragraph 1 of the Charter in terms of freedom of expression of faith in society through public activities and traditional forms of religiously motivated, generally beneficial activities using relevant historically formed economic resources, and especially Article 16 paragraph 2 of the Charter, this in the economic sector of ecclesiastical autonomy.

CZECH REPBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

JUDGMENT
On 1 July 2010, the Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný and Michaela Židlická, adjudicated on a petition from a group of Senators of the Senate of the Parliament of the Czech Republic for annulment of § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property, and for enunciation of unconstitutional inactivity by the Parliament of the Czech Republic; with participation by the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceedings; as follows:

I. The petition for annulment of § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property shall be dismissed.

II. Long-term inactivity on the part of the Parliament of the Czech Republic consisting in non-adoption of a special legal regulation that would settle historic property of churches and religious communities is unconstitutional and violates Article 1 of the Constitution of the Czech Republic, Article 11 paragraphs 1 and 4, Article 15 paragraph 1, and Article 16 paragraphs 1 and 2 of the Charter of Fundamental Rights and Basic Freedoms, and Article 1 of the Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms.

REASONING

I.
Re-capitulation of the Petition and Argumentation of the Petitioner
1. A group of Senators of the Senate of the Parliament of the Czech Republic (hereinafter referred to only as the "petitioner") filed a petition for initiating proceedings pursuant to § 64 paragraph 1, clause b) of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations (hereinafter referred to only as the "Act on the Constitutional Court"), in which they requested that the Constitutional Court declare that:
"Long-term inactivity on the part of the Parliament of the Czech Republic

consisting in non-adoption of a special legal regulation governing disposal of property, the original owners of which were churches, religious orders and congregations, violates Article 1 paragraph 1 of the Constitution of the Czech Republic, Article 4 paragraph 1, Article 11 paragraph 1, paragraph 4 of the Charter of Fundamental Rights and Basic Freedoms, and Article 1 paragraph 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms".

2. Additionally, they proposed that the Constitutional Court annul § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property (hereinafter referred to only as the "Act on Land"). This provision, including the heading, correctly reads (the petitioner included incorrect text according to ASPI (Automated System of Legal Information) instead of the Collection of Laws):
"Property of churches
Property, the original owners of which were churches, religious communities, orders and congregations, cannot be transferred to the ownership of other parties before adoption of acts on such property."

3. According to the petitioner, the provisions of § 29 of the Act on Land quoted above suggests that it was not the will of the legislature to address within the Act on Land the issue of "church restitutions". With respect to the fact that a considerable part of the property was originally owned by churches, religious orders and congregations, the legislature expressed explicitly in the Act on Land that such property would not be addressed by the Act on Land but by other acts yet to be adopted. According to the petitioner, the legislature intended to adopt certain acts, within a short period of time, the subject of which would be definition of the position of churches, the relationship between churches and the state, the funding of churches and, in connection with this, additionally restitutions of original ecclesiastical property. With respect to the fact that the legislature assumed the original ecclesiastical property (or part of the same) would be released to the churches, the provisions of § 29 of the Act on Land are of "a blocking nature", since this property cannot be disposed of (it cannot be transferred). The length of this transitionary period of restriction of ownership right is not limited by the act.

4. The petitioner particularly emphasises that they do not consider as unconstitutional the wording alone of the provisions of § 29 of the Act on Land in the form in which the provisions were adopted and at the time they were adopted. However, they do consider as unconstitutional the condition when legitimate expectation included in these mere "bridging" provisions have not been met as a result of long-term inactivity on the part of the legislature, and thus the status which should have been merely transitional had thus been conserved for a period of (at the time of filing the petition) over fifteen years. In this, the petitioner sees a conflict with the requirement for legal certainty (Article 1 paragraph 1 of the Constitution), as § 29 of the Act on Land consequently does not generate certainty in legal relationships, but, on the contrary, by postponing the intended statutory arrangement indefinitely, a distinct element of uncertainty is introduced into legal relationships, which may be tolerated only for a transitionary period limited in time.

5. In the petitioner's opinion, the legislature, through the provisions of § 29 of the Act on Land, imposed on themself the obligation to adopt acts that would address the legal arrangement of relationships to property original owned by churches, religious orders and congregations. The fact that no such act has yet been adopted is the result of long-term inactivity on the part of the legislative assembly. In this, they referred to the Judgment of the Constitutional Court file No. Pl. ÚS 20/05 as well as to the conclusions of Judgment file No. Pl. ÚS 71/04.

6. According to the petitioner, the provisions of § 29 of the Act on Land create inequality in ownership. A part of owners – particularly municipalities – cannot freely dispose of their property in the long-term. The blocking provisions render impossible, for example, an arrangement of ownership relations in which property so blocked would be transferred to the ownership of the given church or in which the entitled church would lawfully relinquish such property and make it possible for the owner registered with the Cadastre of Real Estate to "unblock" such property. This situation, according to the petitioner, thus infringes also the right to self-government, since municipalities cannot utilise the property so blocked for projects financed from public funds and those of the European Union. Article 4 paragraph 1, Article 11 paragraph 4 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter referred to also as the "Charter"), and Article 1 paragraph 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to only as the "Convention") are thus violated. Furthermore, the petitioner referred to the conclusions of Judgment file No. II. ÚS 528/02 (enunciation of an obligation on the part of the legislature to pass a special act) and Judgment file No. Pl. ÚS 5/03 (concerning the adequacy of restricting a fundamental right in terms of time).

7. With respect to the necessity of adopting the act anticipated by the contested provisions as part of a proper legislative process, the petitioner proposed that enforceability of a derogative judgment be postponed to 31 December 2008. At the same time they proposed a preferential hearing of the case be held pursuant to § 39 of the Act on the Constitutional Court.

II.
Statements by the Parties to the Proceedings
8. Upon request by the Constitutional Court, both parties to the proceedings provided their statements on the petition. The Chamber of Deputies of the Parliament of the Czech Republic, in their statement dated 12 July 2007, signed by the Chairperson of the Chamber of Deputies, Ing. Miloslav Vlček, only stated that the bill had been approved in the constitutionally prescribed manner on 21 May 1991 by the required majority of members of the Federal Assembly, had been signed by the competent constitutional representatives and properly promulgated. The Act under examination was thus adopted within the confines of the powers determined by the Constitution and in the constitutionally prescribed manner. The statement further contains only reference to Judgment file No. II. ÚS 528/02 and a remark that the petition does not contest the constitutionality of § 29 of the Act on Land, but the fact that the same has not been realised.

9. A statement by the Senate was provided by the President of the Senate, MUDr. Přemysl Sobotka, who firstly stated that the concept of restitution was based on the principle of restitution of property upon compliance with certain conditions, not on automatic restoration of ownership rights without additional proceedings. At that time, no constitutional or other act was in existence that would bind the legislature to take such a step. In relation to this, he pointed out the importance of the Preamble to the Act on Land and the content of § 29 of this Act alone, which declares the will of the legislature to mitigate the consequences of property injustice with respect to land and other agricultural property originally owned by churches, religious orders and congregations, and at the same time the will to block transfers of the given property until such a time as statutory arrangements are adopted. He also referred to Judgment II. ÚS 528/02 and its importance as regards emphasis on the obligation of the state to satisfy legitimate expectation on the part of ecclesiastical legal entities. He also highlighted the activities of the Senate in this respect (a public hearing on this issue in April 2007).

III.
Oral Hearing before the Constitutional Court and Procedural Varia
10. On 1 July 2010, a public oral hearing at the Constitutional Court took place, from which the representatives of the parties to the proceedings – the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic – excused themselves.

11. During said hearing, the representative of the petitioner did not submit any proposals for presenting additional evidence. In the recapitulation of the petition, they emphasised the temporary nature of the contested norm and the difference between the apparent silence on the part of the legislature and the omission of the legislature, when, in the issue under examination, the latter is supposed to be the case. This condition has existed for over nineteen years. They pointed out the wider context of the relationship between the state and churches, the issue of independence of churches of the state and, in this respect, also conclusions by Prof. Tretera. Furthermore, the representative of the petitioner emphasised that there is a certain parallel between the condition under examination and the earlier problem of deregulation of rent. To conclude they insisted on the proposals presented in the original petition and proposed that the Constitutional Court determine the date as to which the contested provisions are to be annulled, as the Court deems apt.

12. During the conference of the Plenum of the Constitutional Court, the originally appointed Justice Rapporteur, Jiří Mucha, submitted a report, together with the petition for annulment of the contested provision. However, this petition was then not supported by the qualified majority of Justices anticipated by the provisions of § 13 of the Act on the Constitutional Court, which requires a majority of nine votes for a decision under Article 87 paragraph 1, clause a) of the Constitution to be adopted. By a decision of the presiding Justice, and pursuant to the provisions of § 55 of the Act on the Constitutional Court, the Justice Rapporteur was replaced and a new Justice, Ivana Janů, was appointed to draw up the Judgment.

IV.
Preconditions for Hearing the Petition and Constitutionality of the Legislative Procedure

13. The Constitutional Court concluded that formally the petition is in accordance with the requirements of the Act on the Constitutional Court. In proceedings on annulment of a legal regulation it is the obligation of the Constitutional Court to firstly examine whether the legal regulation which forms the subject of the petition was approved within the confines of the powers determined by the Constitution and in the constitutionally prescribed manner (§ 68 paragraph 2 of the Act on the Constitutional Court). However, this is only possible in the case when the constitutional arrangement, on the basis of which the legal regulation under examination was adopted, is still valid. The provisions of § 29 of the Act on Land are valid in the original wording. They were adopted by the Federal Assembly of the Czech and Slovak Federative Republic on 21 May 1991 and promulgated in the Collection of Laws on 24 June 1991 on the basis of Constitutional Act No. 143/1968 Coll. This Constitutional Act was annulled by Article 112 paragraph 2 of the Constitution of the Czech Republic (hereinafter referred to only as the "Constitution") on 1 January 1993. Therefore, the Constitutional Court has not dealt with the issue of compliance with these two conditions.

V.
Formal Assessment of the Petition
14. The Constitutional Court evaluated the petition both from the viewpoint of argumentation submitted by the petitioner, and from other aspects of constitutional law. The Constitutional Court reached the conclusion that the petition for annulment of the contested provisions is not justified (verdict sub I), but the argumentation of the petitioner (or their intention) is of importance from the viewpoint of constitutional law, which has led the Constitutional Court to satisfy the petitioner as for the verdict itself (verdict sub II). In this, the Constitutional Court has been guided by the following considerations.

15. In the given case, the petitioner submitted a structure of argumentation in which the proposed verdict represents only a means through which the actual objective is to be attained. Such an objective does not consist of removal of § 29 of the Act on Land as unconstitutional provisions, but of rectification of a condition when, as a result of long-term inactivity on the part of the legislature, legitimate expectation based on these bridging provisions were not fulfilled. This condition thus does not generate certainty in legal relationships, as would correspond to Article 1 paragraph 1 of the Constitution, and at the same time it affects other constitutionally guaranteed positions of other legal entities, in particular municipalities. In the reasoning for their petition, the petitioner does not claim that the content of such provisions is in contravention of any part of the constitutional order. Through their petition, the petitioner attempts to achieve a condition that would satisfy legitimate expectation based on a commitment on the part of the legislature to mitigate the consequences of cases of property injustice with respect to land and other agricultural property, the original owners of which were churches, religious orders and congregations. Such an objective, according to the petitioner, is attainable through annulment of § 29 of the Act on Land in

connection with declaring that long-term inactivity on the part of the legislature consisting in non-adoption of a special act, is unconstitutional.

16. The settled case law of the Constitutional Court is based on the fact that the Constitutional Court is bound by the proposed verdict of the petition, not the reasoning for the same. In this connection, the Constitutional Court thus had to address whether it is possible to annul said provisions which even the petitioner themself does not consider unconstitutional. In such a case, intervention by the Constitutional Court is not possible, as such an action would mean that the Constitutional Court leaves its position of "negative legislature" and assumes one reserved solely for positive legislature, that is the Parliament of the Czech Republic. The possibility of a granting judgment of the Constitutional Court – that means annulment of the contested provisions – is associated by Article 87 paragraph 1, clause a) of the Constitution and § 70 paragraph 1 of the Act on the Constitutional Court with the conclusion that the act or individual provisions are in contravention of the constitutional order. Pursuant to Article 88 paragraph 2 of the Constitution, the justices of the Constitutional Court are, in their decision making, bound merely by the constitutional order and the act which establishes the rules of proceedings before the Constitutional Court. If the very provisions of § 29 of the Act on Land have not been found unconstitutional, there would not be reasons for a granting judgment, but rather for dismissal of the petition or rejection of the same as manifestly unfounded. It is therefore possible to summarise that the argumentation submitted by the petitioner calls upon the Constitutional Court to review the constitutionality of the contested provisions in light of a broader context (non-adoption of another legal regulation). The abstract review of constitutionality of legal regulations – or powers of the Constitutional Court – is not designed to fully replace any potential unconstitutional gaps in law for the future (save for provision of protection in individual cases). It is not possible to expect that such a gap in law shall be made constitutional through an interpretation expressed by the Constitutional Court, and that such a problem would be actually so solved. The Constitutional Court would inadmissibly enter the field of positive legislature.

17. At the same time, the Constitutional Court is aware of the fact that non-adoption of the anticipated special act affects a wide circle of various parties; during abstract review of the norm – even if the Constitutional Court found no reasons for its annulment – it cannot be ruled out that there would be such an individual case of application (impacts) of the contested provisions that would raise additional consequences in terms of constitutional law.

VI.
Recapitulation of Case Law of the Constitutional Court in Relation to § 29 of the Act on Land

18. The Constitutional Court has explicated its conclusions both on interpretation of the provisions of § 29 of the Act on Land, and on the consequences of its existence in the context of claims from churches and religious communities, in its earlier case law. The development of this case law was basically marked by two competing approaches which differed in terms of the degree of possibility on the part of the judicial power (at the given time) to interfere with comprehensive and

complex social and political issues, when the locus of responsibility for adoption of a legal arrangement is vested primarily in the legislature.

19. The opinion according to which the interim condition consisting merely of adopting Act No. 298/1990 Coll. on Arrangement of Some Property Relationships of Monastic Orders and Congregations and the Archbishopric of Olomouc, as amended by Act No. 338/1991 Coll. (hereinafter referred to only as "Act No. 298/1990 Coll."), and the contested provisions of § 29 of the Act on Land, and at the same time under the condition of the continued absence of an act on the historic property of churches (i.e. inactivity on the part of the legislature) is not an obstacle to concurrent protection of property claims from ecclesiastical entities, covered by the "enumerative" Act No. 298/1990 Coll., before the ordinary courts [cf. for example, a resolution dated 24 November 2004, file No. I. ÚS 428/04 (not published in the Collection of Judgments and Rulings /SbNU/); Judgment file No. IV. ÚS 298/05, dated 8 August 2005 (N 156/38 SbNU 241); dissenting opinions on the standpoint of Plenum file No. Pl. ÚS-st. 22/05, dated 1 November 2005 (ST 22/39 SbNU 515; 13/2006 Coll.); these decisions as well as all other quoted decisions of the Constitutional Court are available from the electronic database NALUS at http://nalus.usoud.cz], was superseded. A competitive opinion dominated, that is one which emphasised the primary obligation of the legislature to regulate the issue known as "church restitutions" and considered the interference by the judicial power (protection of individual claims) prior to adopting a special act to be improper judicial activism [Judgment file No. II. ÚS 528/02, dated 2 February 2005 (N 23/36 SbNU 287); an opinion of the Plenum dated 1 November 2005, file No. Pl. ÚS-st. 22/05; resolution dated 19 January 2006, file No. II. ÚS 687/04 (not published in the Collection of Judgments and Rulings /SbNU/) and a number of subsequent decisions].

20. Therefore, as early as in the above-specified Judgment file No. II. ÚS 528/02, the Constitutional Court declared that "[the ordinary courts], in the course of the proceedings, neglected to consider that devolution of property of churches is covered by the imperative provisions of § 29 of Act No. 229/1991 Coll., according to which such property as was originally owned by churches, religious orders and congregations cannot be transferred to the ownership of third parties prior to adoption of an act regarding such property. The Act on Land thus anticipates that agricultural property which was earlier owned by ecclesiastical legal entities would be regulated through a separate act and until such an act is passed, such property is protected. Therefore, it is necessary to apply the rule of restitution acts to such property, and thus there is no room for bringing indictments for ascertaining ownership due to the absence of pressing legal interest. Such interest cannot be derived even from the fact that the state was not able to pass a special restitution act in spite of the fact that Act No. 229/1991 Coll., which became effective as early as 24 June 1991, anticipates the adoption of such an act. However, the state must fulfil its obligation to pass a restitution act, established by the above-cited provisions of the Act on Land, regarding ecclesiastical property, as the state must oblige legitimate expectation on the part of ecclesiastical legal entities which are supported by statutory provisions." This conclusion (in opposition to Judgment file No. IV. ÚS 298/05 – see above) was subsequently confirmed by a standpoint taken in file No. Pl. ÚS-st. 22/05 (see above) which first of all addressed the nature of Act No. 298/1990 Coll. as a restitution act, since the restitution purpose of this act

was fulfilled through the enumeration of the entitled parties and property concerned (property being transferred). In addition, this standpoint adopted a part of the reasoning of Judgment file No. II. ÚS 528/02, in such a part which explicitly declares the obligation of the legislature to pass a restitution act, as they must oblige legitimate expectation on the part of ecclesiastical legal entities, which is supported by statutory provisions. This, and particularly the brevity of the argumentation itself for said standpoint, makes it clear that the meaning of the standpoint was not to shape additional new legal conclusions, but to internalise one of previously expressed legal opinions; that is the dissenting opinion to Judgment file No. IV. ÚS 298/05 and legal conclusion of Judgment file No. II. ÚS 528/02, which constituted opposition to the legal opinion of Judgment file No. IV. ÚS 298/05. The above specified declaration of the obligation of the legislature to adopt a restitution act and thus oblige legitimate expectation on the part of the ecclesiastical entities is steadily reproduced in later case law of the Constitutional Court [cf. the previously mentioned resolution file No. II. ÚS 687/04; additionally, resolution file No. II. ÚS 230/05 dated 16 March 2006; resolution file No. IV. ÚS 509/05 dated 19 June 2006; resolution file No. I. ÚS 679/03 dated 10 May 2007; resolution file No. I. ÚS 1652/07 dated 18 July 2007 (not published in the Collection of Judgments and Rulings /SbNU/); clause 29 of Judgment file No. IV. ÚS 34/06, dated 21 November 2007 (N 201/47 SbNU 597); resolution file No. IV. ÚS 158/08 dated 6 May 2008; resolution file No. II. ÚS 2904/08 dated 7 January 2009 (not published in the Collection of Judgments and Rulings /SbNU/) and a number of others; lastly Judgment dated 24 June 2009, file No. I. ÚS 663/06].

21. In none of its decisions did the Constitutional Court express doubts on the constitutionality of the provisions of § 29 of the Act on Land, in spite of the fact that the Court repeatedly had the opportunity to do so. On the contrary, on the basis of interpretation of these provisions, the Constitutional Court consistently makes its conclusions in relation to guarantees of a constitutionally conforming solution to property settlement of property of churches. That is why a possible statement of the unconstitutionality of the contested provisions would, in its consequences, represent an essential and also surprising change in case law, since case law established by Opinion of the Plenum file No. Pl. ÚS-st. 22/05 (see above) would essentially lose its basis.

VII./a
Identification of the Purpose of the Provisions of § 29 of the Act on Land
22. Earlier deliberations contained in the case law of the Constitutional Court foreshadowed interpretation of the purpose of the contested provisions, at which the Constitutional Court also arrived on this occasion in special proceedings on a petition for annulment of a part of a legal regulation.

23. From the generally known course of the legislative process in relation to the historic property of churches in 1990 and 1991, it is evident that the provisions of § 29 of the Act on Land are a result of an objective need to adopt a comprehensive legal arrangement, the preparation for which, with respect to broader contexts of the relation of the state and churches, required a conceptual approach, and it was not proper to associate the same with acts aimed at mitigation of cases of property injustice, upon acknowledging the responsibility of the state for the past also on the basis of specific political deliberations, this also in the period of time when de-

etatisation of property in the state had to form an essential element of the economic transformation of the originally centrally-planned economy. Specific legislative proposals for the settlement of historic property of churches, given the complexity of the whole problem, were not successful. The course of the Parliament debate is evidence that non-inclusion of churches amongst the parties so entitled within the scope of general restitution regulations, with the objective of subsequent adoption of a special act to the benefit of the churches, was a pre-declared intention [a speech by the Minister of Economy of the Government of the Czech and Slovak Federative Republic, Vladimír Dlouhý, at the 14th Common Meeting of the Federal Assembly of the Czech and Slovak Federative Republic on 5 April 1991 (to Print No. 547) includes: "The third area is the area of the entitled parties. Here I would like to mention churches and municipalities, even when these will be mentioned also by the rapporteurs. The Government believes that it is necessary to support the issue of addressing churches through a separate act at the federative level (...)" (read in connection with the debate on Prints Nos. 393 and 643); this and other records in shorthand and Prints quoted in the Judgment are published in the Common Czech-Slovak Digital Parliament Library at http://www.psp.cz]. In the opinion of the Government at this time, this approach should have even been (in light of the legislative design of the previously adopted Act No. 298/1990 Coll.) the result of particular consideration for churches and religious communities, which were not to be burdened with a relatively complicated process of making restitution claims, such claims being prescribed for release of immovable property by general restitution acts [a speech by the Deputy Prime Minister of the Government of the Czech and Slovak Federative Republic, Pavel Rychetský, at the 13th Common Meeting of the Federal Assembly of the Czech and Slovak Federative Republic on 20 February 1991 (concerning Print No. 477, bill of the Act on Extra-judicial Rehabilitation) includes: "I believe a very important issue is that whether we can, through the draft bill submitted, restitute the property of churches and religious communities or not. The Federal Government presented to this Assembly, as the first restitution act after the 17th November, an act on property conditions of some orders and congregations. The Federal Government thus unambiguously expressed its clear intention that it wishes to restore the ownership conditions of churches and religious communities. The Government did so through a new act, which requires nothing from the entitled party. By law, the property of church is simply handed over, they do not have to prove anything, within any deadline, and under no substantive law conditions. Here I have an act which is unambiguously formulated as one in which there are entitled parties on one hand, obliged parties on the other, and in the case of a conflict, there is an independent court entitled to review and interpret this Act. The Government does not wish that churches be put in this position, the Government does not want the churches be additionally restricted by a possible deadline, which would work so that if they did not make a claim within such a deadline, such a claim would completely and forever cease to exist, and the Government further admits and has never denied that it cannot approve of such a vital change in the draft bill, when a change like this concerns exclusively other governments, not the Federal Government."; see the Common Czech-Slovak Digital Parliament Library, reference above].

24. For this reason, the legal order also contains other provisions regulating (restricting) disposal of property, of which the original owner was not the state,

which also anticipate adoption of a special legal arrangement for a detailed arrangement of claims of other entitled entities. The provisions of § 3 paragraph 1 of Act No. 92/1991 Coll. on Conditions for Transfer of Property of the State to Third Parties, as amended by later regulations, which read: "The subject of this Act does not consist of property which is to be returned to legal entities on the basis of special regulations.1). The subject of this Act also does not consist of property which devolved to the state after 25 February 1948 from the ownership of churches, orders and congregations and religious communities", explicitly relate to the "property of churches". In the associated footnote, the provisions refer "for example, [to] Act No. 298/1990 Coll. on Arrangement of Some Property Relationships of Monastic Orders and Congregations and the Archbishopric of Olomouc.".

25. It follows from the meaning of the contested provision and the hitherto interpretation of the same by the Constitutional Court (continuation to the above-recapitulated case law) that their purpose is not only the actual "blockage" of a certain part of state property (partly also property registered as owned by third parties, particularly municipalities); that is, for example, attempts to preserve a certain status quo in terms of property. The nature of the contested provisions must be seen in particular in the commitment (pledge) of the legislature, at a deferred time, to adopt a legal arrangement settling the historic property of churches and religious communities, which would take into account objective particulars of the matter under discussion and actually consummates the provisions of § 29 of the Act on Land. Restriction in terms of disposal of historic ecclesiastical property serves merely to protect this property until the time of adoption of a special act. So conceived purpose of the contested provisions is based on specific historic circumstances of forming "restitution legislation", since this unique process accompanying the prime societal changes may be evaluated exclusively within the context of the given time [cf. typically, Judgment file No. Pl. ÚS 14/94 dated 8 March 1995 (N 14/3 SbNU 73; 55/1995 Coll.) or other decisions regarding the legality and legitimacy of Decrees of the President of the Republic], as well as later interpretations made by the Constitutional Court in cases file No. II. ÚS 528/02, file No. Pl. ÚS-st. 22/05 and file No. I. ÚS 663/06.

VII./b
Identification of the Constitutionally Protected Interests Concerned
26. With respect to entities (other than the state) registered as owners of a certain part of immovable property which are subject to restriction of disposal resulting from § 29 of the Act on Land, what comes into particular consideration is Article 11 of the Charter of Fundamental Rights and Basic Freedoms, according to which everyone has the right to own property, while the ownership right of all owners has the same statutory content and protection. Expropriation or compulsory restriction of the right of ownership is permitted in the public interest on the basis of law and for compensation (cf. also Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms). In the case of municipalities, which the petitioner particularly emphasises, an additional conflict with Article 101 paragraph 3 of the Constitution may be claimed, since restriction of ownership rights of municipalities as local self-government entities may prevent undisturbed exercise of rights of local self-government (Article 8 of the Constitution).

27. In the case of the churches and religious communities concerned, the point is not only the general practical and symbolic meaning of adopting acts “on mitigation of some cases of property injustice”, that is the moral obligation of a democratic rule of law state towards persons affected by systematic violation of fundamental rights at the time of the communist regime, when such persons often belong to a group of people to whom the Czech Republic is indebted for its present democratic and law-based nature, but also – as for the former economic basis for church-related and religious work – particularly the woeful history of fulfilment of explicit obligations on the part of the state towards (historic) churches and religious communities, which the state assumed through Act No. 218/1949 Coll. on Economic Support for Churches and Religious Communities by the State, as amended by later regulations (cf. § 1, 4, 6, 8, § 11 paragraph 1 and § 12), on one hand, and the requirement for material fulfilment of guarantees resulting from Article 15 paragraph 1 and Article 16 paragraphs 1 and 2 of the Charter of Fundamental Rights and Basic Freedoms on the other. In relation to legitimate expectation (property interests) of ecclesiastical legal entities, these concern Article 11 of the Charter and Article 1 of the Protocol to the Convention.

28. Furthermore, the inactivity of the legislature may be deemed to result in violation of the principle of legal certainty and protection of trust in law, which results from the foundation of a material rule of law state pursuant to Article 1 paragraph 1 of the Constitution. In the connection specified above, also Article 4 paragraph 4 of the Charter may be considered, according to which when the provisions on the boundaries of fundamental rights and freedoms are applied, their nature and meaning must be preserved. Such restrictions must not be misused for purposes other than those for which they were established.

VIII.
Actual Review of Constitutionality
29. The above-specified purpose of § 29 of the Act on Land must be observed in the context of the value foundation for restitution and rehabilitation law and the case law of the Constitutional Court. The legislature embodied the primary value points in the preambles and introductory provisions of restitution acts and rehabilitation acts and Act No. 198/1993 Coll. on Lawlessness of the Communist Regime and on Resistance to the Same. The Constitutional Court explicitly declared the non-legitimacy of the regime and its acts from 1948 to 1989 in its key Judgment file No. Pl. ÚS 19/93, dated 21 December 1993 (N 1/1 SbNU 1; 14/1994 Coll.). In addition, it is necessary to emphasise that the issue of the restitution under consideration is not seen by the Constitutional Court, even through the distance of two decades, as one of historic injustice that would stretch beyond the instruments of a rule of law state. For any evaluation of acts adopted within the decisive period after 25 February 1948, the primary reference criterion seems to consist particularly of the then contemporary level of recognition of fundamental rights and freedoms, as was established and explicitly formulated in the international community after World War II. Contrary to cases of injustice which seem to be such merely upon application of later standards, remedying the acts of the communist regime for the decisive period is not merely a moral issue; the direct and lasting consequences of these acts have a specific legal relevance [for sufficiency of mere moral reasoning for remedying “historical injustices”, in polemics e.g. Wyman, K. M. Is there a

Moral Justification for Redressing Historical Injustices? In: Vanderbilt Law Review, January 2008, pp. 128-194]. At the same time, it is true that the locus of responsibility for a specific solution to property restitution rests in first place with the legislature, not primarily the Constitutional Court, which, given its cassational powers, may merely (potentially) rectify the solution adopted by the legislature, not redress the absence of the legal regulation, not even upon the suggestion from the petitioner to do so, who themself is a representative of the legislative power. In other words, the Constitutional Court must reject the attempt being made to involve it in a political struggle in which a particular legal issue serves as a means of attaining various political objectives.

30. In its settled case law, the Constitutional Court has repeatedly inferred that state power – in relation to normative legal acts, especially legislative power – is, in its acting, guided by the imperative of proportionality and a prohibition on legislative arbitrariness. Therefore, if in dubiety on the constitutionality of a legal regulation, the Constitutional Court assesses the purpose (objective) of such an intervention in relation to the means applied, while the measure for such assessment consists of the principle of proportionality, which is manifested by prohibition on excessive nature of infringements of rights and freedoms [cf. also Judgment of the Constitutional Court file No. Pl. ÚS 15/96, dated 9 October 1996 (N 99/6 SbNU 213; 280/1996 Coll.)].

31. These deliberations are reflected in the review of constitutionality of a sub-constitutional regulation in three methodological steps [cf. for example, Judgment file No. Pl. ÚS 41/02, dated 28 January 2004 (N 10/32 SbNU 61; 98/2004 Coll.) and a number of others]. The first of them consists of evaluation of ordinary law through the aspect of suitability, the content of which is the evaluation of the chosen normative means from the viewpoint of possible fulfilment of the purpose pursued. If the given normative means is not capable of attaining the purpose pursued, it is then an expression of arbitrariness on the part of the legislature, which is considered to be in conflict with the principles of a law-based state. The second step of application of the principle of proportionality consists of evaluating ordinary law through the aspect of necessity, which seeks analysis of plurality of possible normative means in relation to the purported purpose and their subsidiarity from the viewpoint of restricting a value protected by the Constitution – a fundamental right or public goods. If the purpose pursued by the legislature may be attained by alternative normative means, then such of them is constitutionally conforming which restricts the given constitutionally protected value to the least degree possible. If ordinary law under consideration pursues, on one hand, protection of any of the constitutionally protected values whilst restricting another, then the third aspect of the principle of proportionality, i.e. measuring, represents methodology for assessing such constitutional values that are in conflict.

32. However, the Constitutional Court is also aware of the fact that not each provision of the legal order may be tested according to a formula given in advance. With respect to the broader context of the contested provisions, as the same are part of “single-purpose” restitution and rehabilitation law which has been implemented, for the most part, at the time of such qualitative societal changes when at least partial remedy of cases of injustice from the past predetermines the

nature of further democratic development, these are conclusions including a below-specified reservation of further review of individual and specific cases.

VIII./a

33. In the first stage of review, the Constitutional Court tests the contested provisions in relation to the capability of fulfilling their purpose (suitability of the means chosen). Its essence consists of assessing an intervention from the viewpoint of possible fulfilment of the purpose pursued. The provisions under examination must be capable of achieving the intended objective, which consists of protecting another fundamental right or public goods. If the legal arrangement is objectively not capable of achieving the purpose pursued, it is a manifestation of arbitrariness of the legislature, which is considered to be in conflict with the principle of a law-based state.

34. When drafting regulations mitigating (in particular) cases of property injustice, democratic legislature is generally limited firstly by the factual status of the objects in question (their actual existence); secondly, they are limited by the imperative to minimise detriment to both other interests protected by law (e.g. public interest) and fundamental rights in relation to origination of new cases of property injustice [be they suffered by any party; cf. for example, Judgment file No. Pl. ÚS 71/04, dated 17 May 2005 (N 109/37 SbNU 421; 272/2005 Coll.), section III. B], this in relation to persons other than the state, who possibly acquired the immovable property in question in the interim following the unlawful encroachment by the state, and this in good faith.

35. The legislature was obliged to assess to what degree the system of restitution legislation (in the broad sense of the term) is internally coherent and non-dissonant both from an objective viewpoint and from that of consecution of adopting individual partial regulations. These post-revolution legal regulations are, therefore, characterised also by provisions of which the objective is to enable factual or legal effects of another future act.

36. In addition to the contested § 29 of the Act on Land, these provisions include also the above-mentioned provisions of § 3 paragraph 1 of Act No. 92/1991 Coll., as well as, for example, § 4 paragraph 2 of Act No. 172/1991 Coll. on Devolution of Some Property from the Czech Republic to the Ownership of Municipalities, which are to prevent the occurrence of a conflict of property rights of plaintiffs (original owners) and municipalities (possible new acquirers). Also the – already annulled – provisions of § 8 paragraph 6 of the Act on Extra-judicial Rehabilitation [cf. Judgment file No. Pl. ÚS 25/98, dated 10 March 1999 (N 38/13 SbNU 269; 57/1999 Coll.)] determined that “An object which was declared to be of national cultural heritage status shall not be released until the Czech National Council and the Slovak National Council adopt a new act on administration and protection of cultural heritage”. Furthermore, the also annulled provisions of § 11 paragraph 5 of the Act on Land (cf. Judgment file No. Pl. ÚS 71/04 – see above), determining that “Immovable property which was declared to be of national cultural heritage status cannot be released until the time that acts are adopted that regulate the administration and protection of cultural heritage”. The instances mentioned last concerned the elimination of a conflict between the property right of the plaintiff and public interest in protecting cultural heritage.

37. In the matter under consideration it is first of all clear that annulment of § 29 of the Act on Land would make possible the transfer of historic property of churches to third parties, which would considerably endanger, or maybe even make impossible, property composition via restitution in kind (as one of the key methods for mitigating cases of property injustice). Transfer of the ownership right to the original ecclesiastical property to third parties (acquiring this property in good faith) would in practice mean a considerable abridgement of discretion of the legislature concerning the methods of any future property adjustment, moreover, with possible increased demands on the state budget.

38. If, therefore, the legislature determined that the transfer (devolution) of property, the owners of which were, as to the decisive date, churches and religious communities or their legal entities, is, as an act contra legem, associated with absolute invalidity (in cases being in opposition to the sense of property composition), the legislature pursued, completely reasonably, the purpose of the contested provision; this in relation to provision of a material basis for a future act on settlement of historic property of churches; and possibly a broader legislative solution to property composition between the state and churches. In the absence of a blocking effect, this purpose could be, partially or totally, thwarted; since merely legal disposal by the state of the property in question may form the basis for adoption of "acts on such property", while respecting the position of potential new owners.

VIII./b

39. In a situation when the purpose pursued may be achieved through various means, such are considered constitutionally conforming, which restrict the given constitutionally protected value to the least possible degree. According to this principle, the use of only the most considerate – in relation to the fundamental rights and freedoms concerned – of several possible means is permitted.

40. Even though at a general level it is up to the legislature to elect the manner of proceeding with rectification of cases of injustice and the means to achieve this (theoretically this would concern restitution in kind or pecuniary restitution, or possibly a combination of these two means), it is the actual restitution in kind, also taking into account the hitherto "restitution legislation", possibly in protection of other fundamental rights and freedoms, which represents the primary method [this is not to rule out other, more suitable, methods: cf., for example, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", adopted and promulgated by the General Assembly of the United Nations by a Resolution No. 60/147, dated 16 December 2005].

41. From publicly available data [for example, data concerning the resolution of the Chamber of Deputies No. 774, dated 29 April 2008 (amendment to the explanatory report "Definition of the scope of property to be released and assessment of the property not to be released, i.e. determination of the scope of financial compensation", Print of the Chamber of Deputies No. 482, http://www.psp.cz], it is known that the owner of the absolute majority of the immovable property affected by the contested provisions is the state, in particular

immovable property administered by the Land Fund of the Czech Republic (Pozemkový fond České republiky), with the right of management pertaining to Forests of the Czech Republic (Lesy České republiky, s. p.), Army Forests and Farms of the Czech Republic (Vojenské lesy a statky ČR, s. p.), and the Office of the Government Representation in Property Affairs (Úřad pro zastupování státu ve věcech majetkových). In relation to immovable property owned by the state, it is irrelevant to test the restriction of disposal of such property in such a way, as such restriction by the state towards itself alone indubitably does not infringe its constitutional standing (cf. even the potential statutory "obligation" of the state to own certain property in the public interest within the intentions of Article 11 paragraph 2 of the Charter). A relatively small number of such immovable items are registered as the property of third parties, in particular municipalities. More detailed information concerning the structure of such third parties has not been submitted to the Constitutional Court.

42. At a general level, a conceivable alternative to restitution in kind is formed by a prevailing emphasis on other methods of mitigating cases of injustice, for example, financial compensation for property (pecuniary restitution) which would remain not blocked (unblocked) under the final ownership of the state (or other entities). The Constitutional Court does not feel called upon to elaborate this reasoning – which might theoretically mean a more moderate infringement of existing property relationships, but perhaps also only seemingly – with respect to the fact that the Constitutional Court would thus enter into an area reserved for the legislature – in particular political and economic issues. The fact is that the pecuniary restitution places a different type of burden on state budgets (the standing of the state as regards property), but in this respect it is not the task of the Constitutional Court to evaluate the suitability of the relation of restitution methods. In this sense, if restitution in kind (in a certain scope determined in the future, in combination with other methods) is a legitimate objective of the legislature, then blockage of the property under consideration via the provisions of § 29 of the Act on Land does not represent an encroachment exceeding the scope of necessity. The Constitutional Court, by its own consideration, cannot order the legislature to respect certain relations between the methods of restitution in kind and pecuniary restitution.

43. The Constitutional Court has not found that the legislature would have available a "more moderate" means other than blocking the property in question, if it is to be to some degree still up to the legislature's future economic and political discretion which methods for mitigating cases of injustice they would choose, or which differentiation in their deliberation they would choose in relation to certain groups of property, the types of entities concerned or other circumstances. This is not to say that the legislature would have completely free discretion in relation to disposing of the blocked property. To the contrary, the future legislative solution must be based on actually weighing up the justified interests of all the entities concerned. Actually with respect to their (constitutionally protected) interests, as such exist at the time of adopting said legislative solution, the legislature must choose a specific combination of methods for mitigating cases of injustice, so that – inter alia – new cases of injustice on the part of the entitled parties or obliged entities would not occur. At a practical level it is possible to refer also to the bill on property composition with churches and

religious communities [specifically: bill on mitigation of some cases of property injustice caused to churches and religious communities at the time of lack of freedom, on settlement of property relationships between the state and churches and religious communities and on modification to some acts (Act on Property Composition with Churches and Religious Communities), Print of the Chamber of Deputies No. 482], which, within the scope of political discretion, proposed that merely the state, state organisations and the Land Fund of the Czech Republic be the obliged entities (cf. § 4), that is not for example municipalities or other entities.

VIII./c
44. Any detriment to a fundamental right must not be inadequate in relation to intended objective, i.e. the measures restricting fundamental human rights and freedoms must not, when a collision of a fundamental right or freedom with a public interest, with their negative consequences, exceed the positive aspects represented by the public interest in such measures.

45. Until today, the Constitutional Court has not even raised the issue of the constitutionality or proportionality of encroachment by § 29 of the Act on Land in its case law, on the contrary, the Constitutional Court principally conducted its constitutionally conforming interpretation.

46. The Constitutional Court has not even in this case found that such a review would result in a conclusion on a disproportion between the objectives and means pursued by the contested provisions and the constitutionally protected interests which are concerned. The facts stated above implicite result in the statement that the purpose of the contested provisions is in itself constitutionally conforming, in fact even desirable, if it is to rectify cases of property injustice committed on churches and religious communities, possibly if it pursues fulfilment of guarantees resulting from Article 15 paragraph 1 and Article 16 paragraphs 1 and 2 of the Charter of Fundamental Rights and Basic Freedoms (see below).

47. In relation to the greatest part of the property which is affected by the blocking effect and remains in the ownership of the state, no encroachment of constitutional-law relevance is involved, in particular as regards the disposal alone of the property so blocked. The state cannot assert the ownership right as a fundamental right against itself, in particular when the state acquired the property in question only at the cost of violating internationally accepted standards for protection of fundamental rights and freedoms and its own law. In this relation it is not possible, even theoretically, to presume good faith or a similar subjective element on the part of the state, since the state knows objectively its law. Therefore, such encroachment cannot be considered unconstitutional, even when the state (factually or legally) does not transfer the reserved section of the property which is formally in its ownership.

48. In relation to municipalities which, in some cases, are registered as the owners of what was originally ecclesiastical property, the Constitutional Court first of all finds that blockage of such property does not comprise arbitrariness of the legislature which would, on the basis of its own political discretion or on the basis of other indefensible intentions, intend to encroach upon specific municipalities or

upon the general level of realisation of the right to self-government. Involvement of such municipalities is based on the historic existence of ownership plurality prior to 1948. In particular it is not possible to state without any further consideration that restriction of transfer of individual specific items of immovable property under the ownership of a municipality would mean, without any other action, restriction of the right to self-government in relation to any given municipality.

49. The Constitutional Court now places special emphasis on the different nature and legal destiny of property which was, prior to the decisive period, owned by persons other than municipalities, since such property was legitimately the subject of considerations (whether they materialised or not) of democratic legislature on restitution in kind to third parties, on one hand, and "historic property of municipalities" on the other.

50. The fact is that the issue of reestablishment of self-government of municipalities (the overall concept of municipal constitution) with the necessary provision of material basis under democratic conditions corresponds to changes made by Government Order No. 4/1945 of Collection of Laws and Orders, on Election and Powers of National Committees, and particularly by Act No. 279/1949 Coll. on Financial Management of National Committees. The provisions of § 30 paragraph 2 of this act determined that "The hitherto municipal capital ceases to be such", whereby legal and actual liquidation of elements of local self-government was completed. It was restored in 1990 in connection with the adoption of Constitutional Act No. 294/1990 Coll. which modifies and amends Constitutional Act No. 100/1960 Coll., the Constitution of the Czechoslovak Socialist Republic, and Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation, and which curtails the election term of national committees. Constitutional Act No. 100/1960 Coll. was amended by this act in Article 86 in particular, in that "the basis for local self-government is a municipality" [paragraph 1] and that "a municipality is a self-governing community of citizens. It is a legal entity; it has its own property which it manages independently. […]" [paragraph 2]. Consequently, Constitutional Act No. 556/1990 Coll. which changes Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation, incorporated in Article 4 paragraph 7 of the amended act, the empowerment for national councils to adopt acts that determine which items forming the property of the Czech Republic and the Slovak Republic are under the ownership of municipalities. For the Czech Republic, such an act was then represented by Act No. 172/1991 Coll. on Devolution of Some Objects from the Ownership of the Czech Republic to the Ownership of Municipalities, through which, pursuant to § 1 and § 2, property which was owned by municipalities as to 31 December 1949, i.e. the "historic property of municipalities", devolved ex lege to municipalities (in addition to other items of property, also with some exceptions).

51. According to the provisions of § 4 paragraph 2 of Act No. 172/1991 Coll., "Also objects owned by the Czech Republic, the release of which is claimed by an entitled party pursuant to a special regulation, shall not pass to the ownership of municipalities". In relation to municipalities this is thus a safeguard which, according to its meaning, is to prevent clashes between the rights and claims of municipalities (as potential new acquirers) and entitled parties (future claimants). In case law related to restitution disputes, the Constitutional Court has, therefore,

repeatedly stated that a municipality cannot derive its ownership right according to Act No. 172/1991 Coll., where the immovable property in question does not represent “historic ownership of municipalities” [cf. Judgment file No. II. ÚS 411/99, dated 9 February 2000 (N 23/17 SbNU 167); Judgment file No. I. ÚS 84/05, dated 1 February 2006 (N 29/40 SbNU 233)]. The fact is that interpretation of the provisions of § 4 paragraph 2 of Act No. 172/1991 Coll. has also encountered some variation. For example, in resolution file No. III. ÚS 630/06, dated 22 March 2007 (U 4/44 SbNU 769), the Constitutional Court, referring to the case law quoted therein, stated amongst other points that the meaning of the provisions of § 4 paragraph 2 of Act No. 172/1991 Coll., which refer to special (restitution) regulations, implies that the same relate “not only to special regulations which have already been passed, but without limitation also to subsequent regulations”. Similarly, an earlier resolution dated 13 November 1997, file No. IV. ÚS 373/97 (not published in the Collection of Judgments and Rulings /SbNU/), firstly specified, with reference to judicial practice, that “in the case of restituted property, municipalities have not become its owners and have to release the immovable property to the entitled parties on behalf of the state due to the fact that they, prior to 24 June 1991, were holders of such property”. This interpretation has attempted to prevent real clash between the above-specified rights of the claimants and the municipalities by eliminating the effects of transfer – be it merely formal – of the property in question to the municipality.

52. In comparison to this, a number of other decisions of the Constitutional Court exist, according to which, pursuant to Act No. 172/1991 Coll., ownership of the immovable property subject to consequent restitutions (which were brought about, for example, by the subsequent Act on Land) does pass de iure to the municipalities, but together with an obligation to “release property to entitled parties according to restitution regulations” [cf. for example, Resolution dated 19 November 2009, file No. III. ÚS 1357/09 (not published in the Collection of Judgments and Rulings /SbNU/); Judgment file No. IV. ÚS 346/98, dated 12 October 1998 (N 122/12 SbNU 187); Judgment file No. II. ÚS 2277/07, dated 21 May 2008 (N 95/49 SbNU 419); Resolution of the Constitutional Court dated 31 October 2007, file No. III. ÚS 801/06; Resolution dated 16 August 2007, file No. III. ÚS 1602/07; Resolution dated 27 July 2000, file No. IV. ÚS 124/99; Resolution dated 17 January 2002, file No. IV. ÚS 477/01; dated 1 March 2000, file No. I. ÚS 448/98 (not published in the Collection of Judgments and Rulings /SbNU/)]. However, potential inconsistency in terms of interpretation of this issue does not seem to be essential for the purpose of the restitution process. It is apt to refer to the wording of the provisions of § 6 paragraph 5 of the Act on Land, according to which “If immovable property passed into the ownership of a municipality, then the entitled party shall have the right, according to this act, towards the municipality.” [In this respect see, for example, Resolution dated 28 September1998 file No. IV. ÚS 157/98; Resolution dated 19 May 1999, file No. II. ÚS 104/99 (not published in the Collection of Judgments and Rulings /SbNU/), including rejection of a petition for annulment of § 6 paragraph 5 of the Act on Land]. Therefore, it is indubitably clear from the context of the adoption of the individual restitution regulations and constant case law of the Constitutional Court, that contrary to returning the historic property of municipalities, devolution of other property determined for future restitution to municipalities was of a totally specific, formal nature, and the position of the municipality as the obliged party within the restitution process has

never been questioned by the Constitutional Court. Moreover, it is not possible to find in the constitutional order such a right of municipalities which would guarantee that their relationship to the historic property of churches would be strengthened as time passes. Article 101 of the Constitution in no way contains any claim of municipalities to the historic property of churches and religious communities. On the contrary, the Constitutional Court in the past explicitly stated that release of property in the restitution process by the municipalities to an entitled party is not an encroachment on local self-government pursuant to Article 101 paragraph 4 of the Constitution [Resolution dated 23 March 1999, file No. IV. ÚS 392/98 (not published in the Collection of Judgments and Rulings /SbNU/)]. As is already evident, the Constitutional Court has not found any violation of the right resulting from Article 11 of the Charter in any of the above-specified decisions.

53. With respect to the above-defined purpose of the contested provisions and the hitherto role of municipalities in the restitution process, where they conceptually act also as obliged parties, the very blockage alone of certain specific property (even though such property is registered as the property of municipalities), at a general level, does not seem to possess an inadequate effect. At this level, the interests of self-governing municipalities on one hand, and those of autonomous churches and religious communities on the other cannot be placed directly in opposition to one another, since the general development of municipalities is not preconditioned by ownership of such original church-owned immovable property directly by the municipalities, but may be equally well achieved through economic utilisation by any third party.

54. During an abstract review of constitutionality, the Constitutional Court is not able to objectively prove or theoretically model every conceivable situation which may be caused by the contested provisions in every individual case. Therefore, the subject of evaluation cannot now be formed by specific cases of individual owners either, with respect to whom, taking into consideration specific circumstances, including, for example, the relevance of the ownership title, the existence of good faith, or the hitherto role of the type of the subject in question in the restitution process, the Constitutional Court may further elaborate its evaluation in the future [for a similar reference to an individual review cf. for example Judgment file No. Pl. ÚS 1/08, dated 20 May 2008 (N 91/49 SbNU 273; 251/2008 Coll.), clause 112; further elaboration and specification of earlier more general legal opinion specified in the Opinion of the Plenum of the Constitutional Court took place when seeking justice in an individual case also, for example, in relation to the Opinion of the Plenum file No. Pl. ÚS-st. 21/05 dated 1 November 2005 (ST 21/39 SbNU 493; 477/2005 Coll.), by later Judgments file Nos. II. ÚS 519/08, dated 25 September 2008 (N 157/50 SbNU 399); dated 4 December 2008, file No. I. ÚS 428/06 (N 215/51 SbNU 673); a Judgment dated 25 June 2009, file No. I. ÚS 89/07; another dated 5 August 2009, file No. I. ÚS 566/07].

55. In relation to the general principle of legal certainty and protection of trust in law (the requirement for definiteness and comprehensibility of legal norms), it is necessary to also consider the overall legislative quality of the contested provisions. Possible objection of uncertainty of determination of the future circle of entitled parties and the circle of blocked (released) property, and possibly other conditions for restitution in kind may be rejected. The Constitutional Court, by

adopting certain interpretation of the contested provisions in prior case law, ruled out their objective uncertainty or incomprehensibility. When the contested provisions speak about “churches, religious communities, orders and congregations”, there is no other reasonable interpretation than that these are entities existing with their own legal personality according to valid law, whether they were understood as ecclesiastical legal entities inside churches and religious communities or besides them, which were the subject of the right in rem from which the churches and religious communities draw resources to attain their objectives, and removal of which they therefore experienced as property injustice. In relation to such ecclesiastical legal entities, this is then such property which de iure or de facto devolved to the state in the decisive period from 25 February 1948 to 1 January 1990 [cf., for example, § 4 paragraph 1 of the Act on Land; § 1 paragraph 1 of Act No. 87/1991 Coll. on Extra-judicial Rehabilitation; as well as § 2 paragraph 1 of Act No. 119/1990 Coll. on Judicial Rehabilitation], this as a result of property injustice [cf., for example, the introductory sentence of Act No. 298/1990 Coll.; preamble and the provisions of § 6 paragraph 1 of the Act on Land; preamble and the provisions of § 1 and § 6 of Act No. 87/1991 Coll.; § 1 of Act No. 403/1990 Coll. on Mitigation of Consequences of Some Cases of Property Injustice]. The definition of the range of the property in question in the provisions of § 29 of the Act on Land is sufficiently definite, since the existence of the right in rem (or forfeiture of the right to property, through the seizure of which injustice was done) within the decisive period of time is an objectively legally provable fact, and it is non-decisive that state bodies do not maintain a complete and separate list of the property in question, for which there is also no legal reason.

56. Finally, it is clear that the contested provisions of § 29 of the Act on Land do not contain a specifically determined term for adopting the act concerning the property originally owned by the church. The period of time for which – from the effectiveness of the contested provisions – the property in question is blocked has been determined only relatively, this in relation to adopting the special act thus mentioned. The Constitutional Court states that, at a general level, such procedure is not a priori impossible. This is rather an issue of legislative technique and its suitability, while a statutory reference to a special act which has yet to originate always contains an element of relative legal uncertainty concerning the contents of such an act; it is, however, justifiable by the limitations of human capability as regards executive power and legislative power to prepare and adopt only a limited number of acts in the given period of time. The structure of the contested provisions, which is non-standard legislatively from a current point of view, is not surprising within the context of the level of restitution legislation at the beginning of the 1990s. In this connection it is necessary to refer to constitutionally significant doubts on fulfilment of requirements posed on the generality of legal regulation regarding also, for example, the “enumerative” Act No. 298/1990 Coll., which, in the test of proportionality, cannot be bridged in any way other than through referring to exceptional reasons for its adoption [as specified by the Constitutional Court in Judgment file No. Pl. ÚS 27/09, dated 10 September 2009 (318/2009 Coll.), part VI./a]. The Constitutional Court relates similar exceptional reasons – resulting from typical circumstances which were wrestled with by the legislature following 1989 – also relating to the case being dealt with now.

57. On the basis of what has been said above, the Constitutional Court has found no

reasons for granting the petition for annulment of § 29 of the Act on Land, since said provisions are not unconstitutional. Within the scope of the attained constitutionally conforming interpretation the Constitutional Court has found that the purpose as well as the means contained in the contested provisions stand up when tested against the constitutional principles; this is not negated even by the petitioner when they state that they "do not consider as unconstitutional the very wording of provisions of § 29 of the Act on Land in the form in which the same were adopted and at the time when they were adopted. However, such a condition is considered as unconstitutional when the legitimate expectation of such provisions, which form only a bridging arrangement in terms of their nature, have not been met as a result of long-term inactivity on the part of the legislature, and thus a condition which should have been merely transitionary was thus conserved for a period exceeding fifteen years".

58. In this case, the legal fact of passing time, as was emphasised by the petitioner, has consequences in terms of constitutional law not in respect of the constitutionality of the contested provisions alone, but, in the case of non-fulfilment of such provisions, gradually increasing the consequences of the absence of a legal arrangement in the sphere of the group of potential beneficiaries of the norm, and this possibly elevated to the intensity of unconstitutionality. In such a situation, annulment of the contested provisions changes nothing in the legal position of the potential beneficiaries of the legal norm, to the contrary, it may further aggravate their position (legal certainty), as a certain circle of legal relationships remains unregulated.

59. The passing of time in the case under consideration and the thereto related inactivity on the part of the legislature did not constitute a reason for annulling the contested norm, but they did constitute a basis for the second verdict of this Judgment, whereby the petitioner required a declaration of unconstitutional inactivity on the part of Parliament.

IX.
Consequences of Passing Time in Relevant Case Law of the Constitutional Court
60. In its case law, the Constitutional Court reflects cases where a qualified legal fact consisting of the passing of time results in intervention by the Constitutional Court, either as a cassational intervention (annulment of the contested arrangement) or an interpretative intervention (enunciation of unconstitutional inactivity on the part of Parliament). With respect to the first group of cases, the petitioner themself refers to Judgment Pl. ÚS 5/03 (see below) and file No. Pl. ÚS 71/04 (see above); the Constitutional Court further considered conclusions resulting from Judgment file No. Pl. ÚS 25/98 (see above), Judgment file No. Pl. ÚS 8/02, dated 20 November 2002 (N 142/28 SbNU 237; 528/2002 Coll.) and Judgment file No. Pl. ÚS 6/05, dated 13 December 2005 (N 226/39 SbNU 389; 531/2005 Coll.). The latter type of attitude may be seen in a Judgment in case file No. Pl. ÚS 20/05, dated 28 February 2006 (N 47/40 SbNU 389; 252/2006 Coll.).

61. In case file No. Pl. ÚS 5/03, dated 9 July 2003 (N 109/30 SbNU 499; 211/2003 Coll.), the Constitutional Court annulled the provisions of § 3 and § 6 of Act No. 290/2002 Coll. on Devolution of Some Other Objects, Rights and Obligations of the Czech Republic to Regions and Municipalities, Civic Associations Working in the

Field of Physical Education and Sports and on Related Changes, and on Change in Act No. 157/2000 Coll. on Devolution of Some Objects, Rights and Obligations from the Ownership of the Czech Republic, as amended by Act No. 10/2001 Coll., and Act No. 20/1966 Coll. on Public Health Care, as amended by later regulations. The reason was constituted by the inadequate nature of the restriction of the ownership rights of regions and municipalities to property, which was, within the scope of reform of public administration, transferred to the municipalities and regions, which was seen in the fact that the act simultaneously bound the municipalities and regions to use such property only for such purposes for which the same was used as at the date of devolution of ownership, this for a period of 10 years. The Constitutional Court found that restriction of the ownership right with respect to the immovable property being transferred must be minimised merely to a "transitionary period". However, in the case under consideration, the situation is significantly different. In the case of the provisions of § 3 and § 6 of Act No. 290/2002 Coll., this was, in terms of purpose, a restriction of property transferred by the state to the municipalities, without indicating any other extraordinary disposal of such property in the future, so it should have been a transfer of a relative permanent nature. To the contrary, in the case now under consideration, where an essential role is played by adopting a constitutionally conforming solution for mitigating cases of property injustice caused to churches and religious communities, the municipalities are, on the basis of the existence of the contested provisions of § 29 of the Act on Land, sufficiently informed on the possibility of restitution in kind of such property or a part of the same, this on the basis of both the text alone of the provisions of § 29 of the Act on Land, and with respect to the case law of the Constitutional Court and its evolution. In case file No. Pl. ÚS 5/03, the Constitutional Court found that the use of the property being transferred merely for a certain purpose for a period of 10 years (the intensity of the obligation imposed) is not balanced by any other value. However, in the case now under examination, rather than the need to remove one effect of the contested provisions, the Constitutional Court found a necessity to balance a number of constitutionally protected interests, which cannot be done without active participation of the legislature.

62. Furthermore, the Constitutional Court evaluated conclusions which the Court arrived at in the case of the petition for annulment of the provisions of § 8 paragraph 6 of the Act on Extra-judicial Rehabilitation under file No. Pl. ÚS 25/98, dated 10 March 1999 (see above). These provisions established that "An object which was declared to be of national cultural heritage status shall not be released until the Czech National Council and the Slovak National Council adopt a new act on administration and protection of cultural heritage". The petition was granted, as well as a petition in case file No. Pl. ÚS 71/04 (see above), in which the provisions of § 11 paragraph 5 of the Act on Land were annulled, which established that "Immovable property which was declared to be of national cultural heritage status cannot be released until the time that acts are adopted that regulate the administration and protection of cultural heritage". In the latter Judgment, the Constitutional Court arrived at a legal opinion specifying that it is not arbitrariness on the part of the legislature that the same, in the field of administration and protection of cultural heritage, has failed to adopt a new act, but it is arbitrariness and also discriminatory procedure when the same preconditions the possibility of applying a restitution claim with this very condition, moreover one which is

expressed vaguely and in contravention of the principles of creation of law in a rule of law state. Also, with regard to these conclusions, the Constitutional Court has found an essentially different nature of the case now under consideration. Firstly, it is clear that in relation to the original owners of the "blocked" property, in the above-specified cases, this blockage established an obstacle to release, in spite of the fact that the act regulating the given issue – that is Act No. 20/1987 Coll. on State Conservation – was in existence and provided the state with a sufficient quantity of instruments for protecting cultural values while respecting the rights of the claimants. Therefore, the above-quoted provisions were determined as an unjustified restriction of and discrimination against such claimants. In the case under examination, however, the contested provisions do not serve primarily as an obstacle, but as a guaranty of a future legal (restitution) arrangement, while referring to a regulation which does not yet exist. In the cases specified above, by annulling the above-quoted provisions of the Act on Land and the Act on Extra-judicial Rehabilitation, the Constitutional Court then removed an unjustified obstacle to the release of an object to the entitled party, however, in the case under examination now, in the absence of a special act, the Constitutional Court would not attain any rectification at all of the improper condition; that being fulfilment of legitimate expectation.

63. With respect to the arguments of the petitioner that they state in their constitutional complaint, at this time the issue is not one pertaining to a possibility of rectification of the alleged unconstitutional condition by annulling the statutory provisions, such as, for example, in the case of annulment of the Fifth Part of Act No. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations [cf. Judgment file No. Pl. ÚS 16/99, dated 27 June 2001 (N 96/22 SbNU 329; 276/2001 Coll.)], when the Constitutional Court also several times fruitlessly appealed to the legislature for the same to rectify said unconstitutional condition and bring the legal arrangement of the administrative judiciary in line with the international obligations of the Czech Republic. In the case now under consideration, the Constitutional Court is actually inclined to believe that by annulling the contested provisions, the Constitutional Court would not contribute to a constitutionally conforming solution (balance) as regards the relationships.

64. The Constitutional Court now finds itself in a different position also in comparison with the proceedings in case file No. Pl. ÚS 6/05 (Judgment dated 13 December 2005 – see above), when the Constitutional Court found that the terms established by the provisions of § 13 paragraphs 6 and 7 of Act No. 229/1991 Coll., as amended by Act No. 253/2003 Coll., and the provisions of Article VI of Act No. 253/2003 Coll., restricted, in terms of time, the exercise of the right of entitled parties pursuant to § 11 paragraph 2 of the Act on Land for release of an alternate parcel of land, in spite of the fact that such rights are not supported by effective procedural means of protection. The Constitutional Court qualified this procedure employed by the legislature as arbitrariness on the part of the legislature, this being in contravention of the constitutional principle of protection of justified trust in law by a citizen, which is a component of a law-based state (Article 1, paragraph 1 of the Constitution), in the context of the case under examination, also in contravention of the principle of legitimate expectation when exercising the property right resulting from Article 1 of the Protocol to the Convention. In the case now under consideration, potential beneficiaries of the provisions of § 29 of

the Act on Land also do not have available an effective means of protection of the right, but its exercise is not restricted by a term which would be possible to annul as unconstitutional.

65. Finally, in the case now under evaluation, an analogy of the initially tolerated unconstitutionality of transformation of relationships based on the right to utilisation to relationships based on the right of lease is not the issue, where, gradually with the passage of time, the legal arrangement became ever more in conflict with protection of the ownership right [cf. Judgment file No. Pl. ÚS 8/02 (see above)], is not concerned here. However, the Constitutional Court discerns the unconstitutionality of the present condition in the fact that a desirable legal arrangement has not been adopted, not in adopting a constitutionally non-conforming legal arrangement, that is insufficient legal arrangement.

66. When viewed through the perspective of actual practical consequences, annulment of the contested provisions would provide protection merely to the interests of one group of addressees of the norm. Protection of the interests of churches and religious communities – as well as the legislative purpose of the contested provisions – would thus be completely omitted since any further transfers of historic ecclesiastical property would considerably aggravate, if not make utterly impossible, any restitution in kind so considered. Responsibility for settlement of historic ecclesiastical property would be, completely abruptly, transferred to the churches and religious communities alone (possibly to former individual subjects of the ownership right) through a large number of individual judicial disputes. This is a way which has already been rejected once by the Constitutional Court, however, not by denying claims from ecclesiastical entities, but by way of interpretation, in which the Constitutional Court preferred a legislative solution to this complex and interlaced area of problems. The Constitutional Court cannot replace the legislature by applying its own political will and in essence positively regulate certain spheres of legal relationships in accordance with interests which are not sufficiently regulated. The instrument which is available to the Constitutional Court on the basis of the provisions of § 70 paragraphs 1 and 2 of Act No. 182/1993 Coll. is objectively not appropriate for balancing the interests of a wide spectrum of persons in various situations for the future. The fact is that annulment of provisions that presume adoption of a special act in the future does not rectify the absence of a positive legal arrangement.

67. Therefore, the Constitutional Court has chosen such a solution which explicitly enunciates constitutional relevance and the urgency of interests of municipalities and third parties, for whom disposal of former ecclesiastical property is restricted, as well as churches and religious communities, whose historic property, lawlessly seized by the former communist regime, is directly concerned. At the same time, the Constitutional Court stated that annulment of the contested provisions of § 29 of the Act on Land would contravene the principle of proportionality in a material law-based state, since any benefit from such a procedure would be, as a result of (further) complicating the future settlement of the historic property of churches and religious communities, additionally with respect to the economic standing of the country, considerably uncertain.

X.
Unconstitutional Inactivity on the Part of the Legislature

68. Therefore, the Constitutional Court has been charged with evaluating how to respond to possible ascertainment (according to the petitioner) concerning said unconstitutional inactivity on the part of the legislature as a result of the passage of time. The petitioner proposed a verdict analogical to the decision in case file No. Pl. ÚS 20/05 (see above), whereby, inter alia, unconstitutional inactivity on the part of the Parliament of the Czech Republic was enunciated, pertaining to non-adoption of a special legal regulation in the field of regulated rent, where the Constitutional Court did not annul the contested legal arrangement. Despite the fact that the provisions of § 696 paragraph 1 of the Civil Code presumed the adoption of a special legal regulation, such a regulation was not passed. Therefore, the condition of unconstitutionality has been preserved. However, the Constitutional Court reached the conclusion that reasons for annulment of § 696 paragraph 1 of the Civil Code were not given since "The text itself of § 696 par. 1 of the Civil Code, which merely expects the passage of new regulations, is not unconstitutional; what is unconstitutional is the long-term inactivity of the legislature, which has led to the constitutionally unacceptable inequality, and whose final result is the violation of constitutional principles".

69. In Judgment file No. Pl. ÚS 20/05 quoted above, the Constitutional Court further stated: "The second level of the petitioner's objections, based on the claimed unconstitutional gap in legislation consisting of the fact that the envisaged legal regulations have not yet been passed, also deserves attention. As a consequence of the inactivity of the legislative assembly it can evoke an unconstitutional situation, if the legislature is required to pass certain regulations, does not do so, and thereby interferes in a right protected by the law and by the constitution. The legislature's obligation can arise both directly from the constitutional law level (e.g. in ensuring the exercise of fundamental rights and freedoms or in protecting them) and from the level of "ordinary" laws, in which it assigns this obligation to itself expressis verbis. […] Thus, we can conclude that under certain conditions the consequences of a gap (a missing legal regulation) are unconstitutional, in particular when the legislature decides that it will regulate a particular area, states that intention in law, but does not pass the envisaged regulations. The same conclusion applies to the case where Parliament passed the declared regulations, but they were annulled because they did not meet constitutional criteria, and the legislature did not pass a constitutional replacement, although the Constitutional Court gave it a sufficient period of time to do so (18 months). Moreover, it remained inactive even after that time period expired, and to this day has not passed the necessary legal framework (after more than 4 years)."

70. In the case now under consideration, the Constitutional Court starts from the above-specified conclusions which differ in unconstitutional inactivity from "ordinary" inactivity on the part of the legislature in such a sense that, on the part of the legislature, there must be an obligation to legally regulate a certain area of legal relationships, and this obligation may result either from ordinary law, where the legislature has explicitly imposed such an obligation on itself, or directly from the constitutional order, when non-regulation of a certain area of relationships

leads to consequences in terms of constitutional law.

71. Guided by the considerations specified above, the Constitutional Court states that the case under consideration involves both non-fulfilment of said explicit obligation based on law, and inactivity in the field of material safeguards of fundamental rights and freedoms. This is manifest at three separate levels.

XI./a
The obligation on the part of the legislature resulting from the pledge in the provisions of § 29 of the Act on Land and the case law of the Constitutional Court

72. The first level which determines the evaluation, from the viewpoint of constitutional law, is the will expressed by the legislature alone (cf. the above-quoted part of Judgment file No. Pl. ÚS 20/05) to resolve the issue of settlement of historic property of churches and religious communities, manifest both in the text of the contested norm, and in the then intention of the legislature reflected, for example, in shorthand records from meetings of the given chambers of Parliament from 1991, when the contested provisions became effective; in practice this occurred from as early as 1990, when Act No. 298/1990 Coll. was approved, which, even at that time, was presented as a temporary measure [in addition to the above-quoted items, see discussion concerning prints relating marginally to historic ecclesiastical property, http://www.psp.cz: for example, Response by the Vice-premier of the Government of the Czechoslovak Federative Republic, RNDr. J. Mikloško, DrSc., to interpellation by a member of the People's Chamber, E. Nováková, dated 28 November 1990: "(…) Act No. 298/1990 Coll. (…) does not reflect by far the entire property of orders and congregations and resolves merely the return of ownership of such units which the orders and congregations necessarily needed for commencement of their operations. During meetings with the orders and congregations it was agreed that this was the first stage of return of the seized property, in other words, that this is not a complete solution to the property rehabilitation of churches and religious associations…", Print No. 272; on the contrary, more recently, cf. furthermore, for example, an explanatory report for a bill on mitigation of some cases of property injustice caused to churches and religious communities at the time of lack of freedom, on settlement of property relationships between the state and churches and religious communities and on modification to some acts (Act on Property Composition with Churches and Religious Communities), Print of the Chamber of Deputies No. 482, which also views the necessity of the act in considerations of both an economic and (constitutional) legal nature, including fulfilment of legitimate expectation of churches and religious communities and the "pledge on the part of the legislature"].

73. Significance of this circumstance, in terms of constitutional law, is undoubtedly known to the legislature from the case law of the Constitutional Court, this at the latest since 2005, when the Constitutional Court completely specifically and explicitly stated that "however, the state must fulfil its obligation to pass a restitution act, established by the above-cited provisions of the Act on Land, regarding ecclesiastical property, as the state must oblige legitimate expectation on the part of ecclesiastical legal entities which are supported by statutory provisions." [Judgment dated 2 February 2005, file No. II. ÚS 528/02; Opinion of

the Plenum dated 1 November 2005, file No. Pl. ÚS-st. 22/05 (see above); Resolution dated 19 January 2006, file No. II. ÚS 687/04 (not published in the Collection of Judgments and Rulings /SbNU/); Judgment dated 24 June 2009 file No. I. ÚS 663/06; and a number of other decisions].

74. The Constitutional Court has repeatedly stated that the principle of protection of legitimate expectation (in the sense of protection of trust in law) is firmly bound to the principles of a law-based state, and is thus based on Article 1 paragraph 1 of the Constitution. The Constitutional Court deems it fit to remark that social philosophy has lead to the conclusion that if boundaries of legitimate expectation based on law are uncertain, then also freedom is uncertain (cf. for example, Rawls, J., A Theory of Justice, Prague, Victoria Publishing, 1995, p. 145). Protection of legitimate expectation is an integral part of the rule of law. A law-based state, and legal certainty as one of its attributes, is preconditioned by such an arrangement of the state in which everyone, both natural persons and legal entities, may have trust in the law, on the basis of which they may, in real time, plan and accomplish their interests. It is evident that legal certainty and strengthening of trust in the law are, to a comparable degree, negatively influenced by both changes in rules [cf. Judgment file No. Pl. ÚS 2/02 dated 9 March 2004 (N 35/32 SbNU 331; 278/2004 Coll.)] and non-adoption of anticipated rules.

75. From a comparative point of view, even though a typical international comparison is not concerned in this case, but rather a comparison with the common "Czechoslovakian element", it is apt to highlight the fate of the contested – and completely identical – provisions of § 29 of the Act on Land in the Slovak Republic after the split of the Czechoslovak federation. Today, this provision in Slovakia is practically consummated by adoption of Act No. 282/1993 Coll. on Mitigation on Some Cases of Property Injustice Caused to Churches and Religious Associations, which became effective on 1 January 1994, and of Act No. 503/2003 Coll. on Restitution of Ownership to Land, which became effective on 1 May 2005. With respect to the specific activity of the Slovak legislature, the existence of the provisions of § 29 of the Act on Land, as is evident, has not raised any issues concerning trust in the activity of the legislature and the constitutionality of possible legislative inactivity, as the commitment contained in the provisions of § 29 of the Act on Land has been met. Through this, additionally the purpose of the contested provisions, as recapitulated by the Constitutional Court above, was further confirmed.

76. Today, the pressure of public interest in removing legal uncertainty resulting from the provisional legal condition (Act No. 298/1990 Coll. in connection with § 29 of the Act on Land) has exceeded the tolerable and justifiable limit. Non-adoption of a special act, to which the legislature has explicitly bound itself, for a period of nineteen years, in spite of the legislature being admonished by the Constitutional Court for the problematic nature of its inactivity, is a sign of impermissible legislative arbitrariness, and violates Article 1 paragraph 1 of the Constitution.

XI./b

Obligation on the Part of the Legislature Resulting from Protection of Legitimate Expectation

77. The second level of the same commitment of the legislature is the mechanism

used to handle legally significant claims of entitled parties from amongst (not only) churches and religious communities with respect to the specific chosen pattern of the overall concept of restitution legislation in Czecho-Slovakia after 1989. The absolute majority of acts whereby the communist state totally removed economic independency from churches and religious communities would not be credible not only with regard to the then completely undoubted international standard of fundamental rights, but also not in light of the Czechoslovak law then valid. Not even at that time could devolution of ownership right be based for example on takover of an object without legal title to the same, in addition by the state which could not have been in good faith for the entire period of possession.

78. The Constitutional Court states that in addition to the explicit statutory basis contained in the provisions of § 29 of the Act on Land, the legitimate expectation of churches and religious communities is also based on the general concept of the restitution process in place after 1989, which, neither in the individual restitution provisions [cf. interpretation in Judgment file No. Pl. ÚS 15/98, dated 31 March 1999 (N 48/13 SbNU 341; 83/1999 Coll.) and a number of others] nor as a whole, may be interpreted to the detriment of entire groups of entities (persons) that, in addition to cases of property injustice, subsisted for long periods under systematic and continuous pressure by totalitarian state power also as regards all of their (remaining) activities.

79. It is especially significant for the case under consideration that according to the case law of the Constitutional Court and the European Court of Human Rights, the settled case law of courts and the interpretation contained therein must be considered as law in the material sense and as part of the relevant legal norm [cf. Judgment of the Constitutional Court file No. II. ÚS 566/05, dated 20 September 2006 (N 170/42 SbNU 455); Judgment file No. IV. ÚS 611/05, dated 8 February 2006 (N 34/40 SbNU 281); Decision of the European Court of Human Rights in the cases of Kruslin v. France dated 24 April 1990, No. 11801/85, Series A No. 176-B; Müller and others v. Switzerland dated 24 May 1988, 10737/84, Series A No. 133; Markt Intern Verlag GmbH and Klaus Beermann v. Germany dated 20 November 1989, No. 10572/83, Series A No. 165; unless specified otherwise, the quoted decisions of the European Court of Human Rights (Commission) are published on the HUDOC database at http://www.echr.coe.int]. Thus in the case now under examination, the existence of the legitimate expectation (property interests) of the ecclesiastical entities concerned results both from statutory provisions and from settled interpretation and application practice (the case law of the Constitutional Court, to which ordinary courts systematically refer).

80. At this point it is necessary to mention that even though the term “legitimate expectation”, in spite of such designation in the considerations of various constitutional courts or the European Court of Human Rights, may possess a specific quality, it is not therefore completely freely interchangeable with similarly designated theoretical structures in another jurisdiction (ésperance légitime; legitimate expectation); its relevant essence is actually the property interests protected by Article 1 of the Protocol to the Convention (and Article 11 of the Charter). According to this Article, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and

by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The term "possessions" contained in the first part of Article 1 of the Protocol to the Convention has an autonomous scope which is not limited to the ownership of material assets and does not depend on formal qualifications of domestic law. It may include both "existing property" and various property values, including receivables, on the basis of which a complainant may claim to have at least "legitimate expectation" to attain effective application of the ownership right. The subject of the protection according to the above article is thus not only the acquired, i.e. existing, property, but also legitimate expectation of acquisition of such property. The central rule for evaluating the applicability of Article 1 of the Protocol to the Convention is the regard to the specific and individual circumstances of the case, which in entirety were to establish property interests protected by Article 1 of the Protocol to the Convention [Iatridis v. Greece [GC], Judgment dated 25 March 1999, No. 31107/96, paragraph 54, ECHR 1999-II; Beyeler v. Italy [GC], dated 5 January 2000, No. 33202/96, paragraph 100, ECHR 2000-I; Broniowski v. Poland [GC], dated 22 June 2004, No. 31443/96, paragraph 129, ECHR 2004-V; Anheuser-Busch Inc. v. Portugal [GC], dated 11 January 2007, No. 73049/01, paragraph 63].

81. The provisions of Article 1 of the Protocol to the Convention in the interpretation of the European Court of Human Rights do not impose on the member countries any general commitment to return property which was transferred to them prior to ratification of the Convention or represent any limitation on the member countries in determining the scope of property restitution and establishing conditions under which property will be returned to the original owners [Jantner v. Slovakia, Judgment dated 4 March 2003, No. 39050/97, paragraph 34]. However, if a member country, after ratifying the Convention (Protocol) adopts a legal arrangement making possible full or partial restitution of ownership of confiscated property, then such an act may establish a new property right under protection of Article 1 of the Protocol to the Convention. The same is true for arrangements relating to restitution of, or compensation for, property which result from an act adopted prior to ratification of the Convention (Protocol) if such an act also remains effective also following ratification of the Convention (Protocol) [Broniowski v. Poland [GC], dated 22 June 2004, No. 31443/96, paragraph 125, ECHR 2004-V; Maltzan and others v. Germany (dec.) [GC], dated 2 March 2005, No. 71916/01, 71917/01 and 10260/02, paragraph 74(d), ECHR 2005-V; Kopecký v. Slovakia [GC], dated 28 September 2004, No. 44912/98, paragraph 35(d), ECHR 2004-IX].

82. Furthermore, as for the term "legitimate expectation", with respect to the differing concept of such an instrument under various jurisdictions, it is possible to comparatively mention, marginally and for example, a differing concept for legitimate expectation in the case law of the European Court of Justice (the Court of Justice of the European Union), which completely fundamentally surpasses the concept settled upon in the case law of the Constitutional Court and the European Court of Human Rights. It is true that respect for legitimate expectation in the case law of the European Court of Justice is one of the principles of law of the

Community/EU most often referred to, however, its application is typical only in specifically defined fields, in particular that of agriculture or employment disputes [see Tridimas, T. The General Principles of EC Law. Oxford University Press, 2000, p. 169]. This principle has a special significance in particular in the context of retroactive application of law. However, it may be referred to also in other connections, but always only to such scope to which the Community/EU has already created a circumstance that gave rise to the given legitimate expectation. Such expectation may arise on the basis of former legislation or on the basis of actions of institutions of the Community, when this principle may be referred only when the legislation or actions of the bodies so concerned form the immediate cause for the legitimate expectation. Legitimate expectation may be the source of substantive rights, whereby the same differs, for example, from the principle of legal certainty, a principle which is rather of a general and interpretative nature. When respecting the above-specified general preconditions, the European Court of Justice specified the concept of the legitimate expectation in its case law in such a way that the same must possess a certain form in terms of who may claim the same, at which time, to which scope and in relation to which rights. For example, clause 38 of Judgment of the Court of First Instance T-199/01, G contre Commission de Communautes européennes, from 7 November 2002, states that previous case law is being referred to and, furthermore, that the right based on legitimate expectation is bound by three pre-conditions – the party who claims the same must be given, by the public administration of the Community, exact, unconditional and identical guarantees resulting from justified and reliable sources; additionally, these guarantees must be of such a type that legitimate expectation is formed on such a basis by the party for whom the same are determined, and eventually such guarantees must be provided in accordance with the applicable norms. However, the conditions specified above relating to the concept of legitimate expectation defined in the above-specified judgment of the Court of First Instance T-199/01, G contre Commission de Communautes européennes, must be understood in a narrow context of the field under discussion, which forms the subject of this case; that is in the context of an employment dispute, in which reimbursement of medical costs of an officer of the European Commission was rejected.

83. The Constitutional Court, in its Judgment dated 8 March 2006, file No. Pl. ÚS 50/04 (N 50/40 SbNU 443; 154/2006 Coll.), stated that “the Constitutional Court has adjudicated on the principle of legitimate expectation in conformity with the case-law of the European Court of Human Rights, from which has clearly emerged the conception of the protection of legitimate expectation as a property claim, which has already been individualized by an individual legal act, or is individualisable directly on the basis of legal rules” (cf. Judgment in case file No. Pl. ÚS 2/02 – see above). Eventually, and absolutely specifically on the issue under consideration, the Constitutional Court expressed its opinion in the case law quoted above [Judgment dated 2 February 2005, file No. II. ÚS 528/02; Opinion of the Plenum dated 1 November 2005, file No. Pl. ÚS-st. 22/05, by way of confirming the conclusions of the earlier-specified Judgment; Resolution dated 19 January 2006, file No. II. ÚS 687/04 (not published in the Collection of Judgments and Rulings /SbNU/); and a number of decisions that followed] when the Court stated that “however, the state must fulfil its obligation to pass a restitution act, established by the above-cited provisions of the Act on Land, regarding

ecclesiastical property, as the state must oblige legitimate expectation on the part of ecclesiastical legal entities which are supported by statutory provisions.”. In the case now under examination, the Constitutional Court thus infers such legitimate expectation (property interests) from a specific statutory provisions supported by long-established interpretation by the Constitutional Court.

84. In a crucial judgment by the Grand Chamber dated 22 June 2004 in the case of Broniowski v. Poland [GC], No. 31443/96, ECHR 2004-V – which is of a pilot nature and whose essential conclusions cannot be neglected in the case now under consideration – the European Court of Human Rights assessed the position of the complainant who, briefly speaking, unsuccessfully claimed a requirement for compensation for immovable property their family lost after the Second World War. The property interests of theirs were supported by the legal order (a pledge by the legislature) and the case law of the highest judicial authorities. As a result of procedures, and in particular inactivity on the part of the state which had not adopted the relevant act – as anticipated by the legal order – according to which it would be possible to decide on such compensation, violation of Article 1 of the Protocol to the Convention was found.

85. For the conclusions of the Constitutional Court it seems to be essential that the European Court of Human Rights has qualified inactivity of the legislature as an encroachment upon the right pursuant to the general rule of the first sentence of Article 1 [paragraphs 136, 145, 146 of the Judgment]. It emphasised that the context of the above-quoted Article also contains a positive obligation on the part of the state to ensure the exercise of the property rights concerned while taking into account a fair balance between the competing interests of an individual and society as a whole [paragraphs 143-144]. Each encroachment upon the right guaranteed by the Convention must aim at a legitimate objective while respecting the principle of fair balance, which is inherent in Article 1 of the Protocol to the Convention. At the same time, it specified that intranational bodies, for their direct knowledge of society and its needs, have broad possibilities available for their own consideration in the issue of identifying public interest when balancing conflicting rights and interests, with the exception of situations when their judgment clearly lacks a reasonable basis [paragraph 149; with reference to James and others v. the United Kingdom, dated 21 February 1986, No. 8793/79, Series A no. 98-A; the Former King of Greece v. Greece [GC], Judgment dated 23 November 2000, No. 25701/94, ECHR 2000-XII]. The above-specified criteria are also valid also for crucial changes to a system, such as are represented by the transition of a country from a totalitarian regime to democratic form of government and the reform of political, legal and economic structures of the state as phenomena which inevitably also include adopting economic and social legislation with a wide-reaching societal impact. When applying Article 1 of the Protocol, the various interests in question must be evaluated overall, while taking into account that the Convention is intended to ensure rights considered “purposeful and effective”. When evaluating the admissibility of an encroachment, it is not needed to evaluate necessarily only specific conditions for compensation, but also the actions of parties and the means employed by the state and their implementation. In this context, the European Court of Human Rights highlighted that uncertainty, whether it results from the law, administrative procedures or the practices of state administration bodies, is a factor which must be taken into consideration when

evaluating steps taken by the state. If disputable issues of public interest are under consideration, the state power must act at the right time, in a proper and consistent manner [paragraph 151; with reference to a judgment in the case of Vasilescu v. Romania, dated 22 May 1998, No. 27053/95, paragraph 51, ECHR1998-III; Beyeler v. Italy [GC], dated 5 January 2000, No. 33202/96, paragraphs 110 in fine, 114 and 120 in fine, ECHR 2000-I; Sovtransavto Holding v. Ukraine, dated 25 July 2002, No. 48553/99, paragraphs 97-98, ECHR 2002-VII].

86. In the given case, the European Court of Human Rights repeatedly considered historic factors, specific features of the given period of time when the state had to cope with problems associated with political, economic and social upheaval, as well as a great range of controversial claims, and admitted the extraordinary difficulty of the situation, requiring comprehensive political decisions [cf. paragraphs 155-163]. Moreover, the European Court of Human Rights admitted that in situations which – so as to be solved – require adoption of a contestable act with significant economic impacts on the whole country, the intranational bodies must have considerable discretion not only in selecting measures for protecting and regulating ownership relations, but also in electing an adequate period of time for their implementation. Selection of such measures may also include any necessary decisions to limit the amount of compensation for the confiscated property at a level lower than its market value. The provisions of Article 1 of the Protocol thus do not ensure a right to full compensation under all circumstances [paragraph 182; with reference to Judgment in James and others v. the United Kingdom, dated 21 February 1986, No. 8793/79, paragraph 54, Series A no. 98-A].

87. Furthermore, the European Court of Human Rights stated that in spite of the fact that the essential reforms of the political and economic system of the country and the condition of pubic finances may justify considerable restriction of any disbursed compensation (for immovable property of which the complainant and other persons were deprived after 1945), the Polish state was not able to offer an adequate explanation, in relation to Article 1 of the Protocol to the Convention, when giving a reason for continued failure over many years as regards satisfying the claim on the part of the complainant as well as thousands of other persons [paragraph 183]. The rules and principles resulting from Article 1 of the Protocol to the Convention require, enunciated the European Court of Human Rights, that the states not only consistently and foreseeably respect and apply the enactments which they have adopted themselves, but as their result also ensure legal and actual conditions for implementation of the same. The same principles bound the Polish state to fulfil, within a reasonable period of time, through a suitable means and consistently, a legislative pledge to settle the relevant claims, this in the public interest [paragraph 184]. The fact that the complainant has already received a negligible proportion (approximately 2%) of compensation, was not found by the European Court of Human Rights to constitute a reason for which the complainant should be deprived of the possibility to obtain at least an adequate portion of the claimed value [paragraph 186 in fine].

88. In addition to the verdict on violation of Article 1 of the Protocol to the Convention, the European Court of Human Rights declared that such violation originates from a system problem consisting in a failure in domestic legislation and practice [verdict sub 3]. Another verdict of the European Court of Human Rights

imposed on the Polish state an obligation to ensure, through suitable legal measures and administrative practice, implementation of the property right concerned also in relation to other holders of the same or to provide them with adequate compensation instead [verdict sub 4].

89. The above-specified legal conclusions of the European Court of Human Rights apply mutatis mutandis likewise to the position of potential beneficiaries of the contested provisions of § 29 of the Act on Land, who had received repeated reassurances from the bodies of state power on future settlement of the historic property of churches, this through standpoints and explicit pledges from top bodies of the executive power as well as individual constitutional representatives, and in particular the very legislature through the pledge contained in the statutory norm. In this ambience, the Constitutional Court finally rejected to deal, in terms of casuistry, with the pledge given by the legislature through individual judicial proceedings, with which the judicial power, burdened by a large number of potential disputes, would in an activistic way fulfil the purpose of an act which would only originate in the future. In this matter, the essential point is the element of trust in law, where the ecclesiastical entities were repeatedly reassured of the specific interpretation of the same by the public power, including explicit decisions of the Constitutional Court [decisions mentioned above: Judgment dated 2 February 2005, file No. II. ÚS 528/02; Opinion of the Plenum dated 1 November 2005, file No. Pl. ÚS-st. 22/05, with attached reference to the previous Judgment; resolution dated 19 January 2006, file No. II. ÚS 687/04; Judgment dated 24 June 2009, file No. I. ÚS 663/06; and a number of other decisions].

90. The point designated by the Constitutional Court in its case law as “legitimate expectation” [cf. the term right to credit stated in quotation marks in verdict sub 3 in the Broniowski judgment], is indubitably a continuing and specific property interest falling under Article 11 of the Charter and Article 1 of the Protocol to the Convention. The impossibility to realise such a property interest (to obtain compensation) during a period of nineteen years thus, in the opinion of the Constitutional Court, fulfils the aspect of unconstitutionality, consisting of an omission to legislatively deal with a systemic and comprehensive problem of which the legislature has repeatedly been reminded by the Constitutional Court. The legitimacy of the purpose of such encroachment (inactivity) may have lasted for a certain transitionary period at the time of adopting the most essential steps of the transformation of the society, however, it is not sustainable ad infinitum. Incidentally, the counter argument that the entities concerned cannot now make their property claims, since they did not defend properly their interests with the available legal means immediately following encroachment upon their rights from 1948 to 1989 appears to be extraordinarily cynical. Similar argumentation exposes the nature of legal and political changes after 1989 to crucial doubts on their sense and remains blind to the role of courts in (ecclesiastical) political trials as complaisant administrators of commands from the Communist Party [cf. especially the Judgment dated 2 February 1999, file No. II. ÚS 66/98 1999 (N 18/13 SbNU 123), which in relation to a similarly “inconsistent” complainant aptly noted that “further exercise of the property right to the immovable property of relatively great value would definitely result in application of the simplest means used then by the state – i.e. removal of the holder of such a right, this without any

reasoning"; in general connection to this, see the Judgment of the Constitutional Court dated 21 December 1993, file No. Pl. ÚS 19/93 (see above)].

91. With respect to the points above, the Constitutional Court admits that a certain specific feature of this subjective property right may – even with respect to the discretion of the legislature – result from the very organisational essence of an individual church or religious community, where the specific form of settlement does not necessarily need to address individual subjects, but, depending on circumstances, does so also towards the church or religious community as a whole. In spite of the points mentioned, the legislature must respect the principles based on Article 11 of the Charter and Article 1 of the Protocol to the Convention, according to which the amount of compensation determined, in relation to the value of the property being compensated for, must not be an expression of arbitrariness of the legislature, but must reflect a principle of proportionality (or "fair balance"). If property injustice caused formally to an individual ecclesiastical legal entity was, with respect to the organisational structure and internal links of the churches, intended and implemented as an act of unlawful repression against the whole (relevant) church, then the positive liability of the legislature also includes discretion on a suitable form of the arrangement of these overall relationships, in addition to providing judicial protection in a specific case. If the course of a large number of individual judicial disputes, in the order of thousands – which would be the practical consequence of the transfer of responsibility from the legislature to the courts of justice upon annulment of § 29 of the Act on Land – is considered a possible alternative to the above specified points, then the Constitutional Court doubts that, after many more years of such proceedings, even if most of the property was actually transferred to the ownership of churches and religious communities, the original moral and economic purpose of restitutions would be at all met or the interests of municipalities or third parties would be taken into consideration to a desirable degree.

XI./c
Obligation on the Part of the Legislature Resulting from the Commitment to Protect Fundamental Rights and Freedoms

92. Despite the fact that the Constitutional Court, in several decisions of the same, has pointed out that "restitution legislation" is based generally on the concept that there is no constitutionally based claim for restitution, and that such a claim neither follows from the international commitments of the Czech Republic, the Constitutional Court, in the quoted case file No. Pl. ÚS 20/05, also declared that inactivity on the part of the legislature (failure to handle a certain issue) is unconstitutional, if the same brings about other direct unconstitutional consequences.

93. The provisions of Article 2 paragraph 1 of the Charter guarantees the plurality of religions and religious tolerance, as well as separation of the state from specific religious denominations (the principle of a state which is neutral from the viewpoint of confession). The principle of plurality of religions and tolerance is expressed in Article 15 paragraph 1 and in Article 16 of the Charter of Fundamental Rights and Basic Freedoms. The central principle of the state being neutral from the viewpoint of confession is implemented through the co-operation pattern of

the relation between the state and churches and their mutual independence. What is crucial for the following considerations is whether and to what degree economic self-sufficiency constitutes a material precondition of independent exercise of rights guaranteed particularly by Article 16 paragraphs 1 and 2 of the Charter. The point is that the constitutional order of the Czech Republic does not contain merely an imperative for independence of the state of churches and religious communities (as part of the ideological and religious neutrality of the state), but also the requirement for the independence of churches and religious communities of the state when carrying out their objectives.

94. With respect to formal legal continuity, but also to clearly declared discontinuity in terms of values of the Czech state with the previous non-democratic regime [Judgment dated 21 December 1993, file No. Pl. ÚS 19/93 (see above)], the Constitutional Court views as a general obligation of a democratic and rule of law state, expressed in Article 1 of the Constitution, and in particular in the individual provisions of the Charter of Fundamental Rights and Basic Freedoms, that of ensuring not only the formal but also the actual renewal of material guarantees for the exercise of fundamental rights and freedoms, where previously – in spite of the elementary human rights content in the international ius cogens – the state has failed. Adoption of the Charter of Fundamental Rights and Basic Freedoms, and acknowledging other international instruments for protecting fundamental rights, however, does not represent a "starting point, from which the obligation of the state would commence, as a limit, and where it is necessary, to actively create preconditions for the exercise of fundamental rights. To the contrary, in relation to the individual bearers of the fundamental right, it is impossible to fail to take into consideration the historically created context of the situation in which they currently and by fault of the state find themselves. In other words, it would be in contravention of the concept of development and reinforcement of fundamental rights if social changes repeatedly resulted in establishing lower standards of fundamental rights on the basis of ignoring historic causes for the condition as exists at present. The history of democratic and rule of law states cannot consist of lines marking out separation of the past; instead lessons taken from prior experience must be reflected as guarantees for non-repetition of past mistakes in the future.

95. In this respect, the Constitutional Court takes the overall process of restitutions (in the broad sense of the term) after 1989 not as a purely political intention that would be merely a part of a (necessary) liberal economic transformation, in which it would primarily fulfil the function of de-etatisation of the wealth of the society, but the Constitutional Court takes the same also as a process of rehabilitation of material safeguards for the exercise of fundamental rights manifested, for example, also in the functioning of civic society [an accent on the first concept in most of the countries of Central and Eastern Europe is visible, and a functioning market economy is considered a criterion of success of transformation, for example, by Posner, E. A. – Vermeule, A. Transnational Justice as Ordinary Justice. In Harvard Law Review, Vol. 117, No. 3, January 2004, pp. 765-825; especially in relation to the Czech Republic, it is possible, even with respect to external observers, to perceive some criticism due to an emphasis on the former concept at the expense of the human rights aspect: Williams, R. C. The Contemporary Right to Property Restitution in the Context of Transitional Justice. Occasional Paper Series,

International Center for Transitional Justice, May 2007, pp. 11-23, http://www.ictj.org].

96. As for the relationship between churches and religious communities as such and the constitutionally guaranteed freedom of religious conviction, the Constitutional Court remarks, for the sake of completeness, that the constitutional relevance of such entities is given by Article 15 paragraph 1 ("The freedom of […] religious conviction is guaranteed.") and Article 16 paragraph 1 of the Charter, according to which practise is guaranteed of religion or faith, in private or public, through worship, teaching, practice, and observance, this either alone or in community with others (an acknowledgement of the legal personality of such an association by law is then only a consequence of such guarantees, since in a state it is impossible to exercise one's rights without entering into legal relationships) [cf. for example, Judgment dated 18 June 2003, file No. I. ÚS 146/03 (see below)]. In addition, the European Commission of Human Rights stated that for the purpose of Article 9 of the Convention, the varied perception of churches and their individual members seems to be merely artificially construed, and, therefore, the churches themselves were separately granted rights pursuant to Article 9 paragraph 1 of the Convention, since through churches and religious communities, merely their believers exercise their fundamental rights [X. & Church of Scientology v. Sweden, App. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979), quoted according to Evans, C. Freedom of Religion under the European Convention on Human Rights. Oxford: Oxford University Press, 2001, pp. 13–14]. Constitutional declaration of freedom of religious conviction without institutional guarantees, which is, for example, without reflection of the element of the right of association or without respect for the necessary functional assets of the individual ecclesiastical entities, would ensure the freedom of religion merely in an illusory capacity.

97. Churches and religious communities are thus bearers of the fundamental rights and are, in the context now under consideration, also qualified to act as subjects of ownership rights. Only marginally in relation to the historic nature of the property of churches is it possible to refer to available doctrinal opinions which congruently do not infer the nature of the ecclesiastical property as ownership of the state [K problematice vlastnictví katolické církve a restitucí církevního majetku / On the issue of ownership of the Catholic Church and restitutions of ecclesiastical property (Masaryk University in Brno); Posouzení otázky církevního vlastnictví / Review of the issue of ecclesiastical property (University of West Bohemia, Faculty of Law); Expert opinion (Institute of State and Law, Academy of Sciences of the Czech Republic); Expert report by the Charles University in Prague from the viewpoint of law and history regarding the historic position of "Catholic ecclesiastical property" in the second half of the 19th century and in the 20th century in the territory of the present day Czech Republic; expert opinions were published in the appendix to Print of the Chamber of Deputies No. 858 "Report by the chairman of the Temporary Commission of the Chamber of Deputies for settlement of property issues between the state and churches and religious communities on the work of the Commission from 13 June 2008 to 31 March 2009"]. Particularly in this respect, it is not decisive for the ownership position of churches whether they were legal entities of public law or private law [The Holy Monasteries v. Greece, dated 9 December 1994, No. 13092/87, 13984/88, Series A No. 301-A, paragraphs 48-49].

98. In its case law, the Constitutional Court has confirmed that the activities of churches cannot be restricted merely to practising their rites, but that constitutional protection (Article 15 paragraph 1, Article 16 paragraphs 1 and 2 of the Charter) is enjoyed also by their traditional activities consisting of community work, provision of education and health care, social work, charitable work and suchlike [Judgment file No. I. ÚS 146/03, dated 18 June 2003 (N 115/31 SbNU 33); Judgment file No. Pl. ÚS 6/02, dated 27 November 2002 (N 146/28 SbNU 295; 4/2003 Coll.); Judgment file No. Pl. ÚS 2/06, dated 30 October 2007 (N 173/47 SbNU 253; 10/2008 Coll.)]. To this, comparison may be made, for example, with the opinion of the German Federal Constitutional Court, according to which "Freedom of religious denomination contains, in addition to the freedom of an individual to express their denomination in privacy and in public, necessarily also freedom of association in organisations for the purpose of shared public profession, especially the freedom of vocation for churches in their historically generated form and on the basis of their mission (BVerfGE 42, 312). Not only religious communities, their sub-organisations and their legally independent establishments, but also legal entities with the objective of fulfilment of charitable tasks in the implementation of one of several basic preconditions of the religious vocation are entitled to file a constitutional complaint for protection of the fundamental right to uninterrupted exercise of the religious vocation (see BVerfGE 19, 129; 30, 112; 42, 312; 46, 73)" [BVerfGE 53, 366]. In this context, for example, "the concept of the Catholic Church includes the practising of religion not only in the field of faith and worship, but also freedom for development and operation in the world, which corresponds to its religious tasks. This in particular includes charitable work. Active love for fellowmen is an essential task of Christians and is understood by Christian churches as a principal function. It does not include only hospital care provided by churches, but generally is, according to basic religious requirements, focused on provision for people in need, including their upbringing and education" (BVerfGE 70, 138; BVerfGE 57, 220). The historic task of churches in society is reflected also in the case law of other constitutional courts [cf. decision of the Constitutional Court of the Italian Republic dated 11 April 1989, ITA-1989-R-001; a decision of the Constitutional Court of the Lithuanian Republic dated 13 June 2000, LTU-2000-2-006; a decision of the Constitutional Court of the Hungarian Republic dated 27 February 1993, HUN-1993-1-003; a designation according to the database CODICES. http://www.codices.coe.int].

99. Moreover, let it be stated that the European Court of Human Rights, in the case of The Holy Monasteries v. Greece dated 9 December 1994, No. 13092/87, 13984/88, Series A No. 301-A, when considering the expropriation of commercial land of the monasteries concerned, established that primarily there was violation of the guaranteed protection of property interests resulting from Article 1 of the Protocol to the Convention, not the right resulting from Article 9 of the Convention. To this, however, the Constitutional Court wishes to add that this individual conclusion (separation of property rights from religious freedom) is not practically transferable in the abstract evaluation of inactivity on the part of the legislature to the – completely different – case now under consideration. The point is that in this section of the reasoning for the Judgment, the Constitutional Court evaluates (a) broader constitutional consequences of the Czech constitutional order, (b) this upon consideration of the total intensity of the encroachment which

(for an essential part) the non-release of property may mean in terms of material guarantees of the level of religious freedom (c) upon taking into account the existence of other guarantees of rights resulting from Article 16 paragraphs 1 and 2 of the Charter.

100. As for clause (a), the Constitutional Court states that the Czech Republic is, pursuant to Article 1 paragraph 1 of the Constitution, a democratic rule of law state based on the respect for rights and freedoms of men and citizens. This particular principle first of all asserts that the Constitutional Court must proceed from such an arrangement in terms of intranational or international law that would provide the greatest degree of protection for fundamental rights and freedoms. The reference criterion is currently in particular Article 16 paragraphs 1 and 2 these being special provisions relating to Article 15 paragraph 1 of the Charter. The degree of definiteness of these provisions reflects previous bitter experience brought about through ignoring formally granted fundamental rights during the time of the Communist regime in Czechoslovakia, and also follows human right standards effectuated in civilised countries. Interpretation of these provisions has been repeatedly conducted in the case law of the Constitutional Court.

101. As for the consideration stated under clause (b), it is first of all necessary to say that presently no individual encroachment against a single entity of a group of entities is involved, but that the essence of the property injustice is the confiscation of all commercial property and a considerable proportion of other property determined for the undertakings of churches in society, which has had a negative impact on this entire segment of society, and, as a result of other measures, eliminated the exercise of essential elements of the fundamental right. Therefore, the Constitutional Court in its considerations takes into account that since there was a centrally coordinated action, this being total and comprehensive, by the Communist state against churches and religious communities, where the primary subject of unlawful repression was not an individual subject of the ownership right (an ecclesiastical legal entity), but instead an agglomeration of such and their position in society, and not the essence of their property but the essence of their existence, then this fact is reflected also in the various positions after changes in social and legal conditions and in the nature of the claims, as well as in the obligation of the new democratic legislature to correct the situation which it did not cause. Thus, the legislature was faced with solving the consequences of such encroachment which did not form an individual exception in relation to the sphere of religious life in Czechoslovakia, but instead a rule, or even a direct ideological imperative, since religion was “[…] the opium of the people. Abolishing religion as an illusory happiness of the people, means to seek their true happiness” [Marx, K. Úvod ke kritice Hegelovy filozofie práva / Contribution to Critique of Hegel's Philosophy of Law. In Marx, K., Engels, B. The Works. Vol. 1. Státní nakladatelství politické literatury / State Publishing House of Political Literature, Prague, 1956, pp. 401–402]. The extinction of materially determined religion as a remnant of a lower grade of social development was then associated with eliminating private ownership of means of production in society as a whole [Engels, B. Anti-Dühring. In Marx, K., Engels, B. The Works. Vol. 20, Svoboda Publishing House, Prague, 1966, p. 310]. In addition to practical “ecclesiastical” policy, the above “ideal” was even promoted as a constitutional norm by way of constitutional Act No. 100/1960 Coll., the Constitution of the Czechoslovak

Socialist Republic, where Article 16 explicitly determined that “All cultural policies in Czechoslovakia, the development of education, upbringing and tuition are administered in the spirit of the scientific world view, Marxism-Leninism, […]”. Historic reality – where the Constitutional Court refers to widely accessible expert studies in fields of history and legal history – thus relativises, in the case of churches and religious communities, the view of cases of property injustice in an isolated manner in relation to the individual affected entities, but the extensive range of the same permeates the very nature of freedom of religion. The overall scope of the ecclesiastical property thus blocked, when, as is evident, the overwhelming majority of historic property of churches and religious communities is concerned, thus, in comparison with the guarantees of Article 16 paragraphs 1 and 2 of the Charter, results in an unconstitutional condition, especially in relation to the right of churches to freely select the form and scope of their activities, and thus “administer their matters independently of state bodies.”.

102. This even occurs when considering (c) mechanisms through which the state practises the “economic support for churches”. This takes place on the basis of Act No. 218/1949 Coll. on Economic Support for Churches and Religious Communities by the State, as amended by later regulations, according to which the state had and still has, pursuant to § 1, 4, 6 and 8, § 11 paragraph 1 and § 12, to fulfil a number of their obligations, including, for example, rights and obligations from the transfer of patronages to the state (in a constitutionally acceptable scope), this also in relation to purely ritual activities. It is not possible to disregard the fact that the “economic support for churches” were, from the beginning, conceived as one of the instruments of removing the economic independence of churches and religious communities, with the direct intention of not satisfying the freedom of religion, but instead of combating it through direct executive control of religious life, and economic oppression. At a meeting of regional secretaries of the Communist Party, Rudolf Slánský, the then General Secretary of the Communist Party of Czechoslovakia, on 15 September 1949 aptly described the purpose and application of Act No. 218/1949 Coll.: “[…] We have taken land from the bishops. We have taken all press from churches. We have installed commissars in consistories in all places. We have closed church schools, not one church school has opened this year. Now gradually we’re taking away their monasteries. We imprison priests […] Now, for example, via another important means – a new salary act for priests. We will still discuss under which conditions and to whom we will actually give a salary. I believe that our work in the sector of churches is positive […] It would be good for you to have “black lists” prepared of the greatest fomenters in the regions and districts. Remember, we will need such lists, if not today, then tomorrow for sure. The Party has learned a lot, politically” [quoted according to Kaplan, K. Stát a církev v Československu 1948–1953 / State and church in Czechoslovakia 1948–1953. Institute of Contemporary History, Academy of Sciences of the Czech Republic, Prague, Doplněk Publishing House, Brno, 1993, p. 98, Note 190]. The “economic support for churches” were considered temporary means, in the spirit of the above-specified ideological points, which is evidenced, for example, also by the fact that Act No. 218/1949 Coll. did not anticipate at all any process of state acknowledgement or registration of new churches and religious communities [additionally, for example, Hájek, J. K problematice právních poměrů církví v ČSSR / On the issue of legal relations of churches in the Czechoslovak Socialist Republic. Administrative Law, 1986, No. 6, p. 369: “the legal arrangement (…) is based on

acknowledgement of the existence of religious convictions as one that is temporary, preconditioned by the level of social progress attained (…)"].

103. At this point, the Constitutional Court summarises, even though it is not now a direct subject of the constitutional review, that the model of the "economic support for churches and religious communities", if the same were conceived as an adequate alternative for the settlement of historic property of churches and religious communities, is not a sufficient guarantee for freedoms resulting from Article 16 paragraph 1 of the Charter, in particular the independence of the (concerned) churches and religious communities of the state according to Article 16 paragraph 2 of the Charter. For correct understanding of such considerations it is necessary to point out that the Constitutional Court now does not carry out any economic analysis of claims of the entitled churches resulting from Act No. 218/1949 Coll. in relation to actual fulfilment by the state, but speaks generally about a mechanism, when it is exclusively the state that grants, through an enactment, to the churches and religious communities concerned, a number of titles of "economic support", but at the same time de facto the state itself determines the total amount that would be spent on such expenditures, whereby the state practically unilaterally decides on the degree of economic dependency by the churches and religious communities concerned on the state [cf., for example, Opinion of the Ministry of Culture contained in the audit conclusion of the Supreme Audit Office No. 08/20: "Over the course of years, the Ministry of Finance, in the state budget, determined only a minimum amount of means for salaries and insurance administration, material costs, and maintenance of ecclesiastical property. Submitting a budget for the individual churches and religious communities was, for this reason, cancelled since the state is not able to finance all the financial needs of churches and religious communities", http://www.nku.cz; for the importance of "economic support" for the exercise of the right resulting from the freedom of religion, cf., for example, Přibyl, S. Pojetí tzv. "zvláštních práv" církví a náboženských společností podle Zákona č. 3/2002 Sb. / Concept of the "special rights" of churches and religious communities pursuant to Act No. 3/2002 Coll. In Právník No. 7, year CXLII, 2003, p. 714].

104. In the absence of a sensible settlement of historic ecclesiastical property, when the state, as a result of its own inactivity, continues to be a dominant source of income for the churches and religious communities concerned, this in addition without any clear link to revenues from the historic property of churches being withheld, the above condition thus, in its consequences, violates Article 16 paragraph 1 of the Charter in terms of freedom of expression of faith in society through public activities and traditional forms of religiously motivated, generally beneficial activities using relevant historically formed economic resources, and especially Article 16 paragraph 2 of the Charter, this in the economic sector of ecclesiastical autonomy. This is a legal opinion which is also held by doctrine, cf. Syllová, J. K výkladu čl. 16 Listiny základních práv a svobod / On interpretation of Article 16 of the Charter of Fundamental Rights and Basic Freedoms. In: Kolář, P., Kříž, J. (eds.). Narovnání vztahu mezi státem a církvemi / Reconciliation of the relationship between the state and churches. CEVRO Institut, Prague, 2009, p. 9: The legislature intended "to renew and rehabilitate the position of churches, which during the last 40 years was marginalised, and to grant them the independence over decision-making that they lost during the time of totality. The constitution-

giver was aware of the circumstance that the formulation containing the word "independence" specified in these provisions is the only possibility of strengthening autonomy in the position of churches, at least in terms of constitutional law, under a situation when activities concerning education and upbringing conducted over hundreds of years were irreversibly interrupted, when the property used by churches was nationalised, and the control of churches over such property was annulled. Documentary establishment was a programme which should have been completed through attaining the true independence of churches. […]The independence of churches may also be grammatically interpreted in such a way that the churches must have property that would allow them to independently exercise their basic ecclesiastical functions, so that everyone has the right to freely express their religion or faith, in private or public, through worship, teaching, practice, and observance, this either alone or in community with others."

105. At this point it is apt to point out that a similar opinion was arrived at by the Constitutional Court of the Hungarian Republic in a decision dated 12 February 1993, No. 4/1993. One of the essential conclusions was the finding that the then contested restitution act – defining the groups of the property being returned through their purpose corresponding to the traditional functions of churches – aims primarily at "losses caused by the state in relation to the constitutional right to free practice of religion, and not losses caused to the ownership right.". At the same time they emphasised that both the historic role of churches in society and the nature of their activities oriented to the public to some degree distinguish the churches from other natural persons or legal entities (taking into account the nature of their assets) and also make comparison possible – in terms of the requirement of independence of the state – with local self-governments (municipalities), which are, as an agglomeration, also indivisible from the individual right of a citizen to self-determination (read: self-government) [cf. especially Section III of the decision; according to the English translation on the website of the Constitutional Court of the Hungarian Republic, http://www.mkab.hu].

106. In other words, impacts of inactivity on the part of the legislature thus are manifested not only in the narrow sphere of property of (historic) churches and religious communities (Article 11 of the Charter, Article 1 of the Protocol to the Convention), but also in the factual restriction of autonomy and independence from the state (church autonomy) guaranteed by Article 16 paragraph 2 of the Charter for the exercise of freedoms guaranteed by Article 16 paragraph 1 and Article 15 paragraph 1 of the Charter. The Constitutional Court considers unacceptable such opinion according to which the widely conceived (from the historical point of view) freedom of thought, conscience and religious denomination, as is based on the Czech constitutional order and on international standards and as is protected by ordinary courts and the Constitutional Court, should justify a certain lower level of economic autonomy of churches and religious communities. For example, potentially the existence of the present higher level of fundamental rights and freedoms in comparison with an earlier status (as to 25 February 1948) could be seen as serving as an argument for not granting property composition.

107. With respect to the above-stated points, the Constitutional Court found

sufficient reasons for declaring that the inactivity on the part of the Parliament was unconstitutional, and, therefore, did not consider it effective to develop to the same level of detail other aspects of the issue, which include the necessity to refer, in particular, to the issue of the rationality of reasons for factually different dealing with entities that, by the will of the legislature, became entitled parties pursuant to Act No. 298/1990 Coll. and other ecclesiastical legal entities which form part of both Catholic Church and other concerned churches and religious communities, this taking into account the fact that this inequality is amplified by the length of the term during which such other legal entities have been referred to an act which does not exist. Considering the mitigation of some cases of injustice cannot be controlled by irrational arbitrariness by the legislature, thereby establishing inequality.

XI./d
108. In relation to municipalities and third parties which are currently registered owners of the blocked historic ecclesiastical property, the long-term inactivity on the part of the Parliament may cause individual unconstitutional effects on the basis of specific circumstances which the Constitutional Court, with respect to the multiplicity of conceivable situations, cannot convey in a general verdict. Even when dwelling on the primary liability of the legislature to provide a legal arrangement for the matter concerned with regard to the comprehensiveness of relationships, and with respect to the self-restraint shown by the Constitutional Court in terms of their positive adumbration, through their possible cassational encroachment, i.e. a future decision of the legislature, the Constitutional Court does not renounce the provision of proper protection to specific individual claims of persons so concerned in the future (together with the ordinary courts), if the legislature fails to adopt a constitutionally conforming solution.

XII.
Conclusion
109. For reasons specified above, the Constitutional Court has found that the contested provisions of § 29 of the Act on Land are not unconstitutional in themselves, since they seek a constitutionally conforming purpose and do not contain excessive means for attaining the same. Concurrently, however, the Constitutional Court has found that the inactivity on the part of Parliament, consisting of non-adoption, for a period of nineteen years, of an act anticipated by the provisions of § 29 of the Act on Land, whereby the historic property of churches would be settled, violates Article 1 of the Constitution, Article 11, Article 15 paragraph 1, Article 16 paragraphs 1 and 2 of the Charter of Fundamental Rights and Basic Freedoms, and Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.
110. The Constitutional Court has found no reasons for a preferential hearing of the petition pursuant to § 39 the Act on the Constitutional Court.

Justices Vladimír Kůrka, Jiří Mucha, Jan Musil and Pavel Rychetský held dissenting opinions to the decision of the Plenum, pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations.

1. Dissenting opinion of Justice Vladimír Kůrka

My dissent is directed against both verdicts of the Judgment issued, for reasons which are aimed at the following:

1. the critical provisions of § 29 of the Act on Land directly establish neither a "commitment" nor "pledge" of the legislature to adopt, at a time deferred, a legal arrangement "settling the historic property of churches and religious communities" (as is claimed in clause 25 of the Judgment); to the contrary, it is proper to understand the same as an expression of political uncertainty as to whether and in which forms or scope to proceed towards further restitution of the same (above the scope of Act No. 298/1990 Coll.), which is proven by the process itself of adoption of the Act on Land, as well as by the consequent period of inability to find agreement on an acceptable solution;

2. even less of a possibility is, from the provisions of § 29 of the Act on Land, to infer a decisive conclusion towards which the majority of the Plenum were inclined; that they established a legitimate expectation on the part of the ecclesiastical entities regarding settlement of their historic property, which logically includes also settlement in the form of establishment of specific restitution claims, in particular claims relating to restitution in kind, where only this type of restitutions is – based on the nature of the matter – relevant to consider here;

3. the reasoning by the majority of the Plenum, contrary to this, is in evident collision with what the Constitutional Court expressed in Opinion file No. Pl. ÚS-st. 22/05, according to which it is possible "to identify itself with the opinion that Act No. 298/1990 Coll. was of the nature of a temporary arrangement, and when adopting it, it was generally believed that adoption of a general restitution regulation regarding ecclesiastical property would take place. Nevertheless, by not adopting such a regulation, the legislature subsequently expressed their will, still continuing, not to proceed with restitution of ecclesiastical property." (The appended obiter dictum, emphasised in clause 20 of the Judgment referring to Judgment of the Constitutional Court file No. II. ÚS 528/02, served merely to support the judgment that the "casuistic solution… in the form of individual judicial decisions in specific cases would be such an activistic solution that, as a consequence, it would result in the judicial power taking over an activity which otherwise, within the separation of powers, belongs solely to the legislative power");

4. the above-quoted opinion of the Constitutional Court deserves attention also due to the fact that it conforms to the principle which is acknowledged both in the case law of the Constitutional Court and the European Court of Human Rights; that there is no constitutionally established claim to a restitution remedy to former cases of property injustice, that such a claim does not follow from international commitments and it is, therefore, up to the legislature to elect the procedure to be adopted in this field and the means for possible remedy;

5. when the majority of the Plenum now in the second verdict reproaches the legislature for "long-term inactivity", they are in evident conflict with their own (previous) opinions;

6. in addition, this verdict opens up also evident risks of individual "judicial restitutions" in the way of exercising such claims that may be inferred (as is easily imaginable) from a similar verdict in Judgment file No. Pl. ÚS 20/05, or in Opinion of the Plenum file No. Pl. ÚS-st. 27/09, dated 28 April 2009 (136/2009 Coll.), be it in the form of a restitution-based release of property or compensation claims or claims consisting of compensation for loss, whereby the conclusions and objectives of the Opinion of the Constitutional Court file No. Pl. ÚS-st. 22/05 would be abandoned once and for ever; besides, this is adumbrated by clause 54 of the Judgment and was also previously expressed in case law (see for example Judgment file No. I. ÚS 663/06);

7. and if only for these reasons, the given petition should have been dismissed;

8. the only point relevant from the viewpoint of constitutional law – in relation to the provisions of § 29 of the Act on Land – was the thereby established and long-term encroachment of the ownership right of third parties, that is owners of the thereby "blocked" property, and, therefore – for these reasons and these reasons only – to the contrary, the petition by the petitioner should have been granted, that is such provisions derogated. The effects of Opinion Pl. ÚS-st. 22/05 on the inadmissibility of individual restitution indictments, inferred not from § 29 of the Act on Land, but also from the restitution nature of Act No. 298/1990 Coll., would have been preserved;

9. as for a detailed substantiation for this conclusion, I refer to the dissenting opinion of Justice Jiří Mucha, with which I identify myself also otherwise;

10. property settlement of the state with the ecclesiastical entities would thereby naturally not be affected; to the contrary, the Constitutional Court – see, for instance, clause 37 or clauses 40 and 42 – by the Judgment being opposed to, inadequately enters the sphere of activity reserved for the legislature, and forces upon them a specific form of future restitution, that is restitution in kind (cf. a contrario the government bill discussed in the Chamber of Deputies, Print of the Chamber of Deputies No. 482, and their resolution dated 29 April 2008 No. 774).

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2. Dissenting opinion of Justice Jiří Mucha

Pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, I hereby submit a dissenting opinion to both points of the verdict and reasoning of Judgment file No. Pl. ÚS 9/07. As the initial Justice Rapporteur in the given case (see clause 12 of the Judgment), I am inclined towards this due to the following reasons:

1. In the given case the petitioner required that the Constitutional Court declare the unconstitutionality of the long-term inactivity on the part of the Parliament of the Czech Republic in relation to § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property (hereinafter referred to only as the "Act on Land"), which, according to the petitioner, violates Article 1 paragraph 1 of the Constitution of the Czech Republic, Article 4 paragraph 1, Article 11 paragraphs 1 and 4 of the Charter of Fundamental Rights and Basic Freedoms and Article 1 paragraph 1 of the Protocol to the Convention for the Protection of

Human Rights and Fundamental Freedoms. At the same time, they requested that such provisions be annulled. The Constitutional Court did identify itself with the opinion of the petitioner concerning the unconstitutionality of the long-term inactivity of Parliament, however, did not annul § 29 of the Act on Land as unconstitutional. In this, the Constitutional Court proceeded towards evaluating the petition not from the viewpoint of objections of the petitioner, but from the viewpoint of other concerned entities, these being churches and religious communities, in spite of the fact that the essence of the petition was alleged encroachment into the position of municipalities as local self-governing units and public law corporations. I do not align myself with the process employed by the majority of the Constitutional Court. Their argumentation, to the contrary, is based on the petition being as if aimed against the position of churches and religious communities. From their position, and beyond the scope of the petition, said majority then lengthily describes its notions of the future legal arrangement, even though this was not the subject of the petition. In clause 29, the Constitutional Court rejects the alleged attempt to become involved in a political struggle, but the vocabulary the majority uses at the end of the reasoning is not proper for the judicial body for protection of constitutionality pursuant to Article 83 of the Constitution of the Czech Republic. I appreciate extensive argumentation and fervour for a certain solution, although I believe that this style does not suit judicial decision making.

2. The reasoning states, in a simplified form, the circumstances under which § 29 of the Act on Land was adopted. It quotes the standpoints of some speakers in the Federal Assembly, but it does not show the specific contents of individual bills from the time between 1990 and 1992 and in particular the fact that they were not adopted by the Federal Assembly. This has utterly crucial significance also from the viewpoint of conclusions of the Constitutional Court, as are explained in Opinion file No. Pl. ÚS-st. 22/05. Pledges for adoption of a certain arrangement, which has, however, never happened as the bills containing the same have never obtained any relevant support, do not in themselves establish unconstitutionality in the form of non-fulfilment of legitimate expectation. For the argumentation of the Constitutional Court, a decision of the legislature whereby the will of the state is expressed should always be decisive, not the standpoints of speakers concerning the bills dismissed by the legislative assembly. Thereby, its argumentation is needlessly weakened.

3. However the Constitutional Court, in other connections and in other cases (the issue of the nature of Act No. 298/1990 Coll. on Arrangement of Some Property Relationships of Monastic Orders and Congregations and the Archbishopric of Olomouc), dealt with the issue of restitution of ecclesiastical property, the Court was not permitted or did not need to ever express its opinion meritoriously on the very issue of the constitutionality of § 29 of the Act on Land. The Constitutional Court merely emphasised, in a number of Judgments and resolutions, the existence of this anticipated solution, stating that in such a case this is a special arrangement which eliminates other possibilities of decision making concerning the property to which these provisions apply. Therefore, the possibility of a surprising twist in this case, as the majority Opinion fears in clause 21 of the Reasoning, is not a plausible scenario.

4. As follows from the history of discussing the individual bills, the Government of the Czech and Slovak Federative Republic, as long ago as autumn 1991, that is practically immediately after adoption of the Act on Land, prepared several versions of the act which would fulfil the provisions of § 29. Proposals for solving these issues in the form of an act were also submitted, in autumn 1992, in the Czech National Council (principles of an act on property restitution for churches, religious communities and religious charitable organisations, principles of act on return of property to the Seventh-day Adventist Church). The Federal Government also dealt with a Slovak bill, a bill of another enumerative act and finally with a Members' bill which was, after disapproval from the Governments of both Republics with the bills developed by the Federal Government, submitted in the form of a Members' bill for the issue of an act on property restitution and the rehabilitation of churches and religious communities (Federal Assembly. 6th election term. Prints No. 955 and No. 1062). Submission of the same was, amongst other reasons, justified by the need to annul the "blocking provisions" both in the Act on Land (§ 29) and Act No. 92/1991 Coll. on Conditions for Transfer of Property of the State to Third Parties (§ 3 paragraph 1), when Act No. 403/1990 Coll. on Mitigation of Consequences of Some Cases of Property Injustice ("Small-scale Privatisation Act") did not contain such provisions. Even with repeated attempts, the bill failed to prove successful. Equally unsuccessful was an attempt of the Government in the mid 1990s to solve this issue, at least partially, through "executive release", as well as an attempt to amend § 29 of the Act on Land in 1997 in this sense, and authorise the Land Fund of the Czech Republic to release the property (the Chamber of Deputies. 2nd election term. Print of the Chamber of Deputies No. 308). In addition, other attempts in the form of various promises in statements of policies from some governments failed. The Chamber of Deputies also dismissed a bill of a Treaty between the Czech Republic and the Holy See on the arrangement of mutual relationships (the Chamber of Deputies. 4th election term. Print No. 17), where the Czech Republic, pursuant to Article 17 paragraph 1, should have committed itself to resolving issues regarding property of the Catholic Church as rapidly as possible. Failure was also seen in the case of a government bill on mitigation of some cases of property injustice caused to churches and religious communities during the time of lack of freedom, on settlement of property relationships between the state and churches and religious communities and on modification to some acts (Act on Property Composition with Churches and Religious Communities) – Chamber of Deputies. 5th election term. Print No. 482). This condition has continued ever since, and thus said encroachment upon the above-specified constitutional provisions continues further and gains in strength, without any solution being offered to finally remove the residuum in the form of Act No. 218/1949 Coll. on Economic Support for Churches and Religious Communities by the State, as amended by later regulations. Furthermore, it is this very regulation which paradoxically is the basis which will, as a result of the decision of the majority, consequently function as support for the mutual relationship between the state and churches and religious communities.

5. The argumentation of the majority opinion has been built on the fact that § 29 of the Act on Land implies legitimate expectation that there will be some form of restitution. However, these provisions are only of a blocking nature (I point out that I have no doubt on the necessity itself of solving the issue of former property of churches and religious communities) and are the result of a compromise created

through the Act on Land being dealt with again by the Federal Assembly in the spring of 1991. Therefore it is difficult to speak about the same as provisions that could constitute “legitimate expectation”, when the issue of “church restitution” was finally removed from the bill of the Act on Land. I base this on the fact that the bill of the Act on Land was, when dealing with the same in the Federal Assembly, as part of comprehensive amendments, proposed with respect to enumeration of the entitled parties, amended with provisions according to which “under the conditions specified above, entitled parties shall include also churches, religious communities, monastic orders and congregations which have their registered administrative centre in the territory of the Czech and Slovak Federative Republic”. This bill however failed to be passed and the Federal Assembly consented to the concept of blockage and to solving the matter through a special arrangement.

6. The majority opinion found the legislative quality of § 29 of the Act on Land faultless. The necessity to reach a compromise in 1991, however, resulted in the fact that the provisions are formulated in such a way that the existence of legitimate expectation cannot be inferred from the same. When evaluating the nature of these provisions, this circumstance is of importance for two reasons. Generally, in my opinion, legitimate expectation are not absolute and irrefutable, and as an instrument of a law-based state must be legally supported. The legal regulation which establishes the same cannot be in itself unconstitutional (as in this case); such expectation cannot be generated to the detriment or at the cost of constitutionally guaranteed rights of a third party. Furthermore, legitimate expectation must possess a certain form from the viewpoint of whosoever may claim the same, at what time (for example, the Preamble of Act No. 298/1990 Coll. speaks of cases of injustice “in 1950s”), to which scope and in relation to which property being the subject matter. Here I may generalise the conclusions of the third panel of the court of the first instance which, with reference to previous case law, associated the right to demand protection of “legitimate expectation” with three preconditions – the person who claims the same must be given, by the public administration of the Community, specific, unconditional and consistent guarantees resulting from justified and reliable resources; furthermore, these guarantees must be of such a nature that legitimate expectation arise in the person to whom the same are determined, and eventually such guarantees must be provided in accordance with applicable norms (“Premierement, des assurances précises, inconditionnelles et concordantes, émanant de sources autorisées et fiables, doivent avoir été fournies a l'intéressé par l'administration communautaire. Deuxiemement, ces assurances doivent etre de nature a faire naître une attente légitime dans l'esprit de celui auquel elles s'adressent. Troisiemement, les assurances données doivent etre conformes aux normes applicables” – Judgment G v. Commission, l'affaire T-199/01, dated 7 November 2002, clause 38, available at http://curia.europa.eu). Section § 29 of the Act on Land implies merely a blockage of property, not other necessary circumstances, which is proven by the number, contents and specific form of attempts since 1992 as to how to solve this issue. In connection with churches and religious communities it is, therefore, apt to note that also here, “the devil is in the detail”, which is ultimately confirmed by the various unsuccessful attempts to solve this issue. Detachment of the issue of a solution for the concerned entities, the scope and manner of remedying the cases of injustice from the declaration of legitimate expectation is, therefore, not

appropriate; the same is true for the majority opinion alone trying to formulate such details, in spite of the fact that the same falls under the exclusive powers of the legislature authorised for such duties (for example clauses 37, 40, 42, 49, 55, 61, 66).

7. Even argumentation through the otherwise complex issue of § 4 paragraph 2 of Act of the Czech National Council No. 172/1991 Coll. on Devolution of Some Objects from Property of the Czech Republic to the Ownership of Municipalities does not gain any standing. In this direction it is not essential that the footnotes (explanatory notes) do not have, according to the settled case law of the Constitutional Court, any normative value or that, at the time of adoption of § 29 of the Act on Land, Act of the Czech National Council No. 172/1991 Coll. had already been effective; what is essential is that the thereby anticipated act pursuant to § 4 paragraph 2 in the given field has not been promulgated since. Therefore, the issue in question is not that of release of the property, as such release is not actually the concern of the petition. The petitioner objects that, with respect to delays in its adoption, development of the afflicted municipalities is hindered, and thus encroachment upon their constitutionally guaranteed rights occurs. Therefore, the considerations in clauses 50 to 53 aim beyond the argumentation of the petition. On the contrary, by the majority opinion in gross rejecting the possibility of unconstitutional encroachment upon the position of municipalities (clauses 17 and 53), said opinion evades the nature of the petition.

8. The test of proportionality is thus paradoxically changed into reasoning on why unconstitutional provisions cannot be annulled. The Constitutional Court here extensively gives reasons for what would be caused by their annulment (I agree with these reasons), but this does not change unconstitutional provisions into constitutional ones (illustratively clause 37). If the Constitutional Court applies the test of proportionality in order to protect an unconstitutional regulation (annulment is not necessary, is not appropriate and loss would be greater than if the unconstitutionality were preserved), then it is contestable under a circumstance when the Constitutional Court has available, in order to prevent such loss, a means in the form of postponement of enforceability, as was proposed by the initial Rapporteur’s report.

9. The task of the test of proportionality also is to find a balance between clashing fundamental rights while maximally preserving all of them. This, however, is in this case to the detriment of rights of municipalities, as these rights are unconstitutionally violated through inactivity on the part of the legislature. The reasoning does require (clause 43) the weighing up of justified interests of all entities concerned, but only via future enactment (…so that new cases of injustice do not occur…). The task of the Constitutional Court, however, was to evaluate whether this principle, in relation to municipalities or other present owners of the given property, is not already violated by § 29 of the Act on Land presently, this during an intolerably long period of time. I leave aside the statement (clauses 41 and 47) concerning irrelevancy of testing whether the state as the owner (that is a legal entity in property relationships and as a vehicle of imperium in relationships of power, when also the state – or state enterprises – in this direction incur additional costs since there is usually not much interest in renting such property) may be restricted, when the whole problem of why the petition has been filed is,

in the end, returned to in just a few sentences in clause 48. Here the Constitutional Court left the argumentation of the petitioner without response, even when the municipalities do not claim such property, but see the encroachment as being formed by the fact that its existence in their territories encroaches upon the possibilities of their development and restricts the possibilities of zone planning, as well as possibly other attributes of local self-government in the management of property.

10. In the second clause of the verdict of the Judgment, the Constitutional Court states that they oblige the petitioner by stating that the long-term inactivity by Parliament, consisting in non-adoption of a special legal regulation that would settle the historic property of churches and religious communities, is unconstitutional and violates Article 1 of the Constitution of the Czech Republic, Article 11 paragraphs 1 and 4, Article 15 paragraph 1, and Article 16 paragraphs 1 and 2 of the Charter of Fundamental Rights and Basic Freedoms, and Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. However, this statement does not solve the unconstitutional situation which has occurred to municipalities, since, in my opinion, the persistent legal arrangement must be evaluated in such a way that it attained such a degree of conflict with constitutionally guaranteed rights of other legal entities and that the blocking of disposal of property specified under § 29 of the Act on Land reached such a level and such a degree that such a condition must be removed by annulling such provisions, provided that the legislature shall be seeking, within a defined (and limited) period of time, for another solution that would first guarantee respect for the constitutionally established rights of, in particular, municipalities, or other legal entities, and on the other hand, would attempt to find a solution to the relationship between the state and churches and religious communities. In fact, the conditions pursuant to the Act on Economic Support for Churches and Religious Communities by the State has been conserved.

11. The practice of constitutional courts shows that the relevant moment in time is, for example, determination of enforceability at the end of an election term (for more details see Krause-Palfner, Th.: Das Verfassungswidrigwerden von Gesetzen. Frankfurt am Main 1973, especially p. 70 et seq.). In the given case however, it was, with respect to the number of elapsed election terms and the number of governments that included a solution to this issue in their statements of policies, and development of opinions in society, far exceeded. In Judgment file No. Pl. ÚS 5/03 (No. 211/2003 Coll.), the Constitutional Court reached the conclusion that restricting municipalities and regions as owners in relation to immovable objects in terms of using the same, this during a period of 10 years from the date of acquiring the same, merely to the purpose for which they were used as to the date of devolution, forms an unconstitutional encroachment upon the right to self-government. The statement by the majority (clause 61) that it is a situation incomparable to the matter under examination now, in my opinion, disregards the fact that that the petitioner does not claim that municipalities should continue to own the former property of churches and religious communities, but the fact that blockage affecting the same in the form of § 29 of the Act on Land obstructs their development. In the case now heard, this restriction (not only of municipalities) has lasted for almost 20 years. At the same time, it represents an encroachment in particular upon the position of municipalities in whose territories such immovable

property is located, as it obstructs their development and restricts, beyond a bearable degree, the implementation of the right to self-government, especially after accession of the Czech Republic to the European Union. Municipalities cannot implement projects for which they could receive grants from the state budget or structural funds of the European Union, since such receipt is preconditioned by non-restricted ownership of the immovable property on which the investments are to be expended. The nature of the part of the immovable property leads to the conclusion that this condition became in conflict with the objectives stated in Article 7 of the Constitution of the Czech Republic. Additionally, there is a conflict with Article 101 paragraph 3 of the Constitution of the Czech Republic, when restriction in ownership rights of municipalities as local self-governing entities prevents uninterrupted exercise of the right of local self-government guaranteed in Article 8 of the Constitution of the Czech Republic. Such continuing legal uncertainty is also an encroachment upon attributes of the term "democratic law-based state" according to Article 1 paragraph 1 of the Constitution of the Czech Republic, as well as the condition when the state, regardless of the requirement of Article 2 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms, financially supports churches and religious communities, since the present situation and inactivity on the part of the legislature force the state to do so. In this case, however, unconstitutionality does not consist only in such long-term inactivity, but also in § 29 itself. In my opinion, therefore, it is a case of unconstitutionality tolerable initially (cf. Judgment file No. Pl. ÚS 8/02, No. 528/2002 Coll.), rather than of gradual metamorphosis from a constitutionally conforming provision into an unconstitutional one. The Constitutional Court failed to address these arguments, as clause II of the verdict in fact addresses a point other than that required by the petitioner.

12. The European Court of Human Rights as well as the Constitutional Court and the entire "restitution legislation" are based on the opinion that there is no constitutionally based claim to restitution and that the same does not follow from the international commitments of the Czech Republic either. The sphere of remedying cases of property injustice is an area which is delineated by the possibilities of each country from the viewpoint of which cases of injustice and to which scope they remedy. It is also an area which is given over to free consideration of the legislature in the conditions of a democratic state. In the case that the legislature decides to undertake restitution and other forms of remedy for cases of injustice, then it falls within the field of requirements of a law-based state and, from such a point of view, their acts are subject to evaluation from the viewpoint of constitutionality. The provisions under examination, however, are not provisions of restitution (this could be the arrangement promised by such), but provisions of a blocking nature. The only fact which follows on from them is that the transfer of property, the original owners of which were churches, religious orders and congregations, to persons different from the same is possible only after adoption of acts on such property. Only the circumstances of the adoption of the Act on Land in 1991, dealing with the individual options of the same, provide the grounds for arriving at more detailed conclusions from the viewpoint of what actually should be the relations of the former, present and future owners, but there were so many options of specific solutions raised in the course of discussing the Act on Land (see below) and such options were so much mutually conflicting, that eventually the Federal Assembly managed to agree only on a compromising

formulation. Therefore, this situation is different from that existing in the case of restitution acts, where there are definitions of an entitled party, obliged party, cases to which the claim applies, the scope of the restitution, a deadline within which the claim may be made and to which items it may be made and the manner to do so.

13. When the Constitutional Court is obliged to protect the fundamental rights and freedoms, or constitutionality in general (Article 85 paragraph 2 of the Constitution of the Czech Republic), the Court should do so consistently and conduct the legislature not to violate the same. In this given case, the unconstitutional § 29 of the Act on Land should have been annulled and the legislature should have been given a sufficient term (for example, this election term) for them to prepare a solution for the historic property of churches and religious communities in such a way as would not interfere with the position of other holders of fundamental rights and freedoms over the sustainable measure. The majority opinion does not force the legislature directly to solve this situation and retains the unconstitutional condition.

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3. Dissenting opinion of Justice Jan Musil

I do not agree with the verdict and the reasoning of the Judgment of the Plenum of the Constitutional Court dated 1 July 2010, file No. Pl. ÚS 9/07, whereby (I) the petition for annulment of § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property (hereinafter referred to only as the "Act on Land") was dismissed; and (II) the unconstitutionality of long-term inactivity on the part of the Parliament of the Czech Republic, consisting in non-adoption of a special legal regulation that would settle the historic property of churches and religious communities, was declared.
Pursuant to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, I adopt a dissenting opinion to both verdicts and the reasoning of the Judgment, substantiated as follows:

I. As for the verdict on dismissal of the petition for annulment of § 29 of the Act on Land

1. I believe that the "blocking provisions" contained in § 29 of the Act on Land, forbidding the transfer of property to which the original owners were churches, religious communities, orders and congregations into the ownership of other persons before the adoption of acts concerning such property, should have been annulled and the legislature should have been given (by postponing the derogative effect) a sufficiently long enough time frame for an adequate response to such annulment.

2. In my opinion, the reason for annulment of the contested provisions is in particular their conflict with Article 101 paragraph 3 of the Constitution of the Czech Republic. The blocking provisions restrict the ownership rights of municipalities as local self-governing units and obstructs their uninterrupted exercise of the right to local self-government guaranteed in Article 8 of the Constitution. However, it may be admitted that, at the time of adoption of the contested provisions, serious reasons justifying such encroachment upon the freedom of disposal by the owners might have existed, although after almost

twenty years such restriction cannot be tolerated any longer, as it prevents the development of municipalities and restricts beyond bearable degree the execution of the right to self-government.

II. As for the verdict on the unconstitutionality of the long-term inactivity on the part of the Parliament of the Czech Republic, consisting in non-adoption of a special legal regulation that would settle the historic property of churches and religious communities

3. In my opinion, the conditions for declaring the inactivity of Parliament unconstitutional have not been fulfilled.

4. The Judgment is based on the premise that the formulation "before adoption of acts on such property", used at the end of the contested provisions of § 29 of the Act on Land, allegedly constitutes the pledge which forms "legitimate expectation" on the part of churches, religious communities, orders and congregations, to which constitutional-law protection must be provided. I do not agree with this opinion.

5. The vagueness of the statutory expression "before adoption of acts on such property" does not make it possible to specify what are to be the contents of the intended acts – whether it should be restitution in kind or pecuniary restitution, or possibly a combination of these means, what its contents are to be, when it should take place, which entities should be the obliged parties and which the entitled entities, no rules are determined for the process of applying the claims and so on. This indefinite statutory provision, in my opinion, cannot establish any legitimate expectation as per an individual legal claim or a new individual property right that would receive protection of Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The condition of exact specification of legitimate expectation was also declared by the European Court of Human Rights, for example, in clause 25 of the Judgment in the case of Bazil v. the Czech Republic (Application No. 6019/02).

6. I deem it necessary to remark again that restitution legislation is generally based on the concept that there is no constitutionally based claim to restitution and that no such claim follows from the international obligations of the Czech Republic either. This was stated in several decisions by the Constitutional Court of the Czech Republic alone, for example, in Opinion Pl. ÚS-st. 21/05, dated 1 November 2005, where it says: "The legislature … when constituting (restitution regulations – insertion made by J. M.) proceeded from the factual condition in 1990 or a little later, being aware of reasons, not only at the time still engraved in memory, which have lead the legislature to such encroachment upon ownership rights, but also the necessity of limiting change in the ownership relations in such a way that the same remain appropriate to the purpose that was pursued by the same and that is best defined in the very provisions of § 1 of Act No. 229/1991 Coll. and the Preamble of Act No. 87/1991 Coll.; that is to purposeful and accurately delineated change in the division of property which prevailed at that time. The will expressed in such a clear manner has contents even more so important, as they were not obliged to take such a step. Even when the cases of property injustice which they meant to mitigate (and not adjust) occurred in principle in contravention of principles of a law-based state in a past period, neither the Constitution nor another legal

regulation requires that such property be returned or that compensation for such be provided, or that any changes be made for such purpose in the legal order. It was the free will of the state whether it makes it possible for the former owners of the property in question to seek its return, since its ownership rights and the ownership rights of persons which acquired such property in the meantime do not depend on unconstitutional norms or procedures which originally comprised a basis for the same. The very establishment of restitution claims was then a benevolent act by the state – accurately defined from the viewpoint of time and matter.".

7. The same standpoint was taken by the European Court of Human Rights; according to their opinion, the Convention for the Protection of Human Rights and Fundamental Freedoms in no way restricts member countries in their freedom to determine the sphere of action for legislation in the area of restitution of property and to elect conditions under which they accept the return of property to persons who were earlier deprived of such property [see for example the decision in the case of Jantner v. Slovakia (Application no. 39050/97), Kopecký v. Slovakia (Application no. 44912/98), Blücher v. the Czech Republic (Application no. 58580/00)].

8. It is self-evident that the legislature may, at the level of ordinary law, declare its intention to legislatively regulate any legal issues, thus also settle relations relating to former property of churches and religious communities; this was done by the Czech legislature in the provisions of § 29 of the Act on Land. Compliance with this intention, however, necessarily requires comprehensive assessment of extremely complex social, political and economic problems, the solution for which rests undoubtedly with the legislature, not with the Constitutional Court. As is known, the legislature has repeatedly attempted to solve this problem in past years, however, they have not managed (also with respect to great economic burden and present economic troubles) to find the necessary social consensus. I believe that under such circumstances it is not possible to reproach the legislature for said "long-term inactivity" and infer from the same any violation of constitutionality.

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4. Dissenting opinion of Justice Pavel Rychetský

The dissenting opinion which I apply according to § 14 of Act No. 182/1993 Coll. on the Constitutional Court, as amended by later regulations, is aimed against both verdicts of Judgment file No. Pl. ÚS 9/07. For this, I have the following reasons:
1. The majority of the Plenum tended to the conclusion that, even after a period of over nineteen years, the provisions of § 29 of Act No. 229/1991 Coll. on Arrangement of Ownership to Land and Other Agricultural Property have not become unconstitutional with respect to the long-term passivity on the part of the legislature. The given provisions were indubitably adopted as a temporary instrument whereby the legislature decided for only a transitionary period to restrict the ownership right of municipalities (possibly other entities with registered ownership right over property, the original owners of which were churches, religious orders and congregations). Restriction of the ownership right specified by the act in the form of a ban on disposal of the property is indubitably in contravention of the provisions of Article 1 paragraph 1 of the Constitution,

Article 4 paragraph 1, Article 11 paragraphs 1 and 4 of the Charter and Article 1 paragraph 1 of Protocol No. 1 to the European Convention. Such statutory provisions may be considered constitutionally conforming only for the purpose of temporary protection of another constitutionally protected right or recognised public interest, and even so such time restriction of an otherwise unconstitutional condition must be limited in time. If such time restriction is justified by the need to adopt a new act of a legislative nature, requiring a constitutionally conforming procedure of preparation, discussion and adoption of a new norm – the end of such a term may be seen at the end of the election term of the legislative assembly which declared such a restriction and also declared the obligation for adoption of a new norm. With respect to the fact that in the given case this was an act adopted by the Federal Assembly of the former Czech and Slovak Federative Republic, about one year before cessation of the same, a delay of another term of the legislative assembly elected for the first time after constituting the independent Czech Republic would be potentially considered as constitutionally conforming. In the given case, however, the inactivity on the part of the legislative assembly and restriction of the ownership right have lasted for over 19 years, when in relation to municipalities, which are so prevented, in the long term, from uninterrupted exercise of the right to local self-government, also violation of the right guaranteed in Article 8 of the Constitution is concerned. For these reasons, during the hearing by the Plenum, I supported the proposal of the initial Rapporteur (JUDr. J. Mucha) for annulment of the contested provisions with an adequate postponement of effectiveness of derogation in such a way so that both the executive power as well as the legislative power have leeway for a political and legislative solution to the unconstitutional condition.

2. In the verdict sub II, the majority of the Plenum of the Constitutional Court consistently declare that the “long-term inactivity on the part of the Parliament of the Czech Republic consisting in non-adoption of a special legal regulation for settlement of historic property of churches and religious communities is unconstitutional…”. Even though I with the majority of the argumentation of the Judgment, criticising the fact that neither the executive power nor the legislative power were able, for a period of almost 20 years, to adopt a legislative solution that would remove the condition established by the “blocking provisions of § 29, I cannot identify myself with the sole outlined conclusion of the majority of the Plenum – i.e. that such provisions established legitimate expectation concerning restitution of the historic ecclesiastical property. The Constitutional Court has repeatedly stated that the process of mitigation of cases of property injustice caused by the Communist regime, through the “restitution acts”, is sovereignly a political and moral act, but that a claim to restitution follows from neither the Czech constitutional order nor international treaties which are binding upon the Czech Republic. This was declared by the Constitutional Court (as well as the European Court of Human Rights) throughout its whole judgment case law and summarised in Opinion of the Plenum of the Constitutional Court file No. Pl. ÚS-st. 21/05. Determination of the scope and manner of mitigating cases of property injustice as well as other cases of injustice caused by a past regime is under the sole powers of the legislature, which cannot be taken over by the Constitutional Court or ordinary courts. Besides, the legislature proceeded to the general arrangement of restitutions only with respect to cases of property injustice caused to natural persons, while as regards legal entities the legislature has chosen the

method of “enumerative restitution acts”, which, in addition, were related only to a limited range of entitled parties (churches, orders and congregations, Junák, Sokol and the like).